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No. 66537-5-I

COURT OF APPEALS,
DIVISION ONE
OF THE STATE OF WASHINGTON

Henry Rogers, *Respondent*

v.

Darron Cage, *Appellant.*

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON
J. O. BAKER

 ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting a motion for continuance of the unlawful detainer trial filed by a non-lawyer other than the *pro se* plaintiff/respondent.

2. The trial court erred in determining that the oral month-to-month lease at issue required the appellant to pay 100% of the monthly mortgage and condominium dues.

3. The trial court erred in making finding of fact 1.3, to wit: “Defendant(s) now occupy the above described premises at a rent of \$1522.11 per month plus condo fees and utilities (\$50.74 per day), payable on the 1st day of each calendar month.”

4. The trial court erred in making finding of fact 1.4, to wit: “Defendant(s) are in default of the payment of rent in the amount of \$9564.45 for the period set forth on notice, on file herein, which amount is now past due and owing to the plaintiff(s).”

Issues Pertaining to Assignments of Error

1. Whether a trial court abuses its discretion when it grants a motion to continue filed by a non-lawyer other than a *pro se* party.
2. Whether a power of attorney authorizes a non-lawyer agent to practice law on behalf of the principal or act pro se in the place thereof.
3. Whether substantial evidence supports the trial court's challenged findings of fact in this case.

II. STATEMENT OF CASE

A. Pretrial proceedings.

This is an appeal from an unlawful detainer action filed by the plaintiff/respondent, Mr. Henry Rogers (“Rogers”), against the defendant/appellant, Mr. Darron Cage (“Cage”), in King County Superior Court (cause no. 10-2-36187-1 KNT) on or about October 12, 2010. *See* CP at 1.

A show cause hearing was held on or about October 20, 2010. *See* CP at 36. However, no writ of restitution was entered on that date; instead, the case was set for trial before the honorable Judge Brian Gain to commence on November 22, 2010. *See* CP at 45-47.

After the hearing, the respondent’s attorney, Mr. Michael W. Jordan, withdrew from further representation of Rogers, effective November 1, 2010. *See* CP at 41-42. In his opposition to the motion to continue filed by “Howard Dean Rogers” (discussed in greater detail below), Cage represented to the court that Mr. Jordan “assured the court that his then client, Mr. Henry Rogers would be present for the scheduled trial date.” *See* CP at 61.

B. Motion to continue.

On November 16, 2010, "Howard Dean Rogers," presumably a

relative of Rogers, filed a document styled "Plaintiff's Motion to Continue Trial Date." *See* CP at 56. Howard Dean Rogers noted the motion for November 22, 2010, *e.g.*, the scheduled trial date. *See* CP at 49.

In one declaration under penalty of perjury Howard Dean Rogers claimed that he was "counsel of record" for Rogers (*see* CP at 55); in yet another declaration he indicated only that he "ha[d] power of attorney for the Plaintiff[.]" *See* CP at 58. Only the latter statement is supported by the record on review.¹ In his motion, Howard Dean Rogers indicated that Rogers was out of the country (where he had been since the summer, *e.g.*, before the unlawful detainer action was filed) and would not be returning until December 6, 2010. *See* CP at 55, 58.

Despite the fact that he received Howard Dean Rogers' motion just one day earlier, Cage's opposition to the motion to continue was filed on November 17, 2010 at approximately 4:27 pm. *See* CP at 61-62. However, even though the motion to continue was not noted until November 22, 2010, the trial court entered an order continuing the trial date (to December 13, 2010) on November 17, 2010. *See* CP at 60.

¹ *See* CP at 54 ("Power of Attorney Affidavit" included in Howard Dean Rogers' moving papers). The fact that "Howard Dean Rogers" was *not* an attorney admitted to practice in Washington can be seen in his failure to include his Washington State Bar Association membership number in his moving papers as required by CR 11(a) and APR 13(a). *See* CP at 49-59. He also did not file a Notice of Appearance under CR 70.1(a).

C. Trial.

“Trial” in this matter commenced on December 17, 2010.² *See* CP at 69. Rogers was present and represented by able counsel at trial. *See* CP at 70, RP at 4-24. Cage represented himself at trial. *See* RP at 4-24. Cage and Rogers were the only “witnesses” at trial. *See* RP at 4-24.

Cage testified that he entered an oral month-to-month lease with Rogers. *See* RP at 5-6. Cage testified that Rogers was going to stay at the property part time and in Thailand part time. *See* RP at 6. The monthly mortgage was \$1,470, plus \$229 for association dues, which came to roughly \$1,700 per month. *See* RP at 6. The amount of Cage’s rent was half of what was required to cover the mortgage and association dues on the property; Rogers was to pay the other half. *See* RP at 6. The rental commenced when the sale was completed at the end of August of 2008.³ *See* RP at 6. Cage made all the payments until June of 2010. *See* RP at 6-7. Cage was paying the whole thing (approximately \$1,700 per month) to Rogers so he could get credit or points for using his card. *See* RP at 7.

