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No. 92978-5

SUPREME COURT
OF THE STATE OF WASHINGTON

STEPHEN FACISZEWSKI and VIRGINIA L. KLAMON,
Respondents

v.

MICHAEL R. BROWN and JILL A. WAHLEITHNER,
Petitioners

SUPPLEMENTAL BRIEF OF PETITIONERS MICHAEL R. BROWN and JILL A. WAHLEITHNER

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ORIGINAL

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I. INTRODUCTION

Under the Seattle Just Cause Eviction Ordinance, a property owner may not evict a residential tenant "unless the owner can prove in court that just cause exists." One of the grounds constituting just cause is that "the owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person's principal residence."

This case presents the question of whether the ordinance means what it says. In other words, before the tenant can be evicted, must the landlord "prove in court" that the landlord or an immediate family member has a *bona fide* intention to live in the unit?

Brown and his wife Wahleithner (collectively "Brown") rented a house in Seattle from Stephen Faciszewski and his wife Virginia Klamon (collectively "Faciszewski"). Faciszewski brought an unlawful detainer action to evict Brown. Faciszewski asserted that he "or/and his mother" intended to occupy the property.

At the show cause hearing, Brown presented considerable evidence that neither Faciszewski, who lived next door in another house, nor his mother, who lived in Colorado, had any intention of actually living in the house. Brown also presented evidence that the real reason for the eviction was Faciszewski's animosity arising out of a dispute about street parking – a reason that clearly did not constitute "just cause." The court commissioner

ruled that there was an issue of fact as to whether Faciszewski or any family member intended to move into the house.[1] Accordingly, the commissioner set the matter for trial.

On a motion for revision of the commissioner's ruling, the trial court held as a matter of law that there was just cause for the eviction and entered an order restoring Faciszewski to possession. The Court of Appeals affirmed the trial court's decision. The Court of Appeals erroneously held that in the unlawful detainer action, the tenant has no right to contest the truth of the owner's stated intention. It also incorrectly held that a post-eviction action for a maximum of $2,000 in damages supplants the tenant's right to remain in the unit unless the owner can prove in court that just cause exists.

This Court granted review, framing the question as "whether Petitioners were entitled to a trial on the just cause for the termination of the lease."[2] Order Granting Review. The answer is "yes."

II. SUPPLEMENTAL ARGUMENT

The plain language of the ordinance prohibits eviction until after the owner has proven that he or she or a close family member actually intends

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[1] RP Aug. 12, 2014, at 5-6, 8-9. The commissioner also noted "There are some questions here of retaliation." Id. at 8.

[2] At the time of the eviction the lease had expired, but the tenancy continued on a month-to-month basis. CP 1, 14.

to occupy the unit. Brown has discussed the language of the ordinance in briefs already filed in the Court of Appeals and this Court.[3]

Other than the opinion of the Court of Appeals below, no appellate decision has considered whether the Seattle ordinance requires proof of the owner's intent before the owner can evict the tenant. But as Brown explained in his Petition for Review, a New Jersey court has interpreted a statute similar to the Seattle Ordinance as requiring the landlord to prove – before the eviction – that the landlord has a *bona fide* intention to occupy the rental unit. Brown offers this Supplemental Brief to elaborate on the New Jersey statute and other decisions interpreting it.

A. <u>The Seattle Ordinance</u>

The Seattle Just Cause Ordinance states: "*[O]wners* of housing units *shall not evict or attempt to evict any tenant,* or otherwise terminate or attempt to terminate the tenancy of any tenant *unless the owner can prove in court that just cause exists*." SMC 22.206.160(C)(1) (emphasis added).[4] An owner has just cause to evict a tenant if "the owner seeks possession *so that the owner or a member of his or her immediate family may occupy the unit* as that person's principal residence." SMC 22.206.160(C)(1)(e)

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[3] See Brief of Appellants at 30-34; Reply Brief of Appellants at 15-19; and Petition for Review at 6-11.

[4] See Appendix for the full text of SMC 22.206.160.

(emphasis added). In an unlawful detainer action, "as with any suit, where the written or oral presentations of the parties disclose a material issue of fact" the issue must be resolved at trial. *Indigo Real Estate Services, Inc. v. Wadsworth*, 169 Wn.App. 412, 421, 280 P.3d 506 (2012).

In addition to requiring pre-eviction proof of the owner's intent, the Seattle ordinance gives the tenant a post-eviction remedy -- albeit a limited one – if neither the owner nor a family member actually occupies the unit as his or her principal residence. SMC § 22.206.160(C)(7). This post-eviction remedy is limited to a maximum of $2,000 in damages plus reasonable attorneys' fees. Id.

B. <u>The New Jersey Statute</u>

Like the Seattle ordinance, the New Jersey Anti-Eviction Law prohibits eviction of the tenant "except upon establishment" of any one of certain designated grounds as "good cause." N.J.S.A. § 2A:18-61.1. As under the Seattle ordinance, there is just or good cause under the New Jersey statute if the owner can establish that he or she "seeks to personally occupy a unit." N.J.S.A. § 2A:18-61.1(*l*)(3).

Also like the Seattle ordinance, the New Jersey law authorizes the tenant to bring a post-eviction action for damages for the owner's failure to carry out his or her stated intent. "Where a tenant vacates the premises after being given a notice alleging the owner seeks to personally occupy the

premises . . . and the owner thereafter arbitrarily fails to personally occupy the premises for a total of at least six months, . . . such owner shall be liable to the former tenant in a civil action for three times the damages plus the tenant's attorney fees and costs." N.J.S.A. § 2A:18-61.6(a).

C. Courts Interpreting the New Jersey Statute Have Held that the Owner Must Prove His or Her *Bona Fide* Intent in a Trial *Before* the Tenant Can Be Evicted

In *Durruthy v. Brunert*, 228 N.J.Super. 199, 549 A.2d 456 (1988), the landlords sought to evict the tenant on the statutory ground that the landlord "'seeks to personally occupy'" the tenant's unit. 549 A.2d at 457 (quoting § 2A:18-61.1(*l*)(3)). The Appellate Division held that the landlords were not entitled to possession because there was insufficient evidence at trial to establish that they intended to personally occupy the unit. Id. at 458.

