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COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

GREGORY NICKEL
APPELLANT

V.

ELLIOTT LLC,
RESPONDENT

BRIEF OF APPELLANT

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2013 OCT 11 11 51 AM '13
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ASSIGNMENTS OF ERROR

1. The Trial Court erred in on November 8, 2013, in granting Respondent's Motion for Conversion of Partial Summary Judgment to appellant personally since there were significant questions of material fact regarding the amount of default and amount due by Appellant.

2. The Trial Court erred in November 8, 2013, in granting Respondents' Motion for Conversion of Partial Summary Judgment to appellant personally since the Respondents failed to meet the duty of good faith in the execution of the contract and settlement agreement.

STATEMENT OF THE CASE

Procedural History

In 2004 Elliott L.L.C., a Washington limited liability company, hereinafter Respondent, leased its property located at 1111 Elliott Avenue W in Seattle to a commercial tenant, Nickel Drumworks USA, a Texas corporation, d/b/a Nickel Drumworks, hereinafter Appellants. (Sub.1, Ex.1, Lease Agreement, p. 229-269)

On September 6, 2011, Respondent, a Washington limited liability company filed an unlawful detainer Complaint against their commercial tenant, Appellants. (Sub. 1, pages 222-263) On December 16, 2011, after mediation, the above named parties entered into a Settlement Agreement and Release (“Agreement”). (Sub 37, p. 8-11) That Agreement, in relevant part, required Appellants to vacate the leased premises on or before March 31, 2012, to pay monthly rent and NNN charges as accrued plus an additional \$3000.00 per month in rent and to leave the premises “broom clean and in the same condition as received.” (Sub. 37, p. 8-11) In Article 6.4 of the lease, Respondent agrees to reimburse Appellants for the value of any improvements whose useful life extends beyond Appellants’ occupancy. This article remained unchanged by the Agreement. Appellant Greg Nickel personally guaranteed the Agreement and proposed settlement.

The action was converted to a Complaint for Ordinary Civil Action by the Respondents on July 6, 2012. (Sub. 42) The issue became whether Appellants had breached the Settlement and Release entered into after mediation. On June 29, 2012, Respondents filed for Entry of

Stipulated Judgment in the amount of \$74,574.70 and Attorney Fees of \$13,000.00 for a total of \$87,574.70 with accrued interest of 12% per annum. (Sub 37, p. 8-11) On September 7, 2012, Respondents' Motion for Entry of Stipulated Judgment was denied. (Sub. 37)

On July 31, 2013, Respondents filed an Amended Complaint naming Greg Nickel personally as an additional defendant and alleging breach of contract, unjust enrichment and conversion. (Sub 64, p, 99-112)

Throughout the proceedings, Respondents and their counsel were aware that Appellant Greg Nickel was blind and only able to view correspondence, pleadings and all documentation via his reliance on Optical Character Recognition (OCR) software. (Sub. 14, Declaration of B. Graff, p. 269-270; Sub. 111, p. 187) During periods of the litigation when he was unrepresented, Nickel attempted contact with the Court via his own unassisted efforts. (See Sub. 111, p. 187; Sub. 118, pages 215-217)

In November, 2013. Respondents' requested a hearing date for their Motion for Partial Summary Judgment Re: Appellants' default and amount due by stipulation (originally filed on October 4, 2013). Counsel for Appellants then withdrew in December 2013, leaving Appellants to proceed pro se. (Sub. 106, p. 145-147)

Appellants filed for Bankruptcy protection on November 18, 2013, the morning of the hearing on the Summary Judgment. (Subs 100-104, p. 136-144) An automatic stay of the proceedings was entered. In June of 2014, Appellant Greg Nickel dismissed his Bankruptcy without prejudice.

