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~~No. 67694-6-I~~

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

ROBERT K. HALL, a single man, and DAYLIGHT PROPERTIES, LLC, a Washington limited liability company,

Respondents/Plaintiffs,

vs.

MATTHEW FEIGENBAUM and JANE DOE FEIGENBAUM, husband and wife and the marital community comprised thereof,

Petitioner/Defendant.

RESPONDENTS HALL/DAYLIGHT PROPERTIES, LLC'S APPEAL BRIEF

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A. Did the trial court abuse its discretion when it denied Feigenbaum's various motions to dismiss based upon lack of subject matter jurisdiction?

B. Did the trial court obtain personal jurisdiction over Feigenbaum?

C. Did the trial court abuse its discretion issuing the pre-trial "stand-still" orders?

D. Did the trial court abuse its discretion when it issued the Writ of Restitution?

E. Did the trial court abuse its discretion when it entered the order converting the case to an ordinary civil action?

F. Whether the award of damages was correct.

G. Whether Hall should be awarded its attorney's fees and costs on appeal.

STATEMENT OF THE CASE

This matter involves a commercial tenancy. Appellant Matthew Feigenbaum is an attorney (Feigenbaum).[1] He entered into a written commercial lease (Lease) with Respondent Robert Hall (Hall).[2] The Lease was to operate a bar in the basement area

[1] Verbatim Report of Proceedings (VR), Dec. 22, 2010, page 12.
[2] Clerks Papers (CP) 1167-1175, and CP 728-36, Exhibit 1 to Affidavit of Robert Hall in Support of Summary Judgment dated October 6, 2011.

of Hall's building (Premises).[3] The Lease required Feigenbaum to pay rent each month and provided that all notices to Feigenbaum were to be mailed to the Premises unless Feigenbaum designated some other address in writing.[4] Feigenbaum never designated any other address.

Feigenbaum ceased doing business at the Premises in 2008. Feigenbaum failed to pay rent in the fall of 2010, as he had many times before.[5] Hall initiated an unlawful detainer action undertaking the following steps:

- Notice to Pay Rent Posted and Mailed to Premises[6] — Nov. 5, 2010
- Evictions Summons and Complaint filed[7] — Dec. 1, 2010
- 6 attempts for personal service[8] — Dec. 1-2, 2010
- Court entered Order Allowing Service by Posting and Mailing[9] — Dec. 6, 2010

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[3] When the Lease was signed, Robert Hall owned the building personally. During the period of the Lease, Hall contributed it to a limited liability company, Daylight Properties, LLC. Hall is the sole owner of the LLC. The reference to either and both will simply be to "Hall." CP 723.
[4] CP 1172, Paragraph 30 of the Lease.
[5] CP 724, Affidavit of Robert Hall in Support of Summary Judgment dated October 6, 2011.
[6] CP 1176-78, Notice to Pay Rent or Vacate/Affidavit of Posting and Mailing, Exhibit C to the Complaint.
[7] CP 1158.
[8] CP 1126-1137.
[9] CP 1119-1125, Order Allowing Service by Posting and Mailing and Declaration in Support of Motion.

- Mailing of Pleadings[10] Dec. 6, 2010
- Posting at residence and Premises Dec. 7, 2010
- Pleadings admitted received by Feigenbaum[11] Dec. 9, 2010
- Show Cause Hearing Dec. 17, 2010
- Feigenbaum personally served in court[12] Dec. 17, 2010
- Continuance granted to Feigenbaum[13] Dec. 17, 2010
- Second Return Date[14] Dec. 21, 2010
- Second Show Cause hearing[15] Dec. 22, 2010
- Date court ordered past due rent must be paid Dec. 27, 2010
- Tenant failed to pay January rent Jan. 5, 2011
- Order Granting Writ of Restitution Jan. 7, 2011

Feigenbaum has made no effort to pay rent since the service of the Writ in the three years since this action was initiated.