> Although we sustain plaintiffs' right to remove defendant if they intend to "personally occupy" his unit, the record before us does not justify such a finding. The testimony taken at the various hearings was fragmented and incomplete; neither the witnesses nor counsel focused on the factual question whether plaintiffs had adequately proved their asserted *bona fide* intention to occupy defendant's second-floor apartment in addition to the third-floor apartment which they already occupied.

Id. (Italics in original; underlining added). Because the evidence did not support a finding that the landlords had proven their *bona fide* intention to occupy the unit, the *Durruthy* court remanded the case for trial. Id.

More recent cases are consistent with *Durruthy*. In *Hale v. Farrakhan*, 390 N.J.Super. 335, 915 A.2d 581, 585 (2007), the court observed that the landlord "*had the burden in the summary dispossession action of proving that she planned to personally occupy*" the tenant's unit. (Emphasis added).

The court also considered the proof required for eviction where the landlord "seeks to personally occupy a unit" in *N'Jie v. Mei Cheung*, No. 09–919 SRC, 2011 WL 809990 (D.N.J. March 1, 2011) (applying New Jersey law), *aff'd*, 504 Fed.Appx. 108 (3rd Cir. 2012).[5] In determining whether the tenant can be evicted, the standard is whether the landlord can prove "*an authentic, subjective intention to personally occupy*" the unit. 2011 WL 809990 at * 3 (emphasis added).

D. Just as the Courts Have Interpreted the Similar New Jersey Statute, This Court Should Interpret the Seattle Ordinance to Require Proof of the Owner's *Bona Fide* Intent

Before the tenant can be evicted, the New Jersey statute requires "the establishment of good cause." N.J.S.A. § 2A:18-61.1. The courts have ruled that this language places the burden of proof on the landlord.

[5] Pursuant to GR 14.1(b), citation to an unpublished opinion from jurisdictions other than Washington State is allowed "if citation to that opinion is permitted under the law of the jurisdiction of the issuing court." Federal Rule of Appellate Procedure 32.1(a) prohibits federal courts from restricting citation to unpublished opinions issued on or after January 1, 2007. Because *N'Jie* was decided in 2011, it may be cited here. A copy of the opinion in *N'Jie* is included in the Appendix.

Durruthy, 549 A.2d at 458; *Hale*, 915 A.2d at 585. Under the Seattle ordinance, it is even clearer that the landlord bears the burden of proving just cause. An owner "shall not evict or attempt to evict any tenant . . . unless the owner can prove in court that just cause exists." SMC 22.206.160(C)(1).

Under the New Jersey statute, the relevant good cause is that the owner "seeks to personally occupy a unit." N.J.S.A. § 2A:18-61.1(*l*)(3). The corresponding language in the Seattle ordinance is essentially the same: "the owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person's principal residence." SMC 22.206.160(C)(1)(e).

The New Jersey statute, like the Seattle ordinance, provides a post-eviction remedy in the form of damages if the landlord fails to carry out his or her announced intent to move into the rental unit. But in contrast to the Court of Appeals in the present case, courts considering the New Jersey statute have *not* held that this post-eviction remedy supplants the tenant's right to remain in possession until the landlord has proven his or her *bona fide* intention to occupy the unit. Courts have found that under the New Jersey statute the post-eviction action for damages exists *in addition to, not instead of*, the requirement that the landlord prove good cause before evicting the tenant. The Seattle ordinance should be similarly interpreted.

Just as the courts have done in interpreting the New Jersey statute, this Court should hold that before a tenant can be evicted in Seattle on the asserted ground that the owner or a family member seeks to occupy the unit, the owner must prove that person's *bona fide* intent to do so. To allow a New Jersey landlord to evict a tenant without such proof would render meaningless the law requiring "the establishment of good cause." N.J.S.A. § 2A:18-61.1. Similarly, the decision of the Court of Appeals in this case eviscerates the Seattle provision which forbids eviction "unless the owner can prove in court that just cause exists." SMC 22.206.160(C)(1). Courts have applied the New Jersey statute to give meaning to its words. This Court should interpret the Seattle ordinance in the same way.

Finally, the Court should interpret the Seattle Just Cause Ordinance in a way that serves its purpose. In declaring the purpose of the ordinance, the City Council stated that "arbitrary eviction of responsible tenants imposes upon such tenants the hardship of locating replacement housing and provides no corresponding benefit to property owners." SMC 22.200.020(D). The decision of the Court of Appeals is fundamentally inconsistent with the purpose of the ordinance. It is an "arbitrary eviction of responsible tenants" when the landlord can evict the tenant merely by ***saying*** that he or she wishes to occupy the unit. To prevent such arbitrary evictions, this Court should honor the words of the Seattle ordinance and

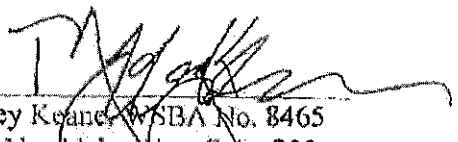
should require the landlord to ***prove*** the putative occupant's *bona fide* intent to live in the unit.

III. CONCLUSION

Tenants Brown and Wahleithner were entitled a trial on the issue of whether Faciszewski (or his mother) had a bona fide intent to occupy the rental house as a principal residence.

Respectfully submitted this 2nd day of September, 2016.