(Sub.111, p. 182)

Despite their knowledge that Greg Nickel was now pro se and aware of the necessity to contact Appellant via OCR, Respondents served Appellant Greg Nickel via U.S. mail for an October 3, 2014, hearing on their Summary Judgment Motion. (Sub. 111, p. 184-185) Due to his disability, Greg Nickel was unable to respond to this format. (Sub. 14, p. 269-270) He ultimately addressed the Court by email on October 3, 2014, requesting a continuance. That same morning the Motion for continuance was denied. (Sub 117, p. 213-214) The Record demonstrates that Respondents' Motion for Summary Judgment was granted after a hearing and that Greg Nickel was absent. (Sub. 99, p. 132-135; Sub. 118, p. 215-217) However, there is a discrepancy in the Clerk's Minutes regarding this Judgment in the Clerk's Minutes at Sub.116, page 212; the clerk's Minutes state that "Plaintiff's Motion for Summary Judgment was denied" on October 3, 2014. (Subs. 37, p. 4-11;Sub 99, p. 132-135; Sub. 113, p. 201-211) That Judgment states in what appears to be the Court's handwritten note that "no opposition having been filed ..(illegible)... and Mr. Nickel failed to appear for oral argument on October 3, 2014." (Sub. 99, p. 132-135)

RELEVANT FACTS

In 2004, Respondents entered into a commercial lease with Appellants regarding property located at 1111 Elliott Avenue W in Seattle. (Sub.1, Ex.1, Commercial Lease Agreement, p. 229-268) On September 6, 2011, Respondents filed an unlawful detainer against Appellants alleging breach of the Lease Agreement. Appellant Gregory Nickel was not named as a party but was cited as the Appellants' agent for service. (Sub. 1, Complaint, p. 222-263)

Throughout the litigation, Respondents were aware that Appellant Greg Nickel is legally blind and required the use of a particular file format (OCR, Optical Character Recognition) to communicate with opposing counsel. Greg Nickel provided Respondents with this information and requested they use only the type of file format he needed in their communications with him. (Sub 35, p. 15-16, email exchange between Respondent counsel and Greg Nickel; Sub. 14, Declaration B. Graff, p. 269-270) Nickel worked with Brian Graff, counsel for Respondents, to ensure proper service of the documents using this software. (Declaration of B. Graff regarding electronic service, p. 269-270)

The parties entered into mediation resulting in an October 17, 2011, Settlement Agreement that, in relevant part, kept the original lease signed in 2004 in full force and effect and terminated the extension early under the additional conditions of the settlement agreement that required Appellants to vacate the leased premises on or before March 31, 2012; to pay monthly rent and NNN charges as accrued plus an additional \$3000.00 per month; and to leave the premises "broom clean and in the same condition as received." (Sub. 37, pages 4-11) In Articles 6.3 and

6.4 of the lease, Respondent agrees to reimburse Appellants for the value of any improvements to building fixtures and systems. (Sub 1. commercial lease agreement, sections 6.3, 6.4, pages 222-268; Sub. 49, p. 26)

Respondents alleged Appellants had breached the Agreement by failing to pay additional rent due and owing for the billing period January 1, 2012, through March 31, 2012, and sought a Judgment total of \$84,574.70 at an interest rate of 12% per annum in a Motion for Entry of Stipulated Judgment filed on June 29, 2012. (Sub. 37, Plaintiffs' Motion for Entry of Stipulated Judgment, p. 4-11).

Appellants had vacated the property on March 31, 2012. On April 6, 2011, Respondents' agent Sydney Eland, one of the owners of the building, did a walk through with Greg Nickel. Due to his sightlessness, Nickel relied on the representation of Eland that the property was "broom clean and in the original condition." During this walk through Sydney Eland declared to Appellant that he had done "a great job" and stating further that Nickel "had done a great job." (Sub 49, Declaration of Greg Nickel in Opposition to Motion for Entry of Judgment, p. 21-22) The fact that of the building was in good condition was further supported by the Declarations of Greg Nickel. Sub. 49, pages 21-28; Dan Vaughn, Sub. 50, p. 273-274; Mark Roby , Sub. 51, p. 29-30; and Steve Sofie, Sub. 52, p. 31-32. Vaughn and Sofie were experienced contractors hired by Appellants to return the property to its original leased condition. Roby was hired to perform building maintenance and was responsible for the general care and cleaning of the building. Appellant Greg Nickel instructed Sofie to follow the directions of the building owners (Respondents). Sofie met with Respondents and worked under their direction to restore the

property. Sofie opined that much of the work he performed reflected items which were much older than Appellants' period of occupancy, probably going back to the 1950's. (Sub. 52, Declaration of Sophie, p. 31-32).