In January of 2011, the court heard all of Feigenbaum's arguments regarding the validity of the 3 day notice, service via mail and posting, and all other issues related to jurisdiction. The

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[10] CP 1114-1118, Declarations of Posting and Declaration of Mailing.
[11] VR December 17, 2010, page 3, line 21-25 and CP 1107. Declaration of Matthew Feigenbaum. Somehow he missed the copy posted to his residence.
[12] CP 1391-93, Declaration of Service filed December 20, 2010, VR December 17, 2010, page 9-10.
[13] VR December 17, 2010, page 7, lines 11-18 and page 8-9.
[14] VR December 17, 2010, page 8-9
[15] VR December 22, 2010, page 17-18 and 24-25.

court made specific findings in its oral ruling.[16] Based upon those findings, the court denied his motion to dismiss.[17]

Feigenbaum failed to answer the Complaint, and an Order of Default was entered along with a judgment.[18] A Writ of Attachment was entered (along with a bond) and at the execution sale, Feigenbaum paid over $60,000 for the personal property covered by the writ of attachment/judgment. At the time Feigenbaum paid this amount, the judgment for past due rent, utilities, late fees and attorney's fees was under $40,000.

After six months from the inception of the case, Feigenbaum hired an attorney who had the default set aside, obtained a return of all the money paid to satisfy the Writ of Attachment, and had the matter continued. Even after the return of the money, Feigenbaum never paid or attempted to pay any of the outstanding rent. Feigenbaum never disputed that he had failed to pay rent and that he breached the Lease.

In response to one of the motions to dismiss for jurisdictional/procedural matters, the court entered an Order on

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[16] VR January 21, 2011.
[17] VR January 21, 2011, page 15-16, pages 18-19, pages 21.
[18] CP 1036-7, Order of Default and Judgment.

September 1, 2011 denying the motions.[19] **Feigenbaum did not appeal that order.** In that order, the court confirmed in writing the procedural history and made specific findings of fact. That Order is attached as Appendix A for easy clarification of the undisputed case timeline and details.

To mitigate its damages, Hall re-let the Premises as of August 30, 2011. Hall did so only after the Writ was issued, the 30 day period to set aside had passed,[20] and Feigenbaum again asserted all of his claims regarding jurisdiction (multiple times). The new monthly rental amount was for less than what Feigenbaum paid under his lease.[21]

After the re-letting of the premises, Feigenbaum affirmatively requested the court to determine if the matter had been converted to a general civil action.[22] Over Hall's objection,[23] the court did enter the order converting the case.[24]

The court then heard Hall's motion for summary judgment for award of damages. The court found that there was no dispute as to

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[19] CP 760-765.
[20] RCW 59.12.190.
[21] CP 687-722, Affidavit of Kane Hall in Support of Summary Judgment and exhibits.
[22] CP 278-323, Declaration of M. Evans in Support of Request for Clarification of Case Status.
[23] CP 343-4.
[24] CP 257-59; VR January 20, 2012, page 3.

any material fact and granted summary judgment, awarding the uncontested amount of damages set forth in Hall's materials.[25]

The court did deny Hall's request for double damages and did reduce the award of attorney's fees and costs. A final judgment was entered after over two and one-half years of litigation.[26]

WAIVER OF ISSUES ON APPEAL

A. Waiver by Feigenbaum: Feigenbaum listed a total of 14 orders/judgments in his Notice of Appeal. Feigenbaum did not assign error/address in his brief any of the following:

- The oral order on December 22, 2010 requiring Feigenbaum to pay $250 in attorney's fees and "request writ of restitution;"[27]
- The order directing the clerk to disburse funds entered on January 21, 2011;
- Oral order denying CR 11 sanctions issued from the bench on January 21, 2011;
- The Order Directing Issuance of Writ of Attachment and the Writ of Attachment that were entered on June 24, 2011;
- The court's oral order denying defendant's motion for the

[25] CP 141-44, Order on Summary Judgment.
[26] CP 1188-1193. This Order was not appealed.
[27] Notice of Appeal, page one, bottom bullet point.

return of his property and the order staying proceedings that were entered on November 18, 2011.