KEANE LAW OFFICES



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IV. APPENDIX

1. Seattle Municipal Code, 22.206.160 – Duties of owners A 1-5

2. *N'Jie v. Mei Cheung*, No. 09–919 SRC, 2011 WL 809990 (D.N.J. March 1, 2011) (applying New Jersey law), *aff'd*, 504 Fed.Appx. 108 (3rd Cir. 2012) A 6-14

22.206.160 - Duties of owners

A It shall be the duty of all owners, regardless of any lease provision or other agreement that purports to transfer the owner's responsibilities hereunder to an operator, manager or tenant, to:

1. Remove all garbage, rubbish and other debris from the premises;
2. Secure any building which became vacant against unauthorized entry as required by Section 22.206.200 of this Code;
3. Exterminate insects, rodents and other pests which are a menace to public health, safety or welfare. Compliance with the Director's Rule governing the extermination of pests shall be deemed compliance with this subsection 3;
4. Remove from the building or the premises any article, substance or material imminently hazardous to the health, safety or general welfare of the occupants or the public, or which may substantially contribute to or cause deterioration of the building to such an extent that it may become a threat to the health, safety or general welfare of the occupants or the public;
5. Remove vegetation and debris as required by Section 10.52.030;
6. Lock or remove all doors and/or lids on furniture used for storage, appliances, and furnaces which are located outside an enclosed, locked building or structure;
7. Maintain the building and equipment in compliance with the minimum standards specified in Sections 22.206.010 through 22.206.140 and in a safe condition, except for maintenance duties specifically imposed in Section 22.206.170 on the tenant of the building; provided that this subsection 7 shall not apply to owner-occupied dwelling units in which no rooms are rented to others;
8. Affix and maintain the street number to the building in a conspicuous place over or near the principal street entrance or entrances or in some other conspicuous place. This provision shall not be construed to require numbers on either appurtenant buildings or other buildings or structures where the Director finds that the numbering is not appropriate. Numbers shall be easily legible, in contrast with the surface upon which they are placed. Figures shall be no less than 2 inches high;
9. Maintain the building in compliance with the requirements of Section 3403.1 of the Seattle Building Code; [11]
10. Comply with any emergency order issued by the Department of Planning and Development; and
11. Furnish tenants with keys for the required locks on their respective housing units and building entrance doors.

B. It shall be the duty of all owners of buildings that contain rented housing units, regardless of any lease provision or other agreement that purports to transfer the owner's responsibilities hereunder to an operator, manager or tenant, to:

1. Maintain in a clean and sanitary condition the shared areas, including yards and courts, of any building containing two or more housing units;
2. Supply enough garbage cans or other approved containers of sufficient size to contain all garbage disposed of by such tenants;
3. Maintain heat in all occupied habitable rooms, baths and toilet rooms at an inside temperature, as measured at a point 3 feet above the floor and 2 feet from exterior walls, of at least 68 degrees Fahrenheit between the hours of 7:00 a.m. and 10:30 p.m. and 58 degrees Fahrenheit between the hours of 10:30 p.m. and 7:00 a.m. from September 1st until June 30th, when the owner is contractually obligated to provide heat;

4. Install smoke detectors on the ceiling, or on the wall not less than 4 inches nor more than 12 inches from the ceiling at a point or points centrally located in a corridor or area in each housing unit and test smoke detectors when each housing unit becomes vacant;

5. Make all needed repairs or replace smoke detectors with operating detectors before a unit is reoccupied; and

6. Instruct tenants as to the purpose, operation and maintenance of the detectors.

C. Just Cause Eviction.

1. Pursuant to provisions of the state Residential Landlord-Tenant Act (RCW 59.18.290), owners may not evict residential tenants without a court order, which can be issued by a court only after the tenant has an opportunity in a show cause hearing to contest the eviction (RCW 59.18.380). In addition, owners of housing units shall not evict or attempt to evict any tenant, or otherwise terminate or attempt to terminate the tenancy of any tenant unless the owner can prove in court that just cause exists. The reasons for termination of tenancy listed below, and no others, shall constitute just cause under this section 22.206.160:

   a. The tenant fails to comply with a three day notice to pay rent or vacate pursuant to RCW 59.12.030(3); a ten day notice to comply or vacate pursuant to RCW 59.12.030(4); or a three day notice to vacate for waste, nuisance (including a drug-related activity nuisance pursuant to RCW Chapter 7.43) or maintenance of an unlawful business or conduct pursuant to RCW 59.12.030(5);

   b. The tenant habitually fails to pay rent when due which causes the owner to notify the tenant in writing of late rent four or more times in a 12 month period;

   c. The tenant fails to comply with a ten day notice to comply or vacate that requires compliance with a material term of the rental agreement or that requires compliance with a material obligation under RCW 59.18;

   d. The tenant habitually fails to comply with the material terms of the rental agreement which causes the owner to serve a ten day notice to comply or vacate three or more times in a 12 month period;

   e. The owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person's principal residence and no substantially equivalent unit is vacant and available in the same building. "Immediate family" shall include the owner's domestic partner registered pursuant to Section 1 of Ordinance 117244 [12] or the owner's spouse, parents, grandparents, children, brothers and sisters of the owner, of the owner's spouse, or of the owner's domestic partner. There shall be a rebuttable presumption of a violation of this subsection 22.206.160.C.1.a if the owner or a member of the owner's immediate family fails to occupy the unit as that person's principal residence for at least 60 consecutive days during the 90 days immediately after the tenant vacated the unit pursuant to a notice of termination or eviction using this subparagraph as the cause for eviction;

   f. The owner elects to sell a single-family dwelling unit and gives the tenant at least 60 days written notice prior to the date set for vacating, which date shall coincide with the end of the term of a rental agreement, or if the agreement is month to month, with the last day of a monthly period. For the purposes of this section 22.206.160, an owner "elects to sell" when the owner makes reasonable attempts to sell the dwelling within 30 days after the tenant has vacated, including, at a minimum, listing it for sale at a reasonable price with a realty agency or advertising it for sale at a reasonable price in a newspaper of general circulation. There shall be a rebuttable presumption that the owner did not intend to sell the unit if:

      1) Within 30 days after the tenant has vacated, the owner does not list the single-family dwelling unit for sale at a reasonable price with a realty agency or advertise it for sale at a reasonable price in a newspaper of general circulation, or

