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STATE OF WASHINGTON
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
Case No. 1016107

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON
Case No. 56396-7-II

YAN HONG ZENG, Respondent,

v.

CASIMIR-SHELTON, LLC, Appellant.

ANSWER OF RESPONDENT TO PETITION FOR REVIEW

Howard R. Morrill
WSBA #17252
Howard R. Morrill, Attorney at Law
12345 Lake City Way NE, #1037
Seattle, WA 98125
(206) 539-2604
hr.morrill@comcast.net

Attorney for Respondent

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I. Introduction

This case involves a fairly ordinary transaction: (1) a commercial landlord entered into an agreement to sell a piece of real estate; (2) the real estate was then occupied by a business tenant pursuant to a commercial lease; and (3) the purchase and sale agreement between the selling landlord and the buyer contained a contingency which allowed the buyer to inspect the premises, subject to the tenant's rights under the lease. Obviously, on these facts, the buyer's right to access the premises for an inspection arose from its purchase and sale agreement with the landlord, but that access also required the landlord's good faith cooperation and performance, its insistence upon *its own* right of entry under the lease. Instead, when the tenant resisted providing prompt access, the landlord simply acquiesced, failing and refusing to insist upon its rights, and thereby breached the promise to provide access to the buyer contained in the purchase and sale agreement.

On cross-motions for summary judgment, the trial court ordered specific performance in favor of the buyer, Respondent Yan Hong Zeng ("Zeng"). Petitioner Casimir-Shelton, LLC ("Casimir-Shelton"), the landlord and seller of the property, appealed that order. The trial court's

order was then affirmed by decision of the Court of Appeals.

Casimir-Shelton has filed this Petition for Review, arguing that somehow the Court of Appeals' decision improperly confers rights under the lease upon Zeng, a non-party to the document. But Casimir-Shelton plainly mischaracterizes the decision. That decision plainly held that it was Casimir-Shelton which had the right of entry under the lease, and it was Casimir-Shelton's failure to insist upon that right which breached its purchase and sale agreement with Zeng. Zeng's rights arose under the purchase and sale agreement and Zeng necessarily had to rely upon Casimir-Shelton to require access of the tenant. The Court of Appeals' holding is unassailable, and the case law cited by Casimir-Shelton is inapposite.

II. Court of Appeals Decision

In a somewhat sprawling fashion, Casimir-Shelton appears to have identified the decisions at issue. It also offers an argument concerning what the Court of Appeals decided which is at odds with the text of the opinion for reasons which include those offered in the immediately preceding Introduction. In addition, Casimir-Shelton bitterly complains that the Court of Appeals accepted an interpretation of the tenant's rights under the lease which gives effect to all the lease's words, even though that interpretation is clearly correct and favored at law over the

interpretation offered by Casimir-Shelton, which would disregard words contained in the lease. *See, Newsome v. Miller*, 42 Wn. 2d 727, 731, 258 P.2d 812 (1953) (“an interpretation of . . . a writing which gives effect to all of its provisions is to be favored over one which renders some of the language meaningless or ineffective.”) Finally, Casimir-Shelton *speculates* about difficulties that *could have* arisen had it not simply acquiesced to the tenant’s extracontractual position. The speculation is not evidence and is necessary only because Casimir-Shelton breached the purchase and sale agreement with Zeng in precisely the way the Court of Appeals found.

III. Issues Presented for Review

Petitioner’s Issue 1: This incredibly contorted question is simply another recasting of the same mischaracterization of the Court of Appeals’ decision discussed in the Introduction to this Answer and will be further discussed below.

Petitioner’s Issue 2: The answer to this question posed by Casimir-Shelton is Yes.

Petitioner’s Issue 3: This case does not involve matters of substantial public interest.

IV. Zeng’s Statement of the Case

Casimir-Shelton is the “Seller” and Zeng is the “Buyer” under the

Commercial & Investment Real Estate Purchase & Sale Agreement (the “Agreement”) at issue in this case, which is provided at CP 126-146. The parties were represented by their agents, Stanley Lam for Zeng, and Faustine Samec for Casimir-Shelton. CP 17, 122, 285. The Agreement contains a feasibility contingency, which includes Zeng’s right to inspect the property; the thirty-day period for satisfaction or waiver of that contingency was specifically negotiated. CP 123, 286. Casimir-Shelton is required by the Agreement to provide access.

Under Paragraph 23.b. of the Agreement, Zeng’s right to access the property, and Casimir-Shelton’s obligation to provide that access, is subject to advance notice to Casimir-Shelton’s tenant, CM1, LLC (“CM1”). CP 131. CM1 operates a marijuana production business on the leased premises. CP 17, 123. The Lease Agreement between Casimir-Shelton and CM1 (the “Lease”) is provided at CP 147-165.

To access the premises, Article 12 of the Lease, like the Agreement, requires advance notice to CM1, and additionally, an “escort by the Tenant or their employee or agent”. CP 157. The Lease does *not* appoint any specific individual as the one and only possible escort; it likewise does *not* permit CM1 to thwart access by refusing to appoint an employee or agent to serve as the escort.

The Lease was provided to Zeng shortly after mutual assent to the

Agreement. CP 18, 287. Mr. Lam read and explained the Lease's provisions to Zeng, noting that someone employed by or otherwise affiliated with CM1's business would have to escort any inspector of the premises. CP 287.