A second review of the property took place roughly 2 weeks after April 6, 2012, by another of the building owners Jim Eland. (Sub. 55, Supplemental Declaration of B. Graff, p.46-96) On April 19, 2012, Appellants first learned that Respondents did not agree with their agent Sydney Eland's representation that the premises were "broom clean and in the original condition." (Sub 55, Supplemental Declaration of B. Graff, p. 47-48) At some time Between March 30, 2012, and Respondents' second inspection of the property in early April, 2012, a burglary occurred at the leased premises. (Sub. 64, Plaintiffs' Motion to Amend Complaint and Amended Complaint, p. 99-112) On April 19, 2012, Respondents' counsel (Bryan Graff) conducted a site inspection at the leased premises. He took photos of the building and attested that he attached them to his Declaration (Sub.55 , Ex. 7, p. 86-96), however, Ex. 7 contains only blank pages.

At this time Appellants also learned that Respondents were demanding payment for alleged damages they had done to the property but which were not noted by Sydney Eland in his walk through. (Sub. 55, Supplemental Declaration of B. Graff, p. 46-96) These alleged damages included a notice from the city of Seattle Fire and Life Safety department regarding a Certificate of Occupancy and neglect action. (Sub 55, Supplemental Declaration of B. Graff, Ex. 3, p. 55-64; Ex. 4, p. 66-74; Ex. 6, p. 80-85) Respondents also presented Appellants with Invoices for repairs which were contested by Appellants. (Sub. 55, Ex. 6, p. 80-85; Ex. 4, p. 80- 85)

In April 2012 Appellant Greg Nickel had a discussion with Respondent's representative Jim Eland pertaining to the initial inspection of Sydney Eland and the change in Respondents' opinion of the condition of the building. When it was determined a burglary had taken place, Respondents appeared to be reluctant to file an insurance claim. Respondent Jim Eland stated he did not want such a claim to effect his insurance premiums. Since the burglary damaged property which was either repaired by, provided by and/or installed by Appellants' agent Greg Nickel, he filed an insurance claim for reimbursement. (Sub 64, Plaintiffs' Motion for Leave to File Amended Complaint and Amended Complaint, p. 100-109 regarding burglary; p. 100-103, 108-109 regarding insurance filing)

Once Appellants filed their insurance claim, Respondents demanded further improvement be made to the building beyond its original condition. (Sub. 65, p. 55-56) Respondents also filed to Amend the Original Complaint (Sub. 64, p. 99-112), alleging Appellants were liable for breach of contract, unjust enrichment based on the filing of insurance claim, and conversion.

Relying upon a management company, Respondents apparently did not know the condition of the building at the time Applicants originally leased the premises. (Sub. 49, page 22) The only documentation in the Court record of the condition of the building upon Appellants taking over the property in 2004 is the letter from Robert A. Brown of Gardico, Inc., the occupant of the building immediately prior to Appellants' move to the property. Brown declared the condition of the building during his tenancy included electrical problems, partition walls, superfluous structures and wiring installed by tenants prior to his occupancy. (Sub. 53, Letter from Robert A. Brown. p. 33-35) As demonstrated above, the Declarations of Greg Nickel, (Sub. 49, p. 21-28)

Dan Vaughn, (Sub. 50, p. 273-274), Mark Roby (Sub. 51, p. 29-30) and Steve Sofie, (Sub. 52, p. 31-32) present the status of the building at Appellants exit on March 31. As set out above, Appellants contested the costs outlined by Respondents and their counsel which were in addition to the rental payment issues. (Sub 49, Declaration of Greg Nickel, p. 21-28)

Respondents continued to add work requests and invoices for claims contested by Appellants. (Sub 49, p. 21- 27; Sub. 55, Ex. 3, p. 55-64; Ex. 4, p. 65- 74)

Respondents also billed Appellants for various construction costs allegedly incurred when repairs were made to the building. (Sub. 55, Ex. 3, 4, 6, pages 21-28) Appellants contested these billings due to the fact that these items were neither caused by them in any way but were the condition of the building at the time Appellants took occupancy. (Sub. 49, p. 21-28; Sub. 51, p. 29-30; Sub. 52, p. 31-32; Sub. 53, p. 33-35) Respondents failed to provide Appellants with a complete, written list of work they expected Appellants to perform until late May 2012. Appellants contested many items listed on an April 12, 2012, invoice provided by Respondent, including but not limited to the DPD fine of \$2000.00 and a portion of Fire Protection Inc charges of over \$7,000.00. (Sub. 49, p. 21-28; Sub 55, Ex. 4, p. 46-96)