2) Within 90 days after the date the tenant vacated or the date the property was listed for sale, whichever is later, the owner withdraws the rental unit from the market, rents the unit to someone other than the former tenant, or otherwise indicates that the owner does not intend to sell the unit;

g. The tenant's occupancy is conditioned upon employment on the property and the employment relationship is terminated;

h. The owner seeks to do substantial rehabilitation in the building; provided that, the owner must obtain a tenant relocation license if required by Chapter 22.210 and at least one permit necessary for the rehabilitation, other than a Master Use Permit, before terminating the tenancy;

i. The owner (i) elects to demolish the building, convert it to a cooperative, or convert it to a nonresidential use; provided that, the owner must obtain a tenant relocation license if required by Chapter 22.210 and a permit necessary to demolish or change the use before terminating any tenancy, or (ii) converts the building to a condominium provided the owner complies with the provisions of Sections 22.903.030 and 22.903.035;

j. The owner seeks to discontinue use of a housing unit unauthorized by Title 23 after receipt of a notice of violation thereof. The owner is required to pay relocation assistance to the tenant(s) of each such unit at least two weeks prior to the date set for termination of the tenancy, at the rate of:

1) $2,000 for a tenant household with an income during the past 12 months at or below 50 percent of the County median income, or

2) Two months' rent for a tenant household with an income during the past 12 months above 50 percent of the County median income;

k. The owner seeks to reduce the number of individuals residing in a dwelling unit to comply with the maximum limit of individuals allowed to occupy one dwelling unit, as required by Title 23, and:

1) a) The number of such individuals was more than is lawful under the current version of Title 23 or Title 24 but was lawful under Title 23 or 24 on August 10, 1994;

b) That number has not increased with the knowledge or consent of the owner at any time after August 10, 1994; and

c) The owner is either unwilling or unable to obtain a permit to allow the unit with that number of residents.

2) The owner has served the tenants with a 30 day notice, informing the tenants that the number of tenants exceeds the legal limit and must be reduced to the legal limit,

3) After expiration of the 30 day notice, the owner has served the tenants with and the tenants have failed to comply with a ten day notice to comply with the limit on the number of occupants or vacate, and

4) If there is more than one rental agreement for the unit, the owner may choose which agreements to terminate; provided that, the owner may either terminate no more than the minimum number of rental agreements necessary to comply with the legal limit on the number of occupants, or, at the owner's option, terminate only those agreements involving the minimum number of occupants necessary to comply with the legal limit;

l. 1) The owner seeks to reduce the number of individuals who reside in one dwelling unit to comply with the legal limit after receipt of a notice of violation of the Title 23 restriction on the number of individuals allowed to reside in a dwelling unit, and:

a) The owner has served the tenants with a 30 day notice, informing the tenants that the number of tenants exceeds the legal limit and must be reduced to the legal limit; provided that, no 30 day notice is required if the number of tenants

was increased above the legal limit without the knowledge or consent of the owner;

b) After expiration of the 30 day notice required by subsection 22.206.160.1.1.a above, or at any time after receipt of the notice of violation if no 30 day notice is required pursuant to subsection 22.206.160.1.1.a, the owner has served the tenants with and the tenants have failed to comply with a 10 day notice to comply with the maximum legal limit on the number of occupants or vacate; and

c) If there is more than one rental agreement for the unit, the owner may choose which agreements to terminate; provided that, the owner may either terminate no more than the minimum number of rental agreements necessary to comply with the legal limit on the number of occupants, or, at the option of the owner, terminate only those agreements involving the minimum number of occupants necessary to comply with the legal limit.

2) For any violation of the maximum legal limit on the number of individuals allowed to reside in a unit that occurred with the knowledge or consent of the owner, the owner is required to pay relocation assistance to the tenant(s) of each such unit at least two weeks prior to the date set for termination of the tenancy, at the rate of:

a) $2,000 for a tenant household with an income during the past 12 months at or below 50 percent of the county median income, or

b) Two months' rent for a tenant household with an income during the past 12 months above 50 percent of the county median income;

m. The owner seeks to discontinue use of an accessory dwelling unit for which a permit has been obtained pursuant to Sections 23.44.041 and 23.45.545 after receipt of a notice of violation of the development standards provided in those sections. The owner is required to pay relocation assistance to the tenant household residing in such a unit at least two weeks prior to the date set for termination of the tenancy, at the rate of:

1) $2,000 for a tenant household with an income during the past 12 months at or below 50 percent of the county median income, or

2) Two months' rent for a tenant household with an income during the past 12 months above 50 percent of the county median income;

n. An emergency order requiring that the housing unit be vacated and closed has been issued pursuant to Section 22.206.260 and the emergency conditions identified in the order have not been corrected;

o. The owner seeks to discontinue sharing with a tenant of the owner's own housing unit, i.e., the unit in which the owner resides, seeks to terminate the tenancy of a tenant of an accessory dwelling unit authorized pursuant to Sections 23.44.041 and 23.45.545 that is accessory to the housing unit in which the owner resides or seeks to terminate the tenancy of a tenant in a single-family dwelling unit and the owner resides in an accessory dwelling unit on the same lot. This subsection 22.206.160.C.1.o does not apply if the owner has received a notice of violation of the development standards of Section 23.44.041. If the owner has received such a notice of violation, subsection 22.206.160.C.1.m applies;

p. A tenant, or with the consent of the tenant, his or her subtenant, sublessee, resident or guest, has engaged in criminal activity on the premises, or on the property or public right-of-way abutting the premises, and the owner has specified in the notice of termination the crime alleged to have been committed and the general facts supporting the allegation, and has assured that the Department of Planning and Development has recorded receipt of a copy of the notice of termination. For purposes of this subsection 22.206.160.C.1.p a person has "engaged in criminal activity" if he or she:

1) Engages in drug-related activity that would constitute a violation of RCW Chapters 69.41, 69.50 or 69.52, or

2) Engages in activity that is a crime under the laws of this state, but only if the activity substantially affects the health or safety of other tenants or the owner.

2. Any rental agreement provision which waives or purports to waive any right, benefit or entitlement created by this subsection 22.206.160.C.1.p shall be deemed void and of no lawful force or effect.

3. With any termination notices required by law, owners terminating any tenancy protected by this section 22.206.160 shall advise the affected tenant or tenants in writing of the reasons for the termination and the facts in support of those reasons.

