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No. 69009-4-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 MAY -3 PM 4:25

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HAFID TAHRAOUI,

Appellant

v.

PAN ABODE HOMES, INC.,

Respondent.

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APPELLANT'S OPENING BRIEF AMENDED

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## A. INTRODUCTION

This case involves a contractual dispute for a commercial storage space where a landlord denied a tenant<sup>1</sup> access to remove his business property during execution of the writ of restitution for his eviction. Appellant Hafid Tahraoui "Tahraoui" was ordered to vacate his business premises following a successful unlawful detainer action brought by Respondent Pan Abode Homes Inc., ("Pan Abode"). Even though Tahraoui had posted a \$20,000 cash bond to stay the writ of execution, and over his objection, the court lifted the stay and he was evicted. During the eviction process and execution of the writ, Pan Abode denied Tahraoui access to the premises to continue the removal of his business property. Later Pan Abode took possession of Tahraoui's property valued at more than \$100,000.00, sold it and kept the proceeds of the sale. Five and half years later, Tahraoui brought a lawsuit against Pan Abode in King County superior court to recover the value of his property illegally taken by Pan Abode. After a trial court dismissed Tahraoui's action on summary judgment and awarded Pan Abode attorneys fees, this appeal followed.

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<sup>1</sup> The parties to this dispute had a license agreement (not a lease) and are licensor and licensee (not tenant and landlord). See license agreement CP at 198). However to simplify the issue, Tahraoui uses the terms of tenant and landlord.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court violated Tahraoui's right to due process and the appearance of fairness doctrine.
2. The trial court erred in dismissing Tahraoui's claim that Pan Abode breached the license agreement.
3. The trial court erred in awarding Pan Abode attorneys' fees.
4. The trial court erred in awarding Pan Abode unreasonably high attorneys' fees.

## **C. ISSUES PERTINING TO ASSIGNMENTS OF ERROR**

1. Whether Tahraoui was deprived of a fair hearing when there is substantial evidences to support that the trial court was biased thereby violating the appearance of fairness doctrine and right to due process.
2. Whether Pan Abode breached the license agreement when it denied Tahraoui access to remove his business property from the premise after the writ of restitution was issued.
3. Whether Pan Abode breached the license agreement based on equitable tolling when Tahraoui's claim for breach was time barred.

4. Whether the equity in this case demands that Pan Abode should be denied attorneys' fees when there is substantial evidence to support that Pan Abode, without valid justification, deprived Tahraoui of his business property valued at more than \$110,000.00.

5. Whether the trial court abused its discretion in the determination of attorneys' fees awarded to Pan Abode on the contract claim when the evidence shows that said fees represents 75 percent of total fees incurred in this action.

6. Whether Tahraoui should be entitled to his attorneys fees and cost if his is the prevailing party on appeal.

#### **D. STATEMENT OF THE CASE <sup>2</sup>**

1. In 2001, Pan Abode and Tahraoui entered into a lease agreement for a commercial space where Pan Abode was landlord and Tahraoui was tenant. More than three years later, Pan Abode notified Tahraoui of its intention to change the parties' lease agreement into a license agreement to reflect a new licensor-licensee relationship (CP at 166, 189).

2. On June 3, 2005, at Pan Abode's insistence, the parties entered into a license agreement, which replaced the lease

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<sup>2</sup> This statement is based on the first declaration of Hafid Tahraoui CP 166-172, second declaration CP 173-174, and third declaration CP 185-187.

agreement. The License Agreement designated Pan Abode as "Licensor" and Tahraoui as "Licensee" and the monthly payment as a "License fee". The monthly license fee was \$1,850 and the security deposit was \$450. However, three days later, Pan Abode required Tahraoui to enter into a License Addendum, which raised the license fee from \$1,850 to \$3,200 per month and the security deposit from \$450 to \$5,450. Pan Abode provided no reason for the increases. Tahraoui protested the increases and a couple weeks later, on June 17, Pan Abode responded in a retaliatory manner with a termination notice to evict Tahraoui and a demand for a payment of \$3,516.67, instead of the \$1,850, by July 1, 2005. Faced with a desperate situation where he could not pay the amount demanded and could not vacate as required by the notice, Tahraoui accepted and signed the license addendum on June 20. Moment later Pan Abode canceled the termination notice (CP at 168, 196). On September 1, Tahraoui tendered his September license fee in the old amount of \$1,850, consisting of \$1,400 check and the \$450 deposit (CP at 167) and gave a 30-day notice to vacate. Pan Abode accepted the payment and notified Tahraoui that the access to his business will be restricted to business hours only and the keys to the property need to be turned in within 7 days.