Feigenbaum has waived all of these issues on appeal.[28]

In addition, Feigenbaum did not identify in the Notice of Appeal, assign error to, or mention in his brief the September 2, 2011 Order Denying Defendant's Motion to Vacate and to Dismiss for Lack of Jurisdiction and Certification for Appeal.[29] As such, that Order and the findings are outside the scope of appeal and verity on appeal.[30]

B. Waiver by Hall: Hall filed a notice appealing the court's denial of double damages. Hall has elected to not pursue that denial and waives and releases that appeal.

ARGUMENT

I. Did the Trial Court Abuse its Discretion when it Denied Feigenbaum's Various Motions to Dismiss Based upon Lack of Subject Matter Jurisdiction?

A. Error Assigned: Feigenbaum assigns error to the denial

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[28] Baumgardner v. American Motors, 83 Wn.2d 751, 759, 522 P.2d 829 (1974) ("*Assignments of error not argued will not be considered.*")

[29] CP 760-765. That order is not listed in the Notice of Appeal and not referenced in Appellant's Brief. Further, the Findings in that order were not assigned error in Appellant's Brief. Attached as Appendix A.

[30] RAP 2.4 and RAP 2.5. None of the exceptions apply — RAP 2.4(b), (c), (d) or (e) are applicable.

of two unspecified motions made by Feigenbaum,[31] but fails to identify the order of the court to which error is assigned.

B. Standard of Review: This is an issue over which the court exercised its discretion when it denied Feigenbaum's motions to dismiss for lack of jurisdiction. Feigenbaum has failed to alleged, let alone prove, that the denials were an abuse of discretion:

> *Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.*[32]

The trial court heard multiple motions and heard directly from Feigenbaum in open court (December 17 & 22, 2010 and January 21, 2011), and reviewed the various issues and facts before it. Based upon this extensive record, the motions were denied. Each denial was an exercise of the trial court's discretion.

Feigenbaum's assertion that the standard is *de novo* is based upon a misunderstanding of the law — that the superior court lacks subject matter jurisdiction in unlawful detainer actions if the time/manner requirements of RCW 59.12 are not strictly

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[31] "Feigenbaum's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Appellant's Brief, page 3, Assignment of Error #1) and "Feigenbaum's Motion to Dismiss for Lack of Personal and Subject Matter Jurisdiction."

[32] State Ex Rel. Carroll v. Junker, 79 Wash.2d 12, 482 P.2d 775 (1971); *cited in* Coggle v. Snow, 56 Wash. App. 499, 784 P.2d 554 (1990).

followed. As Judge Becker eloquently explained in Housing Authority of Seattle v. Bin,[33] there was confusion regarding terminology of subject matter jurisdiction:

> *Because the superior court's subject matter jurisdiction in an unlawful detainer is granted by the constitution, it is incorrect to say that the court "acquires" subject matter jurisdiction by means of the plaintiff's compliance with statutory procedures...*[34]

In Bin, this court cited to Tacoma Rescue Mission v. Stewart,[35] to clarify that the issue is not the acquisition of subject matter jurisdiction, but the propriety of exercising such jurisdiction in the face of errors:

> *What the Supreme Court actually said in Christensen*[36] *is that noncompliance with the statutory method of process precludes the superior court from "exercising" subject matter jurisdiction.*[37]

With this understanding, the court in Bin ruled that dismissal was appropriate for the failure to comply with federal regulations and adopted grievance provisions failed to provide the tenant appropriate due process.

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[33] Housing Authority of City of Seattle v. Bin, 163 Wash. App. 367, 260 P.3d 900 (2011).
[34] Id *at* 376.
[35] 155 Wash. App. 250, 254, 228 P.3d 1289 (2010).
[36] Christensen v. Ellsworth, 162 Wash.2d 365, 173 P.3d 228 (2007).
[37] Id *at* 375.

This was confirmed in MHM & F, LLC v. Pryor.[38] Compliance with the unlawful detainer statutes does not affect subject matter jurisdiction. Instead "...all other defects or errors go to something other than subject matter jurisdiction."[39] As noted by Judge Becker, that "something else" is due process.

Upon review, the analysis must turn on whether adequate due process was provided to insure the tenant did receive the timely benefits of the time/manner procedures set forth in the statute.