4. If a tenant who has received a notice of termination of tenancy claiming subsection 22.206.160.C.1.e, C.1.f, or C.1.m as the ground for termination believes that the owner does not intend to carry out the stated reason for eviction and makes a complaint to the Director, then the owner must, within ten days of being notified by the Director of the complaint, complete and file with the Director a certification stating the owner's intent to carry out the stated reason for the eviction. The failure of the owner to complete and file such a certification after a complaint by the tenant shall be a defense for the tenant in an eviction action based on this ground.

5. In any action commenced to evict or to otherwise terminate the tenancy of any tenant, it shall be a defense to the action that there was no just cause for such eviction or termination as provided in this section 22.206.160.

6. It shall be a violation of this section 22.206.160 for any owner to evict or attempt to evict any tenant or otherwise terminate or attempt to terminate the tenancy of any tenant using a notice which references subsections 22.206.160.C.1.e, 1.f, 1.h, 1.k, 1.l, or 1.m as grounds for eviction or termination of tenancy without fulfilling or carrying out the stated reason for or condition justifying the termination of such tenancy.

7. An owner who evicts or attempts to evict a tenant or who terminates or attempts to terminate the tenancy of a tenant using a notice which references subsections 22.206.160.C.1.e, 1.f or 1.h as the ground for eviction or termination of tenancy without fulfilling or carrying out the stated reason for or condition justifying the termination of such tenancy shall be liable to such tenant in a private right for action for damages up to $2,000, costs of suit or arbitration and reasonable attorney's fees.

(Ord. 123564, § 3, 2011; Ord. 123546, § 4, 2011; Ord. 123141, § 1, 2009; Ord. 122728, § 1, 2008; Ord. 122397, § 2, 2007; Ord. 121408 § 1, 2004; Ord. 121276 § 19, 2003; Ord. 119617 § 1, 1999; Ord. 118441 § 2, 1996; Ord. 117942 § 2, 1995; Ord. 117570 § 2, 1995; Ord. 115877 § 1, 1991; Ord. 115671 § 17, 1991; Ord. 114834 § 2, 1989; Ord. 113545 § 5(part), 1987.)

2011 WL 809990
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court,
D. New Jersey.

Mignone Sally N'JIE and Edward B. Mendy, Plaintiffs,
v.
MEI CHEUNG, Jin Lok, ABC Insurance Company and XYZ Insurance Company, Defendants.

Civil Action No. 09–919 (SRC).
|
March 1, 2011.

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OPINION

CHESLER, District Judge.

*1 This matter comes before the Court on motion for summary judgment by Defendants Mei Cheung, Jin Lok, ABC Insurance Company, and XYZ Insurance Company (collectively, "Defendants"). Plaintiffs have opposed the motion. The Court has opted to rule based on the papers submitted and without oral argument, pursuant to Federal Rule of Civil Procedure 78. For the reasons expressed below, the Court will grant Defendants' motion in its entirety.

I. BACKGROUND

Very briefly, this case arises from a landlord/tenant dispute pertaining to an option-to-buy term in a lease agreement between the parties. On March 3, 2009, Mignone Sally N'Jie and Edward B. Mendy (collectively, "Plaintiffs") filed the Complaint in this action, asserting fourteen claims against Defendants which generally relate to the allegation that Mei Cheung (hereinafter "Cheung") has breached the lease. Eight of Plaintiffs' claims were dismissed by this Court in a July 13, 2009 order and Defendants now move for summary judgment on the remaining six counts.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate under FED. R. CIV. P. 56(a) when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A factual dispute is genuine if a reasonable jury could return a verdict for the non-movant, and it is

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material if, under the substantive law, it would affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.' " *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir.2004) (quoting *Anderson*, 477 U.S. at 255).

"When the moving party has the burden of proof at trial, that party must show affirmatively the absence of a genuine issue of material fact: it must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party." *In re Bressman*, 327 F.3d 229, 238 (3d Cir.2003) (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir.1991)). "[W]ith respect to an issue on which the nonmoving party bears the burden of proof ... the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. *Jersey Cent. Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3d Cir.1985). The party opposing the motion for summary judgment cannot rest on mere allegations and instead must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson*, 477 U.S. at 248; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1130–31 (3d Cir.1995). "[U]nsupported allegations ... and pleadings are insufficient to repel summary judgment." *Schoch v. First Fid. Bancorporation*, 912 F.2d 654, 657 (3d Cir.1990). "A nonmoving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its favor at trial." *Gleason v. Norwest Mortg., Inc.*, 243 F.3d 130, 138 (3d Cir.2001).

***2** If the nonmoving party has failed "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, ... there can be 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Katz v. Aetna Cas. & Sur. Co.*, 972 F.2d 53, 55 (3d Cir.1992) (quoting *Celotex*, 477 U.S. at 322–23).

B. Defendants' Motion for Summary Judgment

1. *First Count: Breach of Contract*

Defendants move for summary judgment on the First Count of the Complaint for breach of contract based on two grounds: 1) Cheung's reason for declining to renew the lease agreement fits within a statutorily enumerated "good cause" ground; and 2) Cheung acted in accordance with the terms of the contract when she refused to sell

Plaintiffs the apartment. In opposition, Plaintiffs dispute Defendants' motivations for wanting to personally occupy the unit, alleging they are pretextual and the eviction, therefore, is unlawful. In addition, Plaintiffs argue that the option-to-buy provision of the lease agreement created an express obligation for Cheung to sell them the property and that her failure to do so was a repudiation of the contract.

a. *Non–Renewal of the Lease*

The parties do not dispute the fundamental principles that this Court should apply to the inquiry as to whether or not Defendants had good cause to refuse to renew the lease agreement. The Anti–Eviction Act, N.J.S.A. § 2A:18–61.1, limits a landlord's right to evict a residential tenant to statutorily enumerated "good cause" reasons. *Aquino Colonial Funeral Home v. Pittari,* 245 N.J.Super. 585, 586 A.2d 331, 331 (N.J.Super.Ct.App.Div.1991). A landlord establishes "good cause" within the meaning of N.J.S.A. § 2A:18–61.1(l)(3) when

> [t]he owner of a building of three residential units or less seeks to personally occupy a unit, or has contracted to sell the residential unit to a buyer who wishes to personally occupy it and the contract for sale calls for the unit to be vacant at the time of closing.