On June 5, 2012, after Appellants had completed all relevant repairs demanded by Respondents. Respondent Jim Eland and Greg Nickel held a phone discussion regarding a conditional tender of payment which would settle the matter. Respondents had notified Appellants that the demand was for \$15,465.42. in this phone discussion respondents representative Jim eland demanded a waiver of the entire security deposit together with 10,000 dollars in cash which in total amounted

to 20,787.00, an amount 5,321.58 in excess of the original demand. Respondents set the conditions for payment during this conversation. (Sub 49, Exhibit B, p. 27) Greg Nickel tendered a check for \$7,698,24 as well as a waiver of the entire security deposit (\$10,767.00) for a total of \$18,465.24 as settlement of the claims. Appellant's offer was greater than the amount due per the original settlement agreement however, \$2321.24 less than the new conditions of payment set during the phone conversation by Respondent. Respondents replied by rejecting this tender. (Sub. 49, Ex. B, p. 21-28; Sub. 55, Ex. 2, p. 52-53)

On July 6, 2012, the unlawful detainer was converted to a civil action. (Sub. 35, Motion to Convert Case to Ordinary Civil Action for Stipulated Judgment, p. 1-3)

On July 21, 2011, Appellants learned that one of Respondents main claims during negotiation of the settlement agreement was misrepresented. Respondents had received notice from the City of Seattle Fire and Life Safety that the building was in violation of the municipal code and the Certificate of Occupancy was outdated. Respondents had been notified of an invalid Certificate of Occupancy in February, 2011, by inspectors for the City of Seattle and the Seattle Fire Department. (Sub. 49, Declaration of Greg Nickel, p. 21-28; Sub 55, Declaration of B. Graff, p. 47, 65-74) On June 6, 2011, the Seattle Fire Department had sent a letter to Sydney Eland at 1644 Broadmoor Drive, E, Seattle, informing him that the building at 1111 Elliott Avenue W needed a valid Certificate of Occupancy from the Department of Planning and Development consistent with actual use of the building. The City is mandated by law to notify the "responsible party for the building." The party notified was Respondents' agent Sydney Eland. (Sub 55, Ex 4, p. 66) Appellants were not informed of a compliance problem for 6 months. DPD fined

Respondents \$2000.00 for their delay in correcting the problem. Respondents claim this amount was owed them by Appellants. (Sub. 55, Declaration of Bryan Graff, Exhibit 4, p. 46-96) Appellants contest this claim since it was in fact Respondents who ignored the notices, who failed to notify Appellants of the problem and Respondent s' failure to abide by the notice. (Sub. 49. Declaration of Greg Nickel, p. 21-28; Sub. 55, Declaration of Bryan Graff, Ex. 6, p. 46-96)

In addition to contesting the requested repairs to property, which was in the condition in which Appellants found on leasing the property, Appellants contested amounts demanded based on Respondents' failure to reimburse them for improvements to the property which were done at Respondent's request. (Sub 1, Commercial Lease Agreement, Section 6.3 and 6.4, p. 229-268) (Subs. 49 Declaration of Greg Nickel, Ex. A, p. 24; Sub. 52, Declaration of Sophie, p. 31-32; Sub. 53. Letter of Robert A. Brown, p. 33-35)

On September 6, 2012, Respondents filed a Motion for Entry of Stipulated Judgment. (Sub. 37, p. 4-11) The following day the Court denied this Motion without prejudice based on the finding that a "significant factual dispute arises which cannot be resolved by this Motion." (Sub. 59, Order Denying Plaintiffs' Motion for Entry of Stipulated Judgment; this Document will be provided pursuant to Applicant's Motion to Supplement the Record.)

