

69009-4

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No. 69009-4-1

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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HAFID TAHRAOUI,

Appellant

v.

PAN ABODE HOMES, INC.,

Respondent.

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COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WA

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APPELLANT'S REPLY BRIEF

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## A. ARGUMENTS

Tahraoui's main argument in this action is that the parties had an implied contract within the license agreement. Pan Abode breached that implied contract when it denied Tahraoui access to the premises to remove his personal property at the time of the eviction, as a direct result of that breach, Tahraoui was deprived of his property. Even though, the license agreement was terminated on October 1, 2005, the implied contract allowing Tahraoui to remove his property will still be valid at the time of the eviction which took place on February 2, 2006. Tahraoui was allowed to stay at the premises after October 1, 2005, under a court order and the posting of \$20,000 bond.

Tahraoui has a choice to bring his action under a breach of contract or torts claims. However because torts claims in this case are time bar, Tahraoui chose to proceed under breach of contract governed by the six year statute of limitation.

### 1. Tahraoui's appeal is timely

Pan Abode's argument that Tahraoui's appeal is untimely is wrong and contrary to established laws.

a. Tahraoui's appeal should not be dismissed because his motion for reconsideration was timely and complied with CR

59(b). Pan Abode argues that Tahraoui's motion for reconsideration did not "identify the specific reasons in fact and law as to each ground on which the motion is based" therefore Tahraoui's motion was untimely and did not toll the thirty day appeal period. However, the record shows that Tahraoui filed his motion for reconsideration on April 23, 2012, (within 10 days after the judgment was entered on April 17, 2012). The motion stated in relevant parts:

D. ERRORS CLAIMED

Plaintiff respectfully claims that the Court was in error when it found in favor of the Defendant, did not dismiss Defendant's motion for partial summary judgment and awarding attorneys' fees, and it failed to find that Defendant breached the license agreement.

2. Plaintiff will provide a Memorandum in support of the motion for revision pursuant to CR 59 and LRC 7.

C. RELIEF REQUESTED

Plaintiff respectfully that the Court reconsider its decision, entered on April 13, 2012, and dismiss Defendant's motion for partial summary judgment and awarding attorneys' fees.

Pan Abode's interpretation of CR 59(b) is very narrow and incorrect. In fact, Pan Abode could not find a single case law to support such interpretation. Tahraoui's motion did comply with CR 59 (b) by stating the specific reasons of the motion (See errors claimed) and that a memorandum in support of the motion will be provided later

pursuant to CR 59 and LRC 7. (Tahraoui's Memorandum in support of the motion for reconsideration was filed on May 8, 2012).

**b.** Tahraoui's Appeal should not be dismissed because his notice of appeal was filed and served within 30 days as required under RAP 5.2. Pan Abode argues that Tahraoui filed his notice of appeal more than 30 days after his motion for reconsideration was denied on May 17, 2012, and therefore his appeal should be dismissed. Pan Abode makes the following 2 erroneous assertions:

**i.** The 30 days tolling period for filling a notice of appeal start from the day when the trial court enters (or sign) an order, however this is not correct. A trial court order is not valid until filed by the Clerk. In this case, the order denying motion for reconsideration was entered (signed by the judge) on May 17, 2012, but was not filed by the clerk until May 25, 2012. Therefore the tolling for filling the notice of appeal start from May 25, and not from May 17, 2012, as Pan Abode argues.

**ii.** Pan Abode believes that the notice of appeal should be filed within 30 days regardless of whether the 30<sup>th</sup> day coincides with a weekend or court holiday, however this is also incorrect. The order denying motion for reconsideration was filed on May 25, 2012, and the notice of appeal was due by June 24, 2012, which is

a Sunday, therefore the notice could not be filed until next business day, which is Monday 25, 2012.

2. Several comments made by the trial court prove that he is biased thereby denying Tahraoui a fair hearing

A review of the transcript of the hearing for summary judgment reveals that the trial court did not research the law, or want to follow the law, on the issue of whether the landlord can deprive a tenant of his personal property after execution of writ of restitution. The trial court was holding some views, contrary to existent laws, hostile to tenant and in favor of landlord. Even after Tahraoui reminded the trial court of the decision of division three of this court (See Parker v. Taylor, 136 Wn. App. 524, Jan. 2007), the trial court still believes that the tenant has no right to get his personal property after the eviction. More important, the trial court never asked Pan Abode why it deprives Tahraoui of his property.