Additionally, all of the cases discussing this issue have been residential landlord/tenant cases. There has not been a current application of the restrictive rules to a commercial tenancy. That difference is considerable — residential landlord tenant law is based upon deeply rooted public policies to protect a person's possession of their residence. These policy reasons do not exist in a commercial setting that is based wholly upon economics. For this reason alone, the same level of compliance is not applicable to commercial tenancies. Instead, a judicial clarification should be

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[38] 168 Wash. App. 451, 459. 277 P.3d 62 (2012).
[39] *Id*, *citing* Marley v. Department of Labor and Industries, 125 Wash.2d 533, 886 P.2d 189 (1994).

made: in commercial tenancies under RCW 59.12.010, *et seq.*, substantial compliance with the time/manner procedures is sufficient.[40] This is an issue of first impression for the court and the matter need be clarified to recognize the vastly different public policies at play.

Notwithstanding all of the foregoing, Hall did strictly comply with the applicable time/manner requirements of RCW 59.12.

C. Discussion.

i. *The 3 Day Notice was Properly Delivered.*

The Notice to Pay Rent or Vacate was both mailed and posted to the Premises.[41] Feigenbaum stipulated in the Lease that notices were **required** to go to the Premises:

> "*Any notice required to be given by either party to the other shall be deposited in the United States mail, postage prepaid, addressed to the…Lessee at 211 Chestnut Street, Bellingham, WA 98225 or at such other address as either party may designate to the other in writing from time to time.*[42]

The Notice to Pay Rent is just the "*notice required to be given by either party to the other…*" this section applies to. In a commercial lease, the parties must be bound to the

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[40] *See* Housing Authority of City of Pasco and Franklin County v. Pleasant, 126 Wash. App. 382, 109 P.3d 422 (2005).
[41] CP 1176-8.
[42] CP 1172, Paragraph 30 of the Lease.

procedures to which they have contracted. Especially when the tenant is an attorney who co-wrote the lease.

RCW 59.12.040 provides methods reasonably calculated to give the tenant actual notice. As noted above, the parties specifically agreed upon what notice in this specific lease would provide actual notice. Compliance with the contractually agreed upon location/method of notice fulfills specifically the intended purpose of the statute. Accordingly, in these circumstance, mailing and posting to the Premises alone fulfills the purpose of the statute and is sufficient.

Regardless of the foregoing, Hall met the requirements of the statute. RCW 59.12.040 directs mailing and posting to the Premises in this circumstance:

> *Any notice provided for in this chapter shall be served either (1) by delivering a copy personally to the person entitled thereto; or (2) if he or she be absent from the premises unlawfully held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his or her place of residence; or (3) if the person to be notified be a tenant, or an unlawful holder of premises, and his or her place of residence is not known, or if a person of suitable age and discretion* ***there*** *cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held,*

> *and also delivering a copy to a person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated. Service upon a subtenant may be made in the same manner…*

Service in this case was completed pursuant to .040(3). (1) and (2) could not be used since the Premises had been vacant since 2008 and no one was there. Pursuant to (3), Hall did not know of Feigenbaum's residence.[43] But more importantly, Feigenbaum had not designated in writing to Hall that his residence was the location for mailing per the Lease.[44] Mailing and posting the Premises met the applicable statute as a matter of law.

Finally, Feigenbaum never asserted that he did not receive the Notice to Pay Rent that was mailed and posted on the Premises. He could not make such a claim — he told the court that he was actively trying to sell the business and that the posting damaged the efforts to sell.[45] Much of this was conveyed through Mr. Feigenbaum's statements in open court. These are the facts the court was reviewing, along with the perception of credibility as Feigenbaum spoke in court on December 17 and 22, 2010 and

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[43] CP 725, Affidavit of Robert Hall in Support of Summary Judgment.
[44] If Hall had posted the Premises and mailed to the "unknown" residence, Feigenbaum would be arguing dismissal for breach of the contract notice provision.
[45] VR Dec. 22, page12-13.

January 21, 2011, that the court relied upon when it did exercise its discretion denying the motions.[46] There has been no showing that this was an abuse of the court's discretion.