Cage acknowledged that he stopped paying after June of 2010 because he was “more than paid up in the rent” for the property; that is,

² The trial court indicated that this case was “continued to, on a show cause, why a writ of restitution shouldn’t be issued.” *See* RP at 4. For purposes of this brief, the December 17, 2010 proceeding is treated as “trial.”

³ Cage sold the property to Rogers. *See* RP at 6.

Cage testified that his rent was \$850, but that he paid the whole amount (\$1700) until June of 2010 at which time he stopped paying because at that point he was owed a significant amount of money by Rogers for the amount he paid on Rogers' behalf. *See* RP at 4-7. Cage indicated that Rogers gave him part, but not all, of the money that Rogers owed him. *See* RP at 5, 7.

Rogers testified that he bought the property from Cage. *See* RP at 8. The agreement was Cage was supposed to make all the payments, all the condo assessment fees and all the utility bills. *See* RP at 8. Cage was supposed to sell off some of his assets and buy the property back from Rogers. *See* RP at 8.

Rogers acknowledged making a \$3,000 payment to Cage, but testified that it was due to Cage telling him that Cage would turn Rogers into the IRS for a bogus "home-buyer's tax credit" if Rogers did not pay Cage \$3,000. *See* RP at 8-11. Rogers claimed he received, but did not admit any evidence of, a check for \$7,400 from the IRS which sat on the kitchen counter for a couple days. *See* RP at 9. Rogers testified that Cage said that was his (Cage's) money since he (Cage) had been making the payments on the property. *See* RP at 9. Rogers said he paid the \$3,000 and then later filed an amended tax return with respect to the error and actually owed money (\$7,687.04.) *See* RP at 8-11. A copy of the check

sent to the IRS was admitted as Exhibit 2. *See* RP at 11. However, Rogers did not admit the erroneous and amended tax returns. *See* RP at 8-13.

Rogers further testified as follows that he never agreed to pay half of the mortgage. *See* RP at 11. The mortgage payments were \$1,470 at first, then went up to \$1,522.11 per month. *See* RP at 11-12. Cage made all of the mortgage payments before he stopped making them. *See* RP at 12. Cage never asked him to pay half the mortgage payments; and that was not their agreement. *See* RP at 12. The mortgage payments for July through December (6 months) had not been paid. *See* RP at 12. Condo assessments in the amount of \$203.29 were due. *See* RP at 12. There were unpaid utility bills in the amount of \$129.00. *See* RP at 12.

On cross examination, Rogers acknowledged that he lived at the property from April 1st until the latter part of June. *See* RP at 15. Rogers said he never paid the rent, but he felt he could live at the property for free as Cage invited him. *See* RP at 15. Rogers had a copy of the key to the property. *See* RP at 15. Rogers could come and go as he pleased. *See* RP at 15-16. Rogers paid one month's utility bills at the property to help Cage out. *See* RP at 16. Rogers paid to have the carpets cleaned and he bought groceries, but "was never, ever asked to pay rent[.]" *See* RP at 16. Rogers' bank statements were coming to the property because he was

“getting ready to come there[.]” -- “he was coming back.” *See* RP at 18. The light bill was in his name, but he claimed this was Cage’s doing. *See* RP at 18-19. Rogers sent an email to Cage “begging [Cage] to find out what [Cage] thought [Rogers] owed [Cage] money for.” *See* RP at 21. At some point, Rogers also contacted the mortgage company saying that he gave up his rights to the property because he couldn’t afford it and that Cage was interested in buying it. *See* RP at 23.

At the conclusion of the trial, the trial court ruled in Rogers favor indicating that it was “satisfied that [Rogers] is the owner of the property, rent has not been paid, and he is allowed to have the property restored to him.” *See* RP at 24. It also entered a judgment for the claimed rent in arrears. *See* RP at 24; *see also* CP at 63-69. The trial court did all of these things despite making the following suggestion to Cage: “you probably should explore what your legal rights are if you feel that you are owed money.” *See* RP at 24.

D. Motion to reconsider and appeal.

The trial court denied Cage’s motion for reconsideration on January 5, 2011. *See* CP at 91. This timely appeal was filed on January 12, 2011. *See* CP at 94.

III. ARGUMENT

B. The trial court abused its discretion by granting a motion for a continuance of a trial date filed by a non-lawyer other than the pro se respondent.

“Whether a motion for continuance should be granted or denied is a matter discretionary with the trial court, reviewable on appeal for manifest abuse of discretion.” *Balandzich v. Demeroto*, 10 Wn. App. 718, 720 (1974) (citations omitted). The *Balandzich* court went on to state the following: “In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.” *Balandzich*, 10 Wn. App. at 720.

Cage acknowledges the general rule that a motion for continuance made by a party is reviewed for a manifest abuse of discretion. It is axiomatic, however, that in order for the trial court to properly exercise its discretion in determining whether or not to grant a party’s motion to continue, the request must actually be made by a party.