On December 7, 2020, Zeng contacted Casimir-Shelton in order to schedule the inspection provided for by the Agreement. CP 18, 123, 286. This was well within the thirty-day contingency period, whether mutual assent to the Agreement was on November 12, 2020, as Casimir-Shelton contends, or November 15, 2020, as the Agreement itself appears to reflect. Casimir-Shelton's request for access to allow Zeng to inspect was promptly forwarded to CM1's owner, Larry Cheung. CP 217. Mr. Cheung was apparently out-of-town at the time. CP 18-19, 217-218.

Ultimately Casimir-Shelton denied Zeng access, based solely upon the unavailability of Mr. Cheung to serve as escort. CP 167-169, 260-261, 287. Rather than insist that Mr. Cheung appoint an "employee or agent" to serve as escort, precisely as the Lease says, Casimir-Shelton took the position that the Lease makes his absence fatal to a request for access, and that Zeng was at fault for not making her request some unspecified amount of time "sooner". CP 260-261, 264. Significantly, as a marijuana business, CM1 must be prepared to provide access to the State at any time, even without notice. WAC 314-55-015(5); WAC 314-55-185; CP 116.

Zeng offered to accommodate both Casimir-Shelton's failure to provide access as agreed, as well as Mr. Cheung's desire to be present at the inspection, by extending the contingency period. CP 124, 287-288. She demurred, however, when Casimir-Shelton sought additional consideration from her in order to agree to the extension. CP 124-125, 287-288. Apparently, Casimir-Shelton did not perceive its failure to provide access to be a breach of the Agreement and deemed Mr. Cheung's absence a valid excuse; the trial court disagreed. CP 296. On cross-motions for summary judgment, Zeng was awarded specific performance of the Agreement and an award of her reasonable attorney's fees and costs pursuant to ¶ 41.c. thereof. CP 296-297. The Court of Appeals affirmed. Zeng v. Casimir-Shelton, LLC, No. 56396-7-II, Slip Op. (October 18, 2022).

V. Authority and Discussion

A. The Court of Appeals did *not* hold that Zeng may enforce the Lease.

The Court of Appeals expressly held that Casimir-Shelton's failure to insist upon *its own* rights of access under its Lease with its tenant was a breach of the PSA. Zeng v. Casimir-Shelton, LLC, at 13. Specifically, Casimir-Shelton had a duty under the PSA to insist upon the access it was entitled to under the Lease. Id., at 10. Casimir-Shelton did not do so. Id.,

at 2.

Nowhere did the appellate court state, assume, or imply that Zeng herself could enforce the Lease between Casimir-Shelton and its tenant, as Casimir-Shelton's "Issue 1" posits. No one has ever *argued* that Zeng could enforce the Lease. Casimir Shelton's statement that the Court of Appeals made any such a holding is simply incorrect. The entire premise of Petitioner's argument is untrue.

B. The Lease is not ambiguous.

Casimir-Shelton's "Issue 2" tacitly suggests that the Lease was deemed ambiguous by the Court of Appeals. The Petitioner then injects a largely irrelevant discussion regarding the "course of performance", all in an attempt to narrow the Lease provisions to fit its argument concerning the *unwritten* terms it now alleges the Lease contained. But the Lease is not ambiguous, as Casimir-Shelton itself has previously argued and conceded. CP 187. And the Court of Appeals did not find any ambiguity. And as the appellate court observed, Casimir-Shelton and CM1 in fact performed in a manner which was entirely consistent with the Lease's written terms. Zeng v. Casimir-Shelton, LLC, at 9. Again, Casimir-Shelton proposes an argument that fails at any examination of its essential proposition.

C. There is no substantial public interest.

Casimir-Shelton’s “Issue 3” posits substantial public interest in (1) the speculation that a breach of the peace would have been the result of its insistence upon access to the leased premises, and (2) the extensive nature of Washington’s marijuana regulation. But the speculation is just that and is unsupported by any evidence. Any impact this case could possibly have on Washington’s comprehensive regulatory scheme is left unexplained. As the Court of Appeals noted, the only regulatory requirement implicated by this matter was that Zeng’s inspector sign-in and that CM1 issue the inspector a badge. *Id.*, at 11.

D. Zeng requests her reasonable attorney’s fees and costs.

Paragraph 41.c. of the Agreement provides that the prevailing party in any suit is entitled to reasonable attorney’s fees and costs. CP 138. Zeng requests an award of her reasonable attorney’s fees and costs incurred in answering Casimir-Shelton’s petition.

VI. Conclusion

The bases for a petition under RAP 13.4 are entirely absent in this case. Instead, the Petition relies upon misstatements regarding the decision below, abject speculation, and unexplained connections to public interest. Zeng should be awarded her reasonable attorney’s fees and costs incurred in opposing this Petition pursuant to the parties’ Agreement.

Respectfully submitted this 7th day of February, 2023.

HOWARD R. MORRILL, Attorney at Law

By: s/Howard R. Morrill
Howard R. Morrill
WSBA #17252
Attorney for Respondent
12345 Lake City Way NE, #1037
Seattle, WA 98125
Tel: 206.539.2604
Fax: 206.539.2606
E-mail: hr.morrill@comcast.net

CERTIFICATE

The undersigned certifies that this ANSWER OF RESPONDENT TO PETITION FOR REVIEW contains 1,655 words and complies with the word limitations of RAP 18.17(c)(10).

/s/ Howard R. Morrill
Howard R. Morrill, WSBA #17252
Counsel for Respondent

HOWARD R. MORRILL, ATTORNEY AT LAW

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