On July 31, 2013, Respondents filed an Amended Complaint naming Greg Nickel personally as an additional defendant and alleging breach of contract, unjust enrichment and conversion. (Sub 64, p. 99-104, 106-112) Respondents amended their complaint to include unjust enrichment by

filing for insurance claims used to restore the building after the break in and after Respondents refused to file their own insurance claim for this work knowing all along that Appellants filed the insurance claim. This dispute coming now more than 1 and ¼ years after the initial insurance claim was requested by Appellant. (Sub 64, Amended Complain, p. 106-112t; Sub 65, Declaration of Bryan Graff in support of Motion to Amend Complaint, this Document will be provided pursuant to Applicant's Motion to Supplement the Record.)

Respondents filed for a hearing on the Motion for Partial Summary Judgment; the hearing date was set for November 8, 2013

On November 8 2013, partial summary judgement was granted to Respondents (Sub 116, p. 212; Sub. 118. p. 215-217) without providing credit to Appellant for \$15,000.00, \$3,000 per month paid to Respondent in excess of rent as part of the stipulated agreement as well as the amount due Appellant for improvements to fixtures and systems installed at Appellant's sole expense for damage done to those systems by Respondent upon inception of the lease agreement. (Sub.1, Ex.1, Commercial Lease Agreement, section 6.3 and 6.4, p. 243) These systems and fixtures are not limited to and include the entire mezzanine of the office area that was made unstable and thus removed entirely by Respondents contractor during his work under the commercial lease agreement. (Sub 1 Commercial lease, p. 229-262). As such the original condition of the building contemplated by the commercial lease was not properly assessed and the value for the fixtures and systems installed by Appellant at Appellant's sole expense to rebuild this portion of the leased premises not credited to Appellant in the Judgment.

Appellant filed for bankruptcy the morning of the hearing, automatically staying the proceedings. (Subs. 55, p. 46-96; Sub. 100, p. 136-138; Sub. 102, p. 139-140; Sub. 103, p. 141-142; Sub. 104, p. 143-144) Appellants counsel withdrew December, 2013. (Sub. 106, p. 145-147) Appellants continued pro se thereafter.

In June of 2013 Appellant's Bankruptcy was dismissed without prejudice and Respondents again filed for a hearing date. Respondents allege mailing the pleadings and notice to Greg Nickel in early September of 2014, but did not use the requested file format to contact him. Appellants continued to appear pro se at that time.

Appellant, had no ability to read the notices mailed to him (Sub 111, p. 184-185) and ultimately responded to this notice via email to the judge. (Sub 113, p. 205) At the time of the scheduled hearing Appellant Greg Nickel was working under a dual disability of blindness, which caused him an inability to read much of the correspondence and pleadings sent him outside of the proper software, and by residing in the State of California while being able to provide legal representation. Respondents opposed the continuance on the grounds that 1. Appellant did not follow procedure for requesting a continuance, 2. Respondents were not served with notice of the need for a continuance and 3. by alleging that Applicant Nickel had a "history" of delaying the action. The Court denied a Continuance (Subs 116, p. 212) and the Motion for Conversion of Partial Summary Judgment to appellant personally was held resulting in a Judgment in excess of \$87,000 against Appellant. (Sub. 115, p. 215-217)

As the Court earlier ruled in denying the Motion for Entry of Stipulated Judgment, significant

factual disputes arise which remain unresolved. (Sub. 59, Order Denying Plaintiffs' Motion for Entry of Stipulated Judgment, this Document will be provided pursuant to Applicant's Motion to Supplement the Record.) Therefore, it is from the lower Court's decision to grant Respondent's the Motion for Conversion of Partial Summary Judgment (Personally) that this appeal is taken.

ARGUMENT

ASSIGNMENT OF ERROR # 1

The Trial Court erred in on November 8, 2013, in granting Respondent’s Motion for Conversion of Partial Summary Judgment to appellant personally since there were significant questions of material fact regarding the amount of default and amount due by Appellant.