N.J. S.A. § 2A:18–61.1(l)(3) (2011). While the statute is framed to afford "residential tenants the right, absent good cause for eviction, to continue to live in their homes without fear of eviction or lease non-renewal and thereby to protect them from involuntary displacement," the Legislature enacted N.J.S.A. § 2A:18–61.1(l)(3) in order "to assure that the owner of a building with a small number of residential units can reside in his own building and have some control over the persons with whom he lives." *Morristown Mem'l Hosp. v. Wokem Mortg. & Realty Co.,* 192 N.J.Super. 182, 469 A.2d 515, 517 (N.J.Super.Ct.App.Div.1983); *Durruthy v. Brunert,* 228 N.J.Super. 199, 549 A.2d 456, 457 (N.J.Super.Ct.App.Div.1988). Therefore, the statute enables a residential owner who does not yet occupy the building to displace a tenant in order to make an apartment available for his or her own use.

*3 The parties here dispute whether Defendant Cheung and her husband Jin Lok (hereinafter "Lok") intend to personally occupy the apartment. The language in the Anti–Eviction statute places the burden of establishing one of the possible grounds for eviction upon the landlord. *Hale v. Farrakhan,* 390 N.J.Super. 335, 915 A.2d 581, 584 (N.J.Super.Ct.App.Div.2007). Because Defendants bear the burden of proof at trial, they carry the summary judgment burden of showing that no reasonable jury could find for the non-moving party on this issue. In support of their motion, the Defendants assert they intend to personally occupy the apartment for two reasons: their desire for more space in order to start a family, and because of their eviction from their current residence. Defendants have shown an authentic, subjective intention to personally occupy

their unit. To defeat the motion for summary judgment, Plaintiffs must point to evidence from which a reasonable jury could conclude that Defendants do not intend to personally occupy the apartment. The only evidence Plaintiffs proffer in support of their contention is that Cheung lied about her motivation for asking Plaintiffs to leave the apartment, as evidenced by the dual reasons she gave. However, Plaintiffs cannot defeat summary judgment solely by challenging Defendant's credibility because a court may not make credibility determinations when considering a motion for summary judgment. *Marino,* 358 F.3d at 247. Summary judgment requires Plaintiffs to point to evidence that would establish a genuine issue of material fact and Plaintiffs fail to carry this burden since they merely dispute Defendants' reasons for wanting to personally occupy the apartment, not their actual intention to do so. As such, Plaintiffs have not provided sufficient evidence to allow a jury to find in their favor at trial. Therefore, as a matter of law, Plaintiffs cannot prevail on their claim that Cheung's failure to renew the lease amounted to a contract breach.

b. *Option–to–Buy Provision*

Defendants additionally move for summary judgment on the ground that the "option to buy" and "right of first refusal" language included in paragraph 32 of the lease agreement entitles Plaintiffs to an opportunity to purchase the property ahead of another buyer and not to force a sale. In opposition, Plaintiffs contend that the provision in the lease is an option, giving them the unilateral power to compel Cheung to sell them the property.

New Jersey substantive law governs the question of contract interpretation in this matter. *See Mayfair Supermarkets, Inc. v. Acme Mkts., Inc.,* No. 87–3994, 1989 U.S. Dist. LEXIS 3466, at * *18–19 (D.N.J. Apr. 3, 1969) ("Historically, a lease was considered a conveyance of an interest in real estate and, consequently, was interpreted under the principles of property law; however, current New Jersey law construes lease agreements under the same guidelines employed to interpret contracts.") In New Jersey, "[t]he construction of the terms of a written lease is a matter of law for the courts." *Barclays Bank P.C. v. 865 Centennial Ave. Assocs. Ltd. P'Ship,,* 26 F.Supp.2d 712, 718 (D.N.J.1998). When interpreting a lease, like other contracts generally, a court is to give plain and ordinary meaning to the contractual terms and should not read or enforce the terms in such a way as to "write a different or better contract for the parties." *Schor v. FMS Fin. Corp.,* 357 N.J.Super. 185, 814 A.2d 1108, 1112 (N.J.Super.Ct.App.Div.2002). In the interpretation of a contract, the intention of the parties is to be gathered from the language used in the instrument as a whole. *Washington Const. Co., Inc., v. Spinella,* 13 N.J.Super. 139, 80 A.2d 318, 320 (N.J.Super.Ct.App.Div.1951). "The situation of the parties, the attendant circumstances, and the objects they sought to attain are all necessarily to be considered by the trial court in it inquiry as to the intention of the parties." *Schnakenberg v. Gibraltar Sav. & Loan Ass'n,* 37 N.J.Super. 150, 117 A.2d 191, 194 (N.J.Super.Ct.App.Div.1961).

***4** The contested lease provision states:

"Option to renew for one year lease terms. Rent for second year shall be $2400.00. Option to buy. Right of first Refusal." (Lease Agreement ¶ 32, April 15, 2007.) This language, lacking all material terms, can not be interpreted to give rise to an enforceable option to buy. By Plaintiff's own admission, the terms of the option were vague and unspecific and needed to be negotiated, including establishing a reasonable time for the exercise of the contested option and the setting of a reasonable purchase price. (Mendy Dep. at 41:17–19, 61:18–62:17, 64:7–15.) In addition, there is no evidence in the record that the parties ever contemplated any financing conditions, closing date, amount of time for the option to remain open, or any other terms that would normally appear. *See generally Wellmore,* 140 A.2d at 426–27; *Goffman,* 2008 N.J.Super. Unpub. LEXIS 979, at —— 16–17. As such, only if Cheung placed the property on the market would there be a duty arising out of the lease to involve the Plaintiffs in some form or fashion, either by negotiating a deal directly with them or soliciting third party offers which, in turn, would have to be transmitted to the plaintiffs on a right of first refusal basis. Because Plaintiffs had no right to compel Cheng to sell her property, Cheung's refusal to do so did not amount to a contract breach.