Tahraoui offered to pay the \$450, which Pan Abode claimed was due, in exchange for keeping his keys and no interference with the access to his business. Tahraoui explained to Pan Abode that he applied the deposit to the last month payment because he thought, according to the old lease agreement, the last month rent is the deposit and he was not aware of the new changes in the license agreement. Pan Abode rejected the offer and insisted the keys to the property be turned in; however, Tahraoui refused to do so and kept working on moving out. On September 13, Pan Abode suddenly changed the locks so as to totally exclude Tahraoui from the business premises, even though his entire inventory and equipment still on the premises. A notice was posted by the warehouse door demanding (again) the immediate return of the keys. The next day, following protest, Tahraoui was allowed access to his warehouse premises for which he had made the September license payment for, but that access was restricted to business hours only, whereas previously he had enjoyed around-the-clock access. This strict limitation on access continued for over a month and a half, until Commissioner Prachnau, at the show cause hearing, halted the lockout, and ordered Pan Abode to grant Tahraoui the same unlimited access he had before. Pan Abode

complied with the order and provided Tahraoui with set of keys on November 2, 2005 (CP at 170).

3. On October 10, 2005, Pan Abode commenced an unlawful detainer action against Tahraoui for failure to vacate the premises by October 1, 2005, in accordance with Tahraoui's 30-day termination notice (CP at 169).

4. Following a show cause hearing on October 28, 2005, the commissioner rejected Tahraoui's claims of lack of jurisdiction and lookout, found Tahraoui guilty of unlawful detainer, and issued a writ of restitution which was stayed after Tahraoui posted a \$20,000 cash bond (CP at 259). Subsequently, the superior court judge denied Tahraoui's motion for revision and lifted the stay of writ on January 20, 2006.

5. On or about February 2, 2006, the deputy sheriff evicted Tahraoui from the premises and served him with a criminal non-trespass notice. Consequently, Tahraoui was unable to complete the removal of his business property from fear of been arrested (CP at 171, 262).

6. The Plaintiff had a large amount of business property at the premise with substantial market value. The property include

pallet racking, industrial and warehouse equipments and other material (CP at 173).

7. Tahraoui asked Pan Abode to allow him access to the premises to continue the removal of his property and offered to pay any storage fees during the period of removal. However Pan Abode refused to do so and warn Tahraoui that he will be arrested if found on the premises (CP at 171, 273).

8. Pan Abode took possession of Tahraoui's property, sold it and kept the proceed of the sale (CP at 173).

## **E. ARGUMENT**

### **1. Standard of review**

When reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the Trial Court. *Failor's Pharmacy v. DSHS*, 125 Wn.2d 488,493,886 P.2d 147 (1994). The Court of Appeals will affirm the summary judgment only if there are no genuine issues of material fact between the parties and only if, on the undisputed facts, the moving party is entitled to judgment as a matter of law. *Id.* All facts and all reasonable inferences from those facts are considered in the light most favorable to the party resisting summary judgment. *Id.* The burden is on the party moving for summary judgment to demonstrate that

there is no genuine dispute as to any material fact. Morris v. McNicol, 83 Wn.2d 491 at 494, 519 P.2d 7 (1974). Summary judgment is appropriate only if reasonable minds could reach but one conclusion from the evidence, and only if the conclusion thus reached entitles the moving party to a judgment in its favor. Failor's Pharmacy, 125 Wn.2d at 493.

2. Tahraoui was deprived of a fair hearing because the trial court was biased in violation of the appearance of fairness doctrine and right to due process

During oral argument for summary judgment, the trial court made several remarks which violate Tahraoui's right to due process and violate the appearance of fairness doctrine.

The appearance of fairness doctrine seeks to ensure public confidence by preventing a biased or potentially interested judge from ruling on a case. In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009). Washington's appearance of fairness doctrine not only requires a judge to be impartial, it also requires that the judge appear to be impartial. State v. Finch, 137 Wn.2d 792, 808, 975 P.2d 967 (1999). To prevail under the appearance of fairness doctrine, the claimant must provide some evidence of the judge's actual or potential bias. Wallace, 111 Wn.

*App. at 706.* Tahraoui will cite some remarks and actions made by the trial court which violate the appearance of fairness doctrine.

- a. The trial court had a preconceive opinion against Tahraoui on the issue of removal of property during eviction

At oral argument the trial court made the following remarks:

The court: They had a business to run as well, did they not, as far as they had the space that they own, that they' re paying taxes on. They want to have a profit, make some money out of that property as well. And your continued presence there prevents them from doing that. RP p. 25

The court: But there is nothing in the contract that required them as the landlord to give you that – make that concession and give you that opportunity, correct? RP p. 32.