An Appellate Court reviews a trial court’s granting of a summary judgment de novo. LYONS V. U.S. BANK NA, 181 Wn.2d, 775, 783, 336 P.3d 1142 (2014). RISK V. TODD PAC. SHIPYARDS CORP, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The evidence is then reviewed in the light most favorable to the non moving party and all reasonable inferences are drawn in that party’s favor. LAKEY V. PUGET SOUND ENERGY, INC., 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Bare assertions of the existence of material issues will not defeat a Summary Judgment Motion in the absence of actual evidence. TRIMBLE V. WASH. STATE UNIV. 140 Wn.2d 88, 93, 993 P.2d. 259 (2000). Summary Judgment is proper only if the record before the trial court establishes “that there is no genuine issue as to any material fact.” CR 56 (C). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. DOWLER V. CLOVER PARK SCHOOL DISTRICT, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). When reasonable minds can reach only one conclusion, then is summary judgment appropriate. FAILLA V. FIXTURE ONE CORP., 181 Wn.2d 642, 649, 336 P.3d 1112 (2014).

As demonstrated in the foregoing Procedural History and Statement of Relevant Facts

Appellants contend the following issues of material fact remain unproven and still in dispute in the case at hand:

A. Respondents asked the Court for a monetary sum far in excess of the initial settlement offer. Instead of the original offer to settle for \$10,000.00 and a surrender of the security deposit (\$10,767.00), Respondents sought and were awarded over \$87,000.00. Arguably this amount reflects the damage which occurred to the property after the surrender on March 31. The question of how this amount jumped from \$10,000 to \$87,000 and whether this amount included setoffs and other reimbursements due Appellants was not addressed by the lower Court and remains a question of material fact.

B. Respondents failed to demonstrate any indication of the condition of the premises at the time Appellants moved onto the property. Declarations of Respondents indicate the property was “broom clean” on the final walk through. Declarations of Appellants’ contractors demonstrate that the building was in “broom clean” condition and that it was an older structure, probable over 30 years old. (Sub.50; Sub. 51, declaration of Mark Roby, p. 29-33; Sub.52, declaration of S. Sophie) The property had numerous tenants in the years prior to Appellants’ lease. The declaration of the tenant who vacated the premises immediately before Appellants moved in sets out the state of the building at that time. He recalled build-outs by other tenants to suit the needs of a theatrical group, a gym with a climbing wall, as well as experiencing electrical problems, superfluous walls and other problems. (Sub. 53, Robert Brown letter, p. 33-35). A break-in occurred sometime after the first walkthrough with Respondent, resulting in changes to the condition of the premises since that time. This occurred after the termination of the lease. These issues remain unaddressed.

C. Respondents provide the documentation of various bids for repairs they allege were necessary due to Appellants' actions. (Sub. 55, Ex. 3, p. 46-96) Again, it is unclear how or when these damages occurred, whether or not Appellant's actions brought about the need, whether previous tenants caused the problem or whether the damage was caused during the break-in. Respondents supply photos of the property as it appeared AFTER Applicants moved out; again, nothing to show the condition of the premises on move in or during the first walk through where Respondents' agent declared the premises "broom clean." (Sub. 55, Ex. 7, p. 46-96)

D. Under the lease, Respondents were to repay Appellants for the pro-rated value of any improvements. The record is void of any mention of the process by which Respondents attempted to assess the value of the work done by Appellants to improve the space or to give Appellants credit for the pro-rated value of any improvements. (Sub. 49, Ex. 1, p. 21-28, Sub. 1, Ex. Lease, p. 222-268).

E. Respondent J. Eland states that "Nickel has failed to pay additional rent that accrued." However, nothing in the Respondents' Motion or declaration explains why costs from Fire Protection, Inc., or the City of Seattle fine are billed as additional rent. Appellants disputed these and other amounts and were provided with no additional documentation.

F. If, for the sake of argument, Applicant violated the conditional agreement in any matter, Respondents should not recover for damages due to the break-in after the final walk through and termination of the lease, nor should Respondents recover for improvements to their property which they enjoy long after the termination of the lease. (Sub. 54, p. 36-45)

These examples of issues of material fact have not been resolved before the trial Court awarded Respondents their Judgment.

ASSIGNMENT OF ERROR # 2

2. The Trial Court erred in November 8, 2013, in granting Respondent's Motion for Conversion of Partial Summary Judgment to appellant personally since the Respondents failed to meet the duty of good faith in the execution of the contract and settlement agreement.

There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *BADGETT V. SEC. STATE BANK*, 116 Wn,2d 563, 569, 807 P.2d 356 (1991). This duty arises in connection with contractual terms. Article 1 Section 304 of the Uniform Commercial Code provides that "every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." Article 1 section 201 of the U.C.C. defines "good faith" as "honesty in fact and the observance of commercial standards of fair dealing." In Washington, the UCC is codified at RCW 62A.3-101, et seq., and contains the same concepts as set out above.