Therefore, Plaintiffs have failed to carry their summary judgment burden, as the nonmovant with the burden of proof at trial, of pointing to sufficient evidence for a jury to find in their favor at trial. No issue as to any material fact precludes the entry of judgment as a matter of law. Defendants' motion for summary judgment on the First Count will be granted.

2. *Second Count: Post–Termination Violations*

Defendants move for summary judgment on the Second Count of the Complaint, for breach of the lease agreement via "post-termination violations." This claim is clearly a cause of action for breach of the implied covenant of good faith since Plaintiffs allege Defendants "fail[ed] to act in good faith" by "not negotiating ... for the resolution of the contract issues with Plaintiffs." (Pls.' Opp'n to Defs.' Summ. J. Mot. 22, Dec. 13, 2010.) "A party to a contract breaches the covenant if it acts in bad faith or engages in some other form of inequitable conduct in the performance of a contractual obligation." *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.,* 228 F.3d 275, 288 (3d Cir.2000) ("every contract in New Jersey contains an implied covenant of good faith and fair dealing.")

Defendants have met their burden at summary judgment by pointing to the absence of evidence to support Plaintiffs' claim. In response, Plaintiffs offer bare accusations that the duty was breached, unsupported by any argument or evidence as to how Defendants' actions amounted to a violation of the implied covenant. Accordingly, Defendants have met their Rule 56 burden of demonstrating that summary judgment on the claim is appropriate. As a matter of law, Plaintiffs cannot prevail on the Second Count and Defendants' summary judgment on the claim will be granted.

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3. *Third Count: Inducing Contract Breach*
*5 Defendants move for summary judgment on the Third Count of the Complaint, arguing that the evidence cannot support a claim that Lok induced Cheung to breach the lease agreement. In New Jersey, to establish the tort of interference with an existing contract, a plaintiff must prove: "(1) an existing contractual relationship; (2) intentional and malicious interference with that relationship; (3) loss or breach of a contract as a result of the interference; and (4) damages resulting from that interference." *DiGiorgio Corp. v. Mendez & Co.,* 230 F.Supp.2d 552, 557 (D.N.J.2002). While the lease agreement is a valid and existing contract between Cheung and the Plaintiffs, this Court has concluded that Cheung did not breach the contract in any way. Furthermore, the only evidence Plaintiffs offer in support of their claim that Lok interfered with the contractual relationship is their observation that "Cheung became more rigid in her position in deciding to keep the Property" after marrying Lok. (Pls.' Opp'n to Defs.' Summ. J. Mot. 23–24.) This observation alone does not constitute evidence that Lok intentionally and maliciously interfered with the lease agreement, as required by law. Because Plaintiffs have failed to show that they can prove an essential element of the inducement of a contract breach claim, Defendants' motion for summary judgment as to the Third Count will be granted.

4. *Sixth Count: Libel and Slander*
The Sixth Count of the Complaint seeks damages for libel and slander based upon Defendants' statements to third parties that Plaintiffs falsely claimed to have an option to buy the property. The parties do not dispute the facts relating to this claim. Defendants simply contend that the statements made by them do not support a defamation claim as a matter of law.

Under New Jersey law, to establish a prima facie case of defamation, whether denominated libel or slander, a plaintiff must show that the defendant (1) made a defamatory statement of fact (2) concerning the plaintiff (3) which was false, and (4) which was communicated to a person or persons other than the plaintiff. *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.,* 164 F.3d 186, 189 (3d Cir.1998). A statement is defamatory when it is "false and 'injurious to the reputation of another' or exposes another person to 'hatred, contempt or ridicule' or subjects them to 'a loss of the good will and confidence' in which he or she is held by others." *Romaine v. Kallinger,* 109 N.J. 282, 537 A.2d 284, 287 (N.J.1988). In addition, to be actionable, all slanderous statements falling outside a *per se* category[1] require proof of special damages other than an injury to reputation or emotional distress. Restatement of Torts § 575 (1938). Typically considered as a pecuniary loss, special damages are "actual and concrete damages capable of being estimated in money." *Beverly Enters., Inc. v. Trump,* 182 F.3d 183, 188 (3d Cir.1999).

1 *Per se* categories include statements imputing a criminal offense, a loathsome disease, improper conduct of a lawful business, or unchastity of a woman and do not require proof of special damages. *Ward v. Zelikovsky,* 136 N.J. 516, 643 A.2d 972, 977 (N.J.1994).

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Viewing the facts in the light most favorable to Plaintiffs, even if Defendants' statements that Plaintiffs lied about the existence of an option-to-buy rose to the level of exposing Plaintiffs to "hatred, contempt, or ridicule," Plaintiffs have failed to put forth any evidence that the comments made by Defendants caused them any monetary or "out of pocket" loss. Because plaintiffs have only alleged damage to their reputation and hurt feelings, they cannot prevail on their defamation claim as a matter of law and summary judgment will be granted in Defendants' favor.

5. *Eleventh Count: Unjust Enrichment*

***6** Defendants move for summary judgment on the Eleventh Count of the Complaint, contending that they are not indebted to the Plaintiffs for the changes Plaintiffs made to the apartment because the lease agreement specifically exempts Cheung from paying for any improvements made to the property. In opposition, Plaintiffs argue that they have a right to recover, under the quasi-contract theory of unjust enrichment, for the improvements they made to Cheung's apartment during their tenancy. There is no dispute about any material fact here. The question before the Court is whether these facts support a claim for unjust enrichment as a matter of law.