Feigenbaum was provided all of the due process reasonable and necessary, and that required under applicable statute. Even if the court assumes that Feigenbaum never received the Notice to Pay Rent when posted, he received more than the statutory time period to both respond and cure.[47] From the date he did receive the Notice to Pay Rent to the date of the continued return date was 11 days,[48] when the statute requires 10.[49] But then Feigenbaum was given another 5 days to pay the admittedly past-due amounts. The purpose of the statute's time/manner requirements were met — Feigenbaum did receive actual notice and did so in more than enough time to respond and cure the default. Feigenbaum's arguments are mere form over substance that should not control in a commercial tenancy.

ii. *Form of Notice to Pay Rent or Vacate Not a Basis*

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[46] Plus Feigenbaum's unsupported sworn testimony that the damaged caused by the TRO was over $1,000,000. These statements did weigh upon the court's interpretation of credibility.

[47] These are the facts the court was reviewing, along with the perception of credibility as Feigenbaum testified in court on December 17th, 22nd, and January 21st.

[48] December 6 to December 21, 2010.

[49] 3 days for the notice and not less than 7 days before the return date — a total of 10 days.

to Dismiss.[50]

The Lease does not dictate the form of the notice, only the waiting period after notice is sent before a legal action may be filed. The Lease provides:

> *...and such failure continues for twenty (20) days after written notice from Lessor...*

This is exactly the situation in First Union Management v. Slack.[51] There the commercial lease required a 10 day notice period before filing. Landlord sent out a 3 Day Notice (not a 10 Day Notice), but waited more than ten days to file. The court held the landlord did comply with the lease and that the action was valid.

Here the Notice to Pay Rent or Vacate was mailed and posted on November 5, 2010. The lawsuit was not filed until December 1, 2010. This provided in excess of 20 days waiting period between posting/mailing of the notice and filing of the lawsuit.

This is not an issue of statutory compliance because Hall unquestionably met the requirements of RCW 59.12.030 — 3 Day Notice and waiting period upon failure to pay rent. That was the form used and more time than the statutory minimum was

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[50] Feigenbaum did not file a notice of discretionary review within 30 days of entry of the injunction, so the issue need not be reviewed here.
[51] 36 Wash. App. 849, 859, 679 P.2d 936 (1984).

given.

The trial court did not abuse its discretion when the court denied the motions.

II. **Did the Trial Court Obtain Personal Jurisdiction over Feigenbaum?**

A. Error Assigned: Feigenbaum assigns error to the trial court's issuance of the Order Allowing Service by Posting and Mailing.

B. Standard of Review: This is reviewed under an abuse of discretion standard. The court exercised its discretion in allowing alternate service by posting and mailing, and by ordering the form of the Eviction Summons with a return date of the December 17, 2010.

C. Discussion: Personal jurisdiction was established because Feigenbaum:

- Received all pertinent pleadings on December 9, 2010 (via mail);[52]
- Was personally served all pertinent pleadings in open court on December 17, 2010.[53]

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[52] VR Dec. 17, 2010.
[53] CP 1391-93, Declaration of Service filed December 20, 2010, VR December 17, 2010, page 9-10.

With actual personal service, Feigenbaum's Issues #4, 5, and 6 are irrelevant — personal jurisdiction was obtained through actual service. Notwithstanding the foregoing, all of Feigenbaum's arguments are without support.

i. *Issuance of Order Allowing Service was Not Abuse of Discretion.*

Feigenbaum is asserting non-compliance with general court rule and statutes (CR 4, RCW 4.28.100), not the unlawful detainer statute. As such, his arguments do not go to the compliance with unlawful detainer requirements.[54] Only to the existence of personal jurisdiction.

The trial court entered the Order Allowing Service by Mail/Posting after it reviewed an uncontested record of diligent efforts. The court is granted the discretion to enter such orders for alternate service pursuant to CR 4(d)(4):

> *In circumstances justifying service by publication...*[55] *the court may order service may be made... by mailing copies of the summons and other process to the party to be served at his last known address or any other address determined by the court to be appropriate.*

Here the court exercised its discretion — publication would have

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[54] Christensen v. Ellsworth, *supra*.