Respondents were obligated under the lease to repay Appellants for the pro-rated value of any fixtures or systems installed by Appellants to repair or replace existing fixtures or systems to the property. (Sub. 1, Ex. 1, Lease Agreement, p. 222-268) The Trial Court granted Respondents an award based on NNN charges which erroneously included repairs and capital

improvements that were not NNN under the lease or the settlement agreement. (Sub. 55, Ex. 5, p. 76-78) Respondents also failed to include an accounting or payment for the pro-rated value of improvements they requested Appellants to make to the property and which Appellants made.

Respondents demanded numerous upgrades and improvements beyond what the lease anticipated. Appellants, acting in good faith, performed the work at their own cost. Many of the upgrades demanded by Respondents included repairs and removal of work done by previous tenants, including removing electrical work and temporary walls as well as upgrading fire protection and other systems. These are improvements to the “systems or equipment in the lease premises,” as contemplated under section 6.4 of the Lease. (Sub. 49, p. 24, 26) Appellants are entitled to be reimbursed for their value.

Under both the lease and settlement agreement Appellants were required only to surrender the premises in a “broom clean” condition and in the same state as at the commencement of the tenancy. This was accomplished on the March 31 walk-through with Respondents’ agent. Despite this, Respondents rejected outright Appellants’ representations that there had been a burglary/break-in despite the fact that their representative had declared the premises satisfactory and in the interim something had happened which occasioned numerous repairs not noted nor demanded before the expiration of the lease on March 31. (Sub. 111, Declaration of Bryan Graff, pages 100-102) Respondents failed to due due diligence by investigating the burglary claim. Instead, their counsel represents that “Sound Asylum first made the insurance claim on April 11, 2012, claiming a burglary had occurred on March 30, 2012.” (Sub 111,

p. 100-101). He add, “Mr. Nickel claimed’ that they had thieves come enter the building and steal 4 electrical panels, copper wire and the cover plate to the sub (sic) pump wells. They also dismantled a roll up door.” (Sub. 111, p. 100-101) Later in this Motion Appellants’ counsel adds flatly that the burglary claim is false. (Sub. 111, p. 102). Arguable, then, Respondents imply that Sydney Eland missed all of this damage during the walk through.

Respondents failed to serve Appellants via the OCR program necessary for Greg Nickel to understand the documents he received. Service of the summons regarding the Oct. 3, 2014 hearing was by regular U.S. mail, a format which prevented Nickel from being able to comprehend its contents. (Sub. 111, Declaration of B. Graff, p.181, 184-185) Nickel was pro se at this time. Respondents also cite Nickel as causing delays throughout the litigation. Nickel’s e-mails explain his inability to read documents sent him in other than OCR format was the cause for previous delay outlined within Respondent’s exhibit. (Sub.111, Declaration of B. Graff, Ex. B, p. 186-189)

Respondents should not be allowed to benefit from this conduct which both caused and contributed to the alleged breach of the agreement.

Conclusion

The Trial Court erred in granting Partial Summary Judgment to Respondents at a hearing wherein Appellant, working under a physical disability and pro se at the time of the hearing, could not appear to present the foregoing issues of material fact as well as the issues associated with Respondents' failure to act in good faith under the facts of this case. These facts were supported by the record at the time of the hearing. Several genuine issues of material fact existed which have not been considered or resolved. Trial is necessary to determine whether the amounts claimed by Respondents were actually incurred by Respondents during Appellants' tenancy and due either to Applicants or Respondents' fault, and whether they are properly included in the demand. Trial is also necessary to assess the offsets/amounts due against any charges for the pro-rated value of the improvements Appellants made to the property.

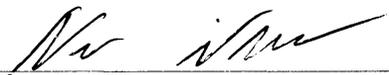
Respectfully submitted,



Gregory Nickel, Pro Se Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has transmitted a copy of this Appellate Brief to all counsel of record on this 13th day of October, 2016.



Gregory Nickel

U.S. DISTRICT COURT
DISTRICT OF MARYLAND
2016 OCT 17 PM 2:30