

No. 71318-3-I

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

2011 JUL 22 PM 1:57
 COURT OF APPEALS
 STATE OF WASHINGTON
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MICHAEL CROSSAN and ROWENA CROSSAN, dba LAKE
WASHINGTON BOAT CENTER,

Appellant,

v.

PHILLIP D. BURGESS and LINDA L. BURGESS,

Respondents.

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES

WASHINGTON CASES

In Re Ross

173 B.R. 937, 74 A.F.T.R.2d 94-5404 (1994)3

Angelo Property Co., LP v. Hafiz

167 Wash.App. 789, 274 P.3d 1075 (2012)4

Shepard v. Dye

137 Wash. 180, 242 P. 381 (1926)4

STATUTES

RCW 64.28.0201
RCW 25.05.055 1, 2
RCW 26.16.1902

1. THERE WAS ONE TENANT TO EVICT - LAKE WASHINGTON BOAT CENTER

Respondent takes the position that there was only one tenant to evict, the Lake Washington Boat Center. This makes no sense, legally or factually. Respondent brought suit against two individuals who were doing business under a trade name. The Lake Washington Boat Center is not a legal entity and has no capacity to sue or be sued. The issue to be determined by this court is whether Rowena and Michael Crossan held the lease as tenants in common.

2. ROWENA AND MICHAEL CROSSAN WERE NOT CO-TENANTS, THEY WERE PARTNERS.

Respondent cites RCW 64.28.020 for the proposition that every interest in real property is an interest in common unless purchased in partnership for partnership purposes. Respondent cites RCW 25.05.055(1) but fails to direct the court's attention to subsections 3(a) and (b), which read as follows:

“(1) Except as otherwise provided in subsection (2) of this section, the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.”

“(3) In determining whether a partnership is formed, the following rules apply:

(a) Joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part

ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property;

(b) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived. . .”

No evidence was presented at trial that, absent the marriage, Rowena Crossan was a business partner of Michael Crossan. Given the absence of this evidence a partnership did not exist and her interest in the lease was as a tenant in common.

RCW 26.16.190 reads as follows:

“For all injuries committed by a married person or domestic partner, there shall be no recovery against the separate property of the other spouse or other domestic partner except in cases where there would be joint responsibility if the marriage or the state registered domestic partnership did not exist.”

It is undisputed that Rowena Crossan was not present or in any other way participated in the acts constituting nuisance. She could not possibly be personally liable for these acts.

3. THE MARITAL COMMUNITY IS PRESUMED TO BE LIABLE.

Rowena Crossan has never contended that the marital community of Michael and Rowena Crossan could not be liable for acts committed by Michael Crossan. The issue in this appeal is

whether Rowena Crossan's separate property interest in this lease could be extinguished by acts of nuisance committed by Michael Crossan. Respondents' contention on page 7 of their brief, "Lake Washington Boat center was and is a marital community business and the lease agreement was entered into by the marital community." is misleading. The Lease was signed by two married individuals; it was not signed by one individual on behalf of their marital community.

Respondents also contend that Rowena Crossan somehow failed in her management duties and that the breach of that duty is a basis to deny her relief. The trial court made no findings to that effect and no evidence supports that contention. *In Re Ross*, 173 B.R. 937, 74 A.F.T.R.2d 94-5404 (1994) cited by respondents, does not support respondents' contentions. The wife worked in the business and shared revenues, a fact not present in this case. The court also emphasized there was a finding of partnership absent marriage, a finding that was not and could not be made in this case.

4. A WRIT OF RESTITUTION RESTORES POSSESSION TO THE LANDLORD.

Respondents make several contentions under this heading. First, that a Writ of Restitution against Michael Crossan but not Rowena Crossan is not a viable option under the law. No authority is

offered for this proposition. Only one tenant created the nuisance and the removal of that tenant solved that issue. Rowena Crossan's tenancy should not have been subject to the Writ. *Angelo Property Co., LP v. Hafiz*, 167 Wash.App. 789, 274 P.3d 1075 (2012) dealt only with the issue of whether a trial court could expand unlawful detainer jurisdiction to include other issues. If Rowena and Michael Crossan were not married there is little doubt that absent a showing of partnership this lease could not be terminated. The marriage does not change that result.

Respondents also contend that the lease could be forfeited despite specific language in the unlawful detainer statute limiting forfeiture for failure to perform a condition in the lease or default in the payment of rent. As indicated in the opening brief of Appellant, unlawful detainer is in derogation of common law and must be strictly construed.

Shepard v. Dye, 137 Wash. 180, 242 P. 381 (1926) does not support respondents' position. This case held that a subtenant's acts are binding on the prime tenant. The issue of whether forfeiture was an appropriate remedy was not raised or certainly not discussed in the opinion. Respondents also fail to explain why, if the lease is to be forfeited, the provisions of the unlawful detainer statute relating to

relief from forfeiture would not apply. In short, respondents would like the statute judicially rewritten to suit their purpose.

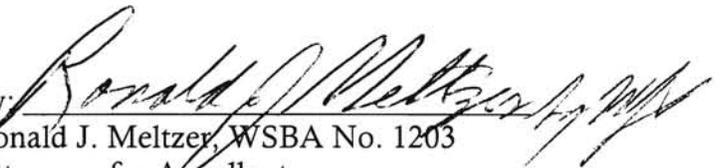
5. THE RELIEF SOUGHT WOULD MAKE WASHINGTON'S UNLAWFUL DETAINER LAW A NULLITY.

This statement is unsupported by law or logic. Respondents achieved their purpose in this case; i.e. removing Michael Crossan for creating a nuisance. Rowena Crossan, his tenant in common, wants to continue with the lease. There is no legal requirement that her lease terminate.

Respondents are not entitled to have possession of the premises restored to them; they are only entitled to have Mr. Crossan removed.

RESPECTFULLY submitted this 22nd day of July, 2014.

SINSHEIMER & MELTZER, INC., P.S.

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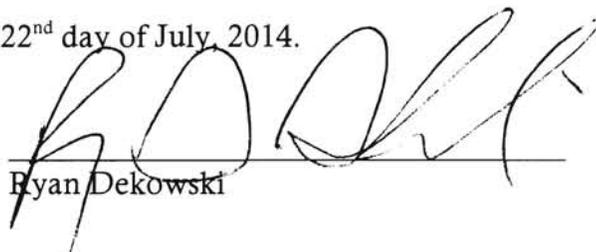
I, Ryan Dekowski, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein.

On July 22, 2014 I caused a copy of Appellant's Brief to be served on the attorneys for Respondents at the address below:

Kenyon E. Luce
Christi C. Goeller
Luce Kenney & Associates
4505 Pacific Highway East, Suite A
Tacoma, WA 98424-2638

-] By causing a full, true and correct copy thereof to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last known address for Mr. Grundstein, and deposited with the U.S. Postal Service on the date set forth below;
-] By causing a true and correct copy thereof to be DELIVERED VIA ABC LEGAL MESSENGER to the Respondent's attorneys at the address listed above, on the date set forth below;
-] By causing a full, true and correct copy thereof to be FAXED to the party at the facsimile number shown above, which is the last known facsimile number for the party, on the date set forth below.

DATED this 22nd day of July, 2014.



Ryan Dekowski