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No. 62931-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

WILLIAM AND TERESA GROVER,

Appellants,

v.

LOSH FAMILY, LLC, and ILIA KERTSMAN,

Respondents.

REPLY BRIEF OF APPELLANTS

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ORIGINAL

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I. INTRODUCTION

Losh and Kertsman make the same fundamental mistakes that the trial court did. First, they mistake a line of cases dealing with a specific form of signature (a name followed by a title) with the law concerning signatures that plainly are made in a representative capacity (the name of the entity followed by the name and title). Second, they ignore the application of the statute of frauds to the assumption of the lease, but instead argue that the original lease comes within an exception to the rule. Third, they disregard the legal standards for summary judgment motions and attempt to draw inferences in favor of the moving party.

This Court should, at a minimum, reverse the order granting summary judgment, and should instead dismiss the Grovers on the grounds that they never signed the lease or performed the assignment.

II. LEGAL ANALYSIS

A. The Grovers Are Not Personally Liable Under the Assignment.

The most perplexing aspect of this case remains the trial court's determination on summary judgment that the Grovers were personally bound by the assignment even though they did not personally sign it. Neither Losh nor Kertsman even attempt to deny that a party must execute a contract before it is bound. Instead, they appear to argue that the Grovers did sign the lease.

Losh was able to muster only three pages of argument on this issue, in which it cited only two cases. Brief of Respondent Losh at 15-17. Essentially, Losh merely adopted the trial court's belief that it could use the language of the agreement to interpret the signature without first considering whether the signature was ambiguous.

Kertsman, the original tenant who assigned the lease, makes a more extensive argument, but he, too, ultimately argues that the Court should not "consider[] the form of the signature," and claims that the Grovers erroneously argue that "the signature alone controls and trumps the test of the Assignment." Brief of Respondent Kertsman at 18, 20.

The fact of the matter is that the signature does control and determine who is a party to a contract. That is the very purpose of a signature.

Without exception, the cases on which Losh, Kertsman and the trial court rely all concern a specific form of signature that is inherently ambiguous. That signature consists of nothing more than a name followed by a title. The cases cited by the court and the signatures are the following:

Wilson Court Ltd. Partnership v. Tony Maroni's, Inc., 134 Wn.2d 692, 700, 952 P.2d 590, 594 (1998) ("Anthony L. Riviera President")

Gavazza v. Plummer, 53 Wash. 14, 101 P. 370 (1909) ("W. H. Plummer, Treas.")

Key v. Cascade Packing Co., Inc., 19 Wn.App. 579, 581, 576 P.2d 929, 931 (1978) (“CLYDE A. HOVIK, President”)

Bailie Communications, Ltd. v. Trend Business Systems, 53 Wn.App. 77, 78, 765 P.2d 339, 341 (1988) (“Harold T. Wosepka, President”)

Not a single case in the entire body of Washington law has ever imposed personal liability when a contract was signed with a standard entity form of signature.

In fact, the cases cited by the respondents clearly indicate that they are authority only when “the face of the document does not otherwise indicate the signer's capacity,” *Wilson Court*, 134 Wn.2d at 700, when a “corporate title was affixed” (*Key*, 19. Wn.App. at 583). Respondents want to turn this rule on its head and have a signature that plainly identifies only a representative capacity personally bind the signer based on other language in the agreement. The trial court agreed with that argument, but this Court should not.

The body of law that Losh and Kertsman would distort is so well established that it has a name. The addition of a title to an individual's name is called “*descriptio personae*.” *Wilson Court*, 134 Wn.2d at 695;; *Gavazza*, 53 Wash. at 15. Black's Law Dictionary defines *descriptio personae* as:

Description of the person. By this is to mean a word or phrase used merely for the purpose of identifying or pointing out the person intended, and not as an intimation that the language in connection with which it occurs is to apply to him only in the official or technical character which might appear to be indicated by the word.

Black Law Dictionary, Revised Fourth Edition (1968).

In *Union Machinery & Supply Co. v. Taylor-Morrison Logging Co.*, 143 Wash. 154, 254 P. 1094 (1927), the Court exhaustively considered the law on signatures from around the country before deciding that, despite language in a promissory note personally binding all signatories, only a corporation was bound by a signature in the form of

‘Taylor-Morrison Logging Co.,

‘J. B. Wood, Pres.

‘J. L. Kahaley, Sec.’

This rule is necessary because, as the *Union Machinery* court pointed out, “the corporation could not sign its own name.” *Id.* at 158. It would not be an overstatement to say that if corporations could not be completely certain that executing documents in a proper entity form precluded any risk of personal liability, modern commerce would collapse overnight.