To establish a claim for unjust enrichment, a plaintiff must prove that defendant received a benefit and that retention of that benefit without payment would be unjust. *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 641 A.2d 519, 541 (N.J.1994). The unjust enrichment doctrine "requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." *Id.* Quasi-contract liability will not be imposed when a valid, unrescinded contract governs the rights of the parties. *Van Ormen v. American Ins. Co.*, 680 F.2d 301, 310 (3d Cir.1982). The authority of an express contract will take precedent over a theory of unjust enrichment or quasi-contract liability concerning the identical subject matter since "[t]he parties are bound by their agreement, and there is no ground for implying a promise so long as a valid unrescinded contract governs the rights of the parties." *Suburban Transfer Serv., Inc. v. Beech Holdings, Inc.*, 716 F.2d 220, 226–27 (3d Cir.1983).

Plaintiffs allege that they made improvements to the property—namely purchasing larger furniture, repainting the apartment, and buying and installing customized drapes and carpeting—and that allowing Defendants to retain such benefits without payment would be unjust. However, the subject matter of Plaintiffs' unjust enrichment claim against Defendants is covered by an express contract, the lease agreement, between these parties. Paragraph 7 of the lease specifically states that the Landlord is not responsible for paying for any improvements, even when consent to make the improvements is given, and that the improvements become the property of the Landlord once they are made. (Lease Agreement ¶ 7.) It is clear that the subject matter of this dispute, the improvements to

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the premises, is covered by an express contract: paragraph 7 of the lease agreement. Accordingly, this Court concludes that Plaintiffs have no unjust enrichment claim for improvements made to the property. Therefore, Defendants have shown that they are entitled to judgment as a matter of law on this claim and the motion for summary judgment will be granted.

6. *Twelfth Count: Detrimental Reliance*
Defendants move for summary judgment on the Twelfth Count of the Complaint, contending that the evidence cannot support a detrimental reliance claim. Specifically, Defendants argue that Cheung never promised to sell Plaintiffs the apartment and that, even if a promise to sell had been made, Plaintiffs have not suffered any detrimental consequences from their reliance on the promise. In opposition, Plaintiffs assert that Defendants represented that they would sell the property to the Plaintiffs and that, to their detriment, Plaintiffs passed up various opportunities to rent or buy other properties at a lower price in reliance on those statements.

*7 Under New Jersey law, to plead a cause of action for promissory estoppel, Plaintiffs must sufficiently allege these elements:

(1) clear and definite promise by the promisor;

(2) promise must be made with expectation that promisee will rely thereon;

(3) promisee must in fact reasonably rely on the promise, and

(4) detriment of a definite and substantial nature must be incurred in reliance on the promise.

Royal Assocs. v. Concannon, 200 N.J.Super. 84, 490 A.2d 357, 361 (N.J.Super.Ct.App.Div.1985). Indefinite promises or promises subject to change by the promisor are not "clear and definite" and cannot give rise to a claim for promissory estoppel. *Aircraft Inventory Corp. v. Falcon Jet Corp.,* 18 F.Supp.2d 409, 416 (D.N.J.1998) (no clear and unambiguous promise where specificity with respect to conditions of the sale such as "warranties, disclaimers, delivery, taxes, and allocation of risk of loss were not established nor even discussed.")

The parties do not dispute most of the relevant basic facts. Although Defendants challenge Plaintiffs' contention that they incurred a detriment in reliance on Cheung's promise to sell them the apartment, the Court need not address this issue since Plaintiffs' detrimental reliance claim fails to survive at the first step of the aforementioned analysis. The parties agree that Cheung did not make a "clear and definite" promise to sell the apartment. By his own admissions during his deposition, Plaintiff Mendy stated that he "could not get any real affirmation or commitment from Cheung" about selling the property because she "always gave him plausible reasons for her reason not to sell" and that no sale price was ever established. (Mendy Dep. 59:1, 62:12, 82:7.) Plaintiff's own statements illustrate that Defendants never made any unambiguous and concrete promise to sell,

as required by law. As such, the alleged promise to sell is insufficient, as a matter of law, to support a claim for detrimental reliance. Therefore, as to the Twelfth Count, Defendants have shown that they are entitled to judgment as a matter of law and the motion for summary judgment will be granted.

C. Rule 56(d) Application

Plaintiffs urge the Court to delay its decision on Defendants' motion for summary judgment pursuant to Rule 56(d). Rule 56(d) provides that a court may refuse the application for judgment or order a continuance if a "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed.R.Civ.P. 56(d). Plaintiffs contend that summary judgment is premature in the current case because they have not had an opportunity to complete deposition of Defendants due to inadequate time for discovery.

On August 16, 2010 Magistrate Judge Michael Shipp closed fact discovery with finality in this case based on its procedural history and the conduct of the parties. (Shipp Op. and Order 10, Aug. 16, 2010.) In his order, Judge Shipp pointed to at least five separate instances in which Plaintiffs failed to comply with the court's orders and deadlines throughout the discovery process. (*Id.* at 2–6.) In the August 16th order, Judge Shipp dismissed Plaintiffs' motion to compel responses to interrogatories, document discovery, and appearances for depositions because Plaintiffs failed to submit supplementary exhibits that were necessary to the merits of their motion, in spite of the Judge's numerous text orders and voice mails over a five month period instructing their submission. (*Id.* at 10–11.) Moreover, Judge Shipp found that even if additional time for discovery was granted, the proceedings would be thwarted by the parties' inability to work with one another. (*Id.* at 9.) Because Plaintiffs had adequate time to complete discovery in this case and failed to comply with discovery demands on multiple occasions, this Court denies their request to delay a decision on Defendants' motion for summary judgment pursuant to Rule 56(d).

III. CONCLUSION

***8** For the foregoing reasons, the Court will grant Defendants' motion, ordering summary judgment in their favor on the First, Second, Third, Sixth, Eleventh, and Twelfth Counts of the Complaint. An appropriate form of Order will be filed.

All Citations

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SUPREME COURT
OF THE STATE OF WASHINGTON

STEPHEN FACISZEWSKI and VIRGINIA L. KLAMON, Respondents, vs. MICHAEL R. BROWN and JILL A. WAHLEITHNER, Petitioners.	)	**No. 92978-5** **CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below a copy of Supplemental Brief of Petitioners Michael R. Brown and Jill A. Wahleithner was served as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

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Attached please find Petitioners' Supplemental Brief for filing with the Court.

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