In Parker v. Taylor, 136 Wn. App. 524, Jan. 2007, the court held that:

A landlord's right in quickly recovering his or her property is balanced with a tenant's personal property rights. A tenant who abandons a residence, leaving personal property, leaves on his or her own free will and may be presumed to have taken the belongings he or she desires, whereas **a tenant who is escorted off the premises by a sheriff**, upon the execution of a writ of restitution, does not leave on his or her own

free will and is leaving without removing all his or her desired belongings.

Tahraoui could not have a fair hearing given the trial court views.

3. Equitable tolling is applicable in the case at bare

It is implied in the license agreement that Tahraoui has a right to retrieve and take possession of his personal property before or after the termination of said license. Tahraoui's property was stored under the license agreement and was not retrieved from the premises before October 1, 2005, when the license was terminated. Tahraoui still had the right, under the implied contract, to retrieve his property at the eviction time.

4. The issue of the reasonableness of attorneys' fees was properly preserved for appeal; therefore the findings of the trial court regarding these fees are not a verity on appeal.

Pan Abode's argument that Tahraoui failed to assign error to the findings regarding the amount of award of attorneys' fees is misleading. The order for the amount of attorneys' fees, prepared by Pan Abode counsel, did not have the proper format of typical findings of facts and conclusions of law to alert Tahraoui. It is a trap set by Pan Abode to prevent the review of attorneys' fees. Tahraoui clearly assigned an error to the Trial court findings that the fees awarded are reasonable (See assignment of error No. 4).

Pan Abode failed to provide any meaningful response to why it is reasonable to award 75 percent of all fees incurred in this action to a single issue which is the breach of contract, and the remaining 25 percent of fees goes to 5 or more issues. Pan Abode asked this court to find the award reasonable because the trial court said so. In fact, the trial court never took an active role to determine whether the amount requested by Pan Abode was reasonable. While it is true the trial court signed the order for the amount of fees awarded, Pan Abode had total control of the content of that order and was worded to withstand any challenge on appeal.

The record shows the followings facts:

a. 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 followings 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.

b. Pan Abode dedicated very little argument on the issue of contract, by comparison to the other issues. Pan Abode submitted close to 3 pages on its counterclaims.

c. Pan Abode's counsel spent 58.2 hours in this action according to his declaration.

d. Pan Abode requested and was awarded fees for 41.7 hours spent on the contract claim alone. That's about 75 percent of the total fees.

The above facts clearly show that the amount of fees awarded to Pan Abode is not reasonable.

Also, Pan Abode argues that the claims are interrelated and did its best to segregate the fees. However, this is not correct, because the issue of breach of contract could be addressed independently from the rest of other issues. In addition the bulk of Pan Abode's argument on the contract issue is that there was no contract at the time of the eviction, which a very simple and a strait forward argument.

5. Pan Abode should not be entitled to its attorneys' fees and cost on appeal

a. If this court rules that Tahraoui's appeal is untimely as Pan Abode suggest, Pan Abode would have had an obligation, few weeks after the notice of appeal was filed, to bring a motion before the commissioner of this court to dismiss the appeal. Pan abode knew that the appeal is untimely and deliberately waited to rack up as much as it can of attorneys fees and cost. Therefore Pan Abode should be denied fees and cost because it fails to mitigate its fees.

b. Pan Abode should not be awarded fees and cost under RAP 18.9 (a) because Tahraoui's appeal is not frivolous. Tahraoui presented debatable issues and has the right to be heard before this court.

c. Pan Abode should not be entitled to fees and cost under the contract claim as in Park v. Ross Edwards, Inc., 41 Wn. App. 833, 837, 706 P.2d 1097, because the holding of the Park court in awarding fees was based on equity. See Kaintz v. PLG Inc., 147 Wash.App. 782, 789, 197 P3d 710 (2008).

It is not equitable for this court or the trial court to award fees to Pan Abode when Tahraoui presented declarations and evidence to support that Pan Abode denied him access and unlawfully deprived him of his property valued at more than \$100,000.

d. If this court rules that Pan Abode is entitled to attorneys fees on appeal, those fees should be limited to time spent on the contract issue. The fees should exclude time expended on other issues.

**B. 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 11<sup>th</sup> day of September 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 September 11, 2013, I caused to be served true and correct copy of the following document:

- 1- Second motion for extension of time to file appellant's reply brief.
- 2- Appellant's reply brief.

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

Attorney for Defendant  
Mark S. Leen  
777 108<sup>th</sup> Avenue N.E. Suite 1900  
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425-455-1234

Dated this 11<sup>th</sup> day of September, 2013.



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SUPERIOR COURT OF WASHINGTON  
COUNTY OF KING