That is why sources such as Washington Practice Digest state that

the form of signature used by Grover International is “perhaps the safest way in which executives of a corporate maker may execute a note on behalf of the corporation **without the risk of an argument** that they are (or either of them is) executing it in a personal rather than in a representative capacity.” 7 Wash. Practice 2008 Supplement, p. 474, 3-402, FORM 2 (2008) (emphasis added). It is why the Court of Appeals called this form of signature “[t]he unambiguous way to make the representation [capacity] clear.” *St. Regis Paper Co. v. Wicklund*, 24 Wn.App. 552, 556, 597 P.2d 926, 929 (1979), *reversed on other grounds*, 93 Wn.2d 497, 610 P.2d 903 (1980).

Under the trial court’s ruling, corporations and other entities could no longer rely on the form of the signature to ensure that the individual signing a contract would not be personally liable. If this Court were to adopt such a rule, it would have immediate, pervasive and drastic consequences for contracts and for commerce as a whole. This Court should decline to modify long established law, and should rule as a matter of law that the signature on the Assignment of Lease bound only Grover International, LLC.

B. The Absence of a Valid Legal Description Is Fatal to Losh's and Kertsman's Claims.

1. The Property Description in the Lease is Deficient.

Although Losh did not defend the property description in the trial court proceedings, he now argues that any requirement that the legal description identify the plat is “hypertechnical.” Losh Brief at 18. All that need be said in response is that Losh surprisingly does not mention *Key Design Inc. v. Moser*, 138 Wn.2d 875, 881, 983 P.2d 653, 657 (1999), in which the Supreme Court was urged to abandon Washington’s requirement for a legal description because the rule was “extreme, unusually strict, and not generally accepted or favored.” The Court fully acknowledged that the rule was strict and produced harsh results, but refused the change the rule because when *Martin v. Seigel*, 35 Wn.2d 223, 212 P.2d 107, 23 A.L.R.2d 1 (1949) announced the rule, it intended a strict rule.

The description of the property in the lease cannot be narrowed down any further than somewhere in the City of Renton. That description is defective by any measure.

2. The Trial Court Erred in Finding Part Performance on Summary Judgment.

The trial court found inferences in the record to support part performance. CP 170. Losh’s brief argues that “[t]he trial court’s **finding**

that partial performance was met by the Grovers is well supported by Washington law and the facts of this case.” Losh Brief at 23. Similarly, Kertmans argues that the part performance doctrine “must be flexible and consider all relevant facts,” and that [u]nder the totality of the circumstances, it would be inequitable to allow the Grovers to disavow” the lease. Kertsman Brief at 24, 26.

All of this would make sense if this appeal were arguing whether substantial evidence supported the trial court’s findings of fact after a trial. But this is summary judgment. The Grovers are the non-moving parties. Unlike the plaintiff, they do not have the burden of proof.

The standards for summary judgment are not secret. The admissible evidence submitted by the nonmoving party must be accepted. Here, the trial court ignored and did not even mention the Declaration of William Grover attesting that Grover International, LLC, and not the Grovers, occupied the property and paid the rent. Instead, the trial court stated that the Grovers “acknowledged both possession and payment” (CP 171) which was flatly wrong.

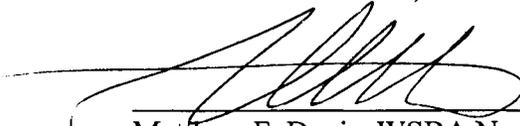
The trial court did not consider whether the evidence, when viewed in a light most favorable to the defendant nonmoving party demonstrated, as a matter of law, that the plaintiff had carried its burden of proof. Instead, the trial court found that the Grovers had not “overcome” the

inference of part performance. CP 171. When it was pointed out to the Court on reconsideration that the Grovers had never acknowledged possession or payment, but instead had denied them under oath, the trial court simply denied the motion. CR 280-81.

For whatever reason, the trial court treated the plaintiff's summary judgment motion as a trial on the merits and effectively made factual findings against the nonmoving party while at the same time failing to consider the actual form of the signature on the Assignment of Lease. The Grovers did not personally bind themselves to the Assignment of Lease as a matter of law, and the Lease contained a defective legal description. This Court should reverse and remand for entry of judgment dismissing William and Teresa Grover from the case.

DATED this 2nd day of September, 2009.

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DECLARATION OF SERVICE

I, Ellen Krachunis, state:

On this day I caused to be delivered by ABC Legal Messengers for delivery on September 4, 2009, to the Court of Appeals Division I and to

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Reply Brief of Appellants.

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 2nd day of September, 2009 at Seattle, Washington.


Ellen Krachunis