These remarks and others by the trial court are not based on law; instead they were based on preconceive opinion hostile to Tahraoui in particular and to tenants in general. According to the trial court thinking or reasoning, Tahraoui should have vacated the premises at the time he was served by the unlawful detainer action; otherwise he will risk losing his property at the time of the execution of the writ, regardless of any affirmative defense or the posting of bond by Tahraoui. In addition, the trial court believes that Pan

Abode in particular and landlord in general, had no obligation to allow Tahraoui access to remove his property from the premises once the writ has been issued. This reasoning by the trial court is biased against Tahraoui and deprived him of fair hearing. Said reasoning is not based on existing law or sound judgment, instead it is based on favoring Pan Abode over Tahraoui in particular or favoring landlord over tenant. The trial court never asked Pan Abode why it denied Tahraoui access to remove his property; instead he defended Pan Abode's action as legitimate because his concern for the loss of rent income for Pan Abode.

**b. The trial court relied on Pan Abode's advice in making its decision and ignored existing laws.**

The trial court relied mostly on Pan Abode advice to decide some legal issues without making an independent decision based on the law. The following are specific examples of trial court biased:

i. On whether to grant or deny Tahraoui's motion to amend complaint, the trial court defended Pan Abode's position and made remarks that Pan Abode is entitled to attorneys fees even if the complaint is amended. In other word, the trial court was concerned about Pan Abode attorneys' fees for the torts claims if the motion to amend is granted. In this issue, the trial court was not

following the requirements of CR 15, to grant motion to amend complaint; instead it relied on unfounded argument raised by Pan Abode. Under CR 15, the outcome of attorneys' fees is irrelevant to decide a motion to amend a complaint. (See RP p. 4-6)

ii. The trial court granted Pan Abode's request for fees without understanding the bases of its decision. At oral argument, Pan Abode's counsel tried to correct the trial court on the bases of the award of fees when it was clear that the trial court was wrong in its reasoning. (See RP p. 42-44, p. 48)

c. The trial court ignored most of Tahraoui's arguments believing they had no merit.

Even though Tahraoui presented viable argument, the trial court rejected all of them because of its preconceived opinion and believe that Pan Abode's arguments must be correct regardless of what the law is.

3. Pan Abode breached the license agreement when it denied Tahraoui access to remove his business property from the premises

Tahraoui claims that Pan Abode breached the parties' license agreement, or breached an implied contract, on or around February 6, 2006, when it denied him access to remove his business property from premises, and later Pan Abode took

possession of Tahraoui's property without his permission. Pan Abode, however, argues that it could not have breached the license agreement on February 6, 2006, because said agreement was terminated on October 1, 2005.

Here the issue for resolution before the court is whether Pan Abode actions of denying Tahraoui access to remove his property and depriving him of it, on February 6, 2006, are govern by the license agreement, and thus subject to the six year statute of limitation RCW 4.16.040(1).

In *Kloss v. Honeywell*, 77 Wn. App. 294, 298, 890 P.2d 480 (1995), the Court held that:

"RCW 4.16.040(1) applies a limitations period of 6 years to "[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement." (Italics ours.) This language is very broad in its scope and differs from the statutes of limitation of most, if not all, other states ... [in] that an implied liability arising out of a written instrument is included in the same clause with an express liability arising out of a written contract."  
Evans, 52 Wn.2d at 645.[3]

As a result of RCW 4.16.040(1)'s broad definition including implied liability arising out of a written agreement, "what is normally regarded as a necessary element of a written contract need not be

expressly addressed if it is implicit in the writing” Kloss, 77 Wn. App. at 299.

The parties’ license agreement provides in part:

“Permitted use. The premises shall be used by licensee solely for the storage of non-hazardous materials.” (CP at 198)

Based on the Kloss court, and the broad definition of RCW 4.16.040(1), it is implied, under the license that Pan Abode can not deny Tahraoui access to remove his property stored on the premises or deprive him of said property. Pan abode, however, argues that its actions occurred on or after February 6, 2006, more than four month after the agreement was terminated. Pan Abode argument fails for several raisons.