In the case at bar, “Howard Dean Rogers” was neither a party to the case nor Rogers’ attorney when he submitted moving papers to the

court which requested a continuance on Rogers' behalf. Rather, Howard Dean Rogers was acting merely under a "power of attorney." And as *State v. Hunt*, 75 Wn. App. 795, 807 (1994) teaches, "A power of attorney does not authorize the practice of law." Further, "a person may practice law on his own behalf but cannot transfer his 'pro se' right to practice law to any other person." *See id.*

As such, the trial court abused its discretion in granting a motion to continue made by someone other than Rogers or his attorney at law. Moreover, because Rogers was out of the country on the scheduled trial date in November (according to the representations made by Howard Dean Rogers) and because Rogers' counsel did not appear until the date to which the trial was continued (in December), it is reasonable to conclude that no capable individual would have been present to prosecute this action had the case been called for trial on the originally-scheduled trial date of November 22, 2010. Such an occurrence would have resulted in the dismissal. *See, e.g., Eriksen v. Mobay Corp.*, 110 Wn. App. 332, 340 (2002) ("If the plaintiff does not appear and is unrepresented at trial, the defendant is entitled to dismissal upon request.").

Under the circumstances present in this case, *e.g.*, where a continuance is/was obtained through the unlawful practice of law, this Court should reverse and vacate the judgment against Cage.

B. Substantial evidence does not support the trial court's findings that Mr. Cage agreed to pay 100% of the monthly mortgage payments, condominium association dues and utility bills as the rental amount for the premises.

“Where the trial court has weighed the evidence [appellate] review is limited to determining whether the findings are supported by substantial evidence and, if so, whether the findings in turn support the trial court's conclusions of law and judgment.” *Holland v. Boeing Co.*, 90 Wn.2d 384, 390 (1978) (citations omitted). “Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Holland*, 90 Wn.2d at 390-91. Finally, “conflicting evidence is substantial if that evidence reasonably substantiates the finding even though there are other reasonable interpretations.” *Sherrell v. Selfers*, 73 Wn. App. 596, 600-01 (1994).

Here, Cage takes exception with the following closely-related factual findings of the trial court: (1) “Defendant(s) now occupy the above described premises at a rent of \$1522.11 per month plus condo fees and utilities (\$50.74 per day), payable on the 1st day of each calendar month[;]” and (2) “Defendant(s) are in default of the payment of rent in the amount of \$9564.45 for the period set forth on notice, on file herein, which amount is now past due and owing to the plaintiff(s).”

These findings are premised on an alleged oral agreement between

Cage and Rogers whereby Cage would pay 100% of the monthly mortgage payments, condo fees and utilities.

The above findings fly in the face of Rogers' acknowledgment that he paid Cage a substantial sum of money around the time which Rogers claims Cage was in default for rent (i.e. July-December, 2010.) Rogers' rebuttal to the argument that his payment demonstrated his consciousness of the debt created by his failure to honor the true agreement between the parties (i.e. that they would both split the amount that was required to cover the mortgage and association dues on the property) was simply to state that Cage extorted the money from him by threatening to report Rogers to the IRS for income tax fraud. However, Rogers only "corroborated" this alleged threat by providing a copy of a check he sent to the IRS in response to the threat; he did not provide the original (erroneous) and amended tax returns or elicit any testimony from his accountant regarding the same.

Rogers' version of events is also not consistent with someone being threatened with disclosure of an offense involving the IRS, especially where the taxpayer enlisted the services of a tax professional and did nothing more than sign an income tax return, which Rogers admittedly did here. With this in mind, why would Rogers feel compelled to submit to a demand for money under threat of prosecution for tax fraud?

The answer is that Rogers' payment to Cage was not made under threat of prosecution, but rather the co-occupancy⁴ agreement between the parties as evidenced by other factors present in the case: Rogers acknowledged that he lived at the property from April 1st until the latter part of June (RP at 15); Rogers had a copy of the key to the property (RP at 15); Rogers could come and go as he pleased (RP at 15-16); Rogers paid one month's utility bills at the property (although he claimed he was just helping Cage out) (RP at 16); Rogers paid to have the carpets cleaned and bought groceries (RP at 16); Rogers' bank statements were coming to the property (RP at 18); the light bill was in Rogers' name (although he claimed this was Cage's doing) (RP at 18-19); and Rogers' explanation of the email sent to Cage "begging [Cage] to find out what [Cage] thought [Rogers] owed [Cage] money for." See RP at 21-22.

All of these factors support the conclusion argued by Cage at trial. The trial court erred in finding otherwise. This Court should therefore reverse and vacate the judgment of the trial court.

IV. CONCLUSION

For all the foregoing reasons, the appellant, Mr. Cage, respectfully

⁴ Recall that Cage testified that Rogers was going to stay at the property part time and in Thailand part time. See RP at 6.

requests that this Court reverse and vacate the monetary judgment entered against him on or about December 17, 2010 in the amount of \$9,564.45, plus \$400 in attorney's fees.

Dated this 6th day of June, 2011.

VAN SICLEN, STOCKS & FIRKINS

By

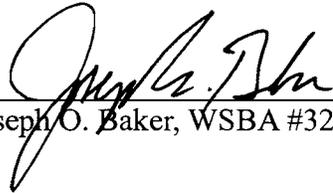


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CERTIFICATE

I certify that on June 6, 2011 I caused a copy of the foregoing **BRIEF OF APPELLANT** to be served on the following individuals by messenger delivery:

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