a. Tahraoui’s property was entered and stored on the premises under the license; therefore it should be subject to the license. When the license agreement was terminated on October 1, 2005, Tahraoui refused to vacate the premises on that date because he claimed, among other thing, that Pan Abode locked him out of the premise and interfered with his access which hinders Tahraoui effort to move out by the due date. (See first declaration of Hafid Tahraoui, CP 166-172) Subsequently, Pan Abode brought an unlawful detainer action to evict him. Tahraoui posted a \$20.000

bond and the execution of the writ was stayed until the court decides the issue of possession. After the motion for revision, the court found in favor of Pan Abode and Tahraoui was ordered removed from the premises on February 2, 2006. The period from October 1, 2005 until February 2, 2006, was still subject to the license agreement because of dispute which arose between the parties. There is nothing to suggest that the parties entered into an oral or verbal agreement after October 1, 2005, and until February 2, 2006. Instead, it is the court that preserves the status quo and required Tahraoui to post a bond to protect Pan Abode's interest until the dispute is resolved.

b. Security deposit is a good example to illustrate that some element of the license agreement will be subject to the license even after its termination. Pan Abode could be in breach after the license is terminated if it fails to refund the security deposit. Similarly, removal of property can take place before or right after the license is terminated. If removal is not completed by the due date, Pan Abode is entitled to damages but it can't deny Tahraoui's access to finish the removal of his property.

c. When Tahraoui was an unlawful detainer of the premise, Pan Abode was awarded damages and attorneys' fees

based on the license which already had expired. That same reasoning should apply against Pan Abode when it denies Tahraoui access to remove his property.

Pan abode's actions of denying access and taking possession of Tahraoui's property are governed by the license agreement even after its termination. Thus they are subject to the 6 years statute of limitation.

4. Pan Abode breached the license agreement under equitable tolling if Tahraoui's claim is time barred

As an alternative, Tahraoui's claims should be viable under equitable tolling. Equitable tolling is a doctrine under which a trial court may allow an action to proceed when justice requires it, even though the limitations period has expired. *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). The remedy may be appropriate to effectuate the policies underlying the authorizing statute and the purposes underlying the limitations statute *Benjaminov v. City of Bellevue*, 144 Wn. App. 755, 767, 183 P.3d 1127 (2008), The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.

In the instant case, Pan Abode acted in bad faith when it denied Tahraoui access to remove his property even after he offered to pay for any storage fees during the removal period. Pan Abode was awarded a judgment of more than \$60,000 (including double damages and attorneys' fees) for Tahraoui's unlawful detainer of the premises; it is unjust to allow Pan Abode escape its liability, because of technicality, when it deprive Tahraoui of his property worth more than \$110,000.

5. The equity in this case demand that Pan Abode should not be awarded attorneys' fees at trial

A trial court may award reasonable attorney fees only if it has a statutory, contractual, or recognized equitable basis. Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 690, 82 P.3d 1199 (2004).

In the case at bar, the trial court awarded Pan Abode fees on the contract claim, based on Park v. Ross Edwards, Inc., 41 Wn. App. 833, 837, 706 P.2d 1097, and denied their fees request under CR 11 and RCW 4.84.185. The court, however, incorrectly misinterprets the Park case and concluded that the award of fees was based on contract.

In Kaintz v. PLG, Inc., 147 Wash.App. 782, 789, 197 P.3d 710 (2008), the court held that the award of attorneys fees under the Park case was based on equity and not contract.

“We affirmed the attorney fee award. In reaching this decision, although we did not explicitly announce that we were so doing, we plainly applied the equitable principle of mutuality of remedy.”

Then, if the award of fees for Pan Abode was based on equity rather than contract, the trial court abused its discretion when it failed to consider whether it is equitable to award Pan Abode fees when there is substantial evidence, or at least prima facie case, to support that Pan Abode deprived Tahraoui of his property valued at more than \$110,000.

6. Pan Abode's award of attorneys' fees was unreasonably high

Even if Pan Abode was entitled to attorneys' fees, the trial court abused its discretion in the amount of fees awarded. Over Tahraoui' objection, the trial court granted Pan abode the entire amount it requested without making an independent decision to the reasonableness of fees.

a. A fee award, on the contract claim alone, of nearly 75 percent of the total fees incurred represents too high a proportion to be reasonable.

Based on the court order entered on April 13, 2012, CP at 360-363, Pan Abode was awarded attorneys' fees only on the contract claim. The trial court denied Pan Abode fees on the following claims and counterclaims:

1. Torts claims which include six cause of action.
2. Counterclaims which include two claims: contractual indemnity and vexatious litigation.
3. Sanctions under CR 11.
4. Sanctions under RCW 4.84.185.
5. Amended complaint.
6. KCLCR 11, method of service.

In addition, Pan Abode dedicated very little argument on the issue of contract, by comparison to the other issues, to prevail in this action. In fact Pan Abode did not have to go through extensive argument or review of record to assert that the breach of contract claim should fail because there was no contract at the time of the act complained of. It is a factual point that can be briefly stated.

According to the declaration of Mr. Leen (CP at 281-288, 327-329), Pan Abode's counsel spent 58.2 hours in this action (including all claims and counterclaims). Pan Abode requested and was awarded fees for 41.7 hours spent on the contract claim alone. This means

that Pan Abode spent almost 75 percent of its fees on the contract claim and 25 percent on all remaining claims and counterclaims. However, the evidence shows that the contract claim did not require more than 20 percent of total legal work in this action. Therefore, it's not reasonable to allocate 75 % of fees to 20% of the work and 25% of fees to 80% of the work.

In Loeffelholz v. C.L.E.A.N, the court was faced with similar situation to the case at bar and held that:

"The record does not show that the claims were so interrelated as to excuse segregation. Nor will the record support a finding that \$50,000 was reasonably incurred to establish a single defense (immunity) to a single claim (the IA defamation claim). This case embodied many claims and issues, and an award of nearly half the total fees incurred represents too high a proportion to be reasonable."

In this case, which is much simpler than Loeffelholz case, the claims are not so interrelated to excuse segregation as Pan Abode had claimed. Therefore, there is no evidence to support that Pan Abode should be awarded, on the contract claim alone, 75 percent of the total fees incurred in this action.

**b. Awarding Pan Abode \$240 Hourly Rate is Excessive and not Reasonable**

Pan Abode's counsel, Mr. Leen, was admitted to the WA Bar on December 14, 2004, and has been in private practice for 5-6

years. Tahraoui has contacted four attorneys in the Seattle area and found that the prevailing hourly rate for attorneys with similar level of experience as Mr. Leen is between \$150 and \$175. An hourly rate of \$240 is reserved for attorneys with 18-22 years of experience. Mr. Leen failed to provide justification for a \$240 hourly rate. Given the simplicity of the legal issue that were before the court and the going rate for attorney with 5-6 years experience, Pan Abode's counsel hourly rate should be set at \$150 per hour.

c. Pan Abode's Claim of 9 hours spent to quantify its attorneys' fees is excessive and not reasonable

In his declarations (CP at 281, 327-329), Mr. Leen, stated that he expended nine hours to quantify his attorney fees. Mr. Leen did not need nine hours to go through a billing statement that was already generated over time where entrées are added each time service has been performed. If Mr. Leen. Spent 9 hours to reconstruct the statement of time for his service, then his billing statement could not be verified because he could not remember all entrees over 4 months period. This is a good example to illustrate that Pan Abode's fees are excessive and unnecessary and therefore unreasonable. (See CP at 330-334, 338-341)

d. Pan Abode Claims for Some attorneys' fees are wasteful and invalid and should be denied

It is obvious that the trial court ignored Tahraoui's arguments on the reasonableness of the fees awarded because the evidence does not support such award. "The trial court, instead of merely relying on the billing records of the plaintiff's attorney should make an independent decision as to what represents a reasonable amount for attorney fees." Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 859 P.2d 1210 (1993) (quoting Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987)). "Courts **must take an active role in assessing the reasonableness of fee awards**, rather than treating cost decisions as a litigation afterthought. "They should not simply accept unquestioningly fee affidavits from counsel." Mahler, 135 Wn.2d at 434-35 (citing Nordstrom, Inc., 107 Wn.2d at 744).

In this case Tahraoui pointed out specific fees, claimed by Pan Abode, that are wasteful and invalid and should have been denied however the court ignored Tahraoui's argument and just rubber stamped Pan Abode's request for fees in its entirety without any independent decision as to what represents a reasonable fees (CP at 332). The trial court's findings should provide its rationale for arriving at its decision.

7. Tahraoui should be entitle to his attorneys' fees and costs on appeal

The parties' license agreement and RCW 4.84.330 authorizes the award of attorneys' fees and cost to the prevailing party. Tahraoui should be entitled to a reasonable award of attorneys' fees and costs for this appeal in accordance with RAP 18.1.

**F. CONCLUSION**

For the foregoing reasons, Tahraoui respectfully request that the Court reverse the trial court grant of Pan Abode's motion for partial summary judgment and award of attorneys' fees.

Dated this 3<sup>rd</sup> day of May, 2013.

Respectfully submitted,



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**DECLARATION OF SERVICE**

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on May 3, 2013, I caused to be served true and correct copy of the following document:

1- Appellant's opening brief amended

to the counsel of the record listed below via first class mail.

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Dated this 3<sup>rd</sup> day of May, 2013.



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2013 MAY -3 PM 4:26