[55] Such existed pursuant to RCW 4.28.100(6): the matter involves excluding Feigenbaum from his claimed possessory interest in the real property.

been pointless to provide timely service for the Show Cause Hearing on the 17th. So the court ordered mailing and posting — to both the residence and the Premises.

The record was clear of the due diligence.[56] The trial judge's observations are telling:

> *THE COURT: A car at the residence, lights on, nobody answering the door, six attempts to serve. That's probably why the court issued that because it appeared to the court that whoever was there was avoiding.*[57]

And the trial court made a specific factual finding on this:

> *1. Plaintiffs conducted a diligent search for the defendant before securing the order authorizing service by mail.*[58]

This written factual finding was not appealed and there was no assignment of error to this factual finding. It is verity on appeal. The court went beyond CR 4(d)4 and required both mailing and posting, and to both the residence and the Premises. This was not an abuse of discretion and was correct as a matter of law.

ii. *Form of Eviction Summons was Appropriate and*

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[56] The rented Premises were empty, Hall hired a professional legal service company to locate Feigenbaum's home (which they did), and that company had made six attempts at service at the location. The attempts at service were at a house that was occupied, but no one responded to the knocks.

[57] VR January 21, 2011, page 8. Note further that the court made a number of factual findings during the January 21, 2011 hearing regarding the efficacy of alternate service. Feigenbaum failed to assign error to any of these factual findings and is, therefore, verity on appeal.

[58] CP 763, Order Denying Defendant's Motion to Vacate.

Could Not Require a 90 Day Return Date.

RCW 59.12.070 grants to the court the discretion to set the return date "*at such time as may be deemed proper.*" The court exercised this discretion, ordering that the Eviction Summons be in the form required by the statue and including the return date of December 16, 2010.[59] Note that CR 4's form summons is trumped by RCW 59.12.070 and .080 based upon RCW 59.12.180 and CR 81(a). The civil rules do not apply when in conflict with RCW 59.12.070 and .080 because unlawful detainers are special proceedings.[60]

The court was correct as a matter of law when it required the return date to be less than 90 days per RCW 59.12.070. And it did not abuse its discretion setting the return date for December 16th and the Show Cause Hearing for December 17th given the increased alternate personal service requirements to best assure actual receipt (which occurred). Because statute **requires** that the return date be within 30 (not 90) days of issuance, the trial court was correct as a matter of law when it ordering use of the special unlawful detainer summons with the December 16th return

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[59] CP 1119-1120. The Order was issued upon the form submitted to the court and with a declaration of counsel specifically requesting that the form be consistent with RCW 59.12.070 &080. CP 1121-23, *see* specifically CP 1123.
[60] Christensen v. Ellsworth, *supra*.

date.[61]

iii. *Feigenbaum Received the Statutory Notice Required in RCW 59.12.070.*

The record is undisputed: Feigenbaum received the pleadings on December 9, 2010, appeared on the 17th[62] and upon his request, Feigenbaum received a continuance for both the return date and the show cause hearing (December 21st and December 22nd, respectively.)[63] Feigenbaum did submit materials prior to that new return date. Upon this record, Feigenbaum received more than 7 days between notice (December 9th) and the new return date (December 21st). Note the court made a specific finding of fact regarding this:

> *3. The Defendant was provided sufficient notice of the return date so as to respond to the Summons and Complaint served upon him.*[64]

No error was assigned to that finding and it is verity on appeal.

CR 4(d)4 does not apply.[65] The 10 day period in the

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[61] To hold otherwise would make it impossible for a landlord to evict a tenant that avoids service: summons via CR 4 would be required, but would violate RCW 59.12.070 and .080, and Feigenbaum would then argue the court lacks subject matter jurisdiction for failure to follow the statutory requirements of unlawful detainer.

[62] Which was seven days after actual receipt.

[63] VR December 17th, 2010, page 8-9.

[64] CP 764.

[65] Hall continues to assert that the correct statute is RCW 4.28.100(6) and that pursuant to that statute, service was effective upon posting, or at least three days

rule is only for the purpose of calculating a date that service can be ***implied*** when actual service date is not known.[66] The implied service date cannot take precedent over the actual date of service.[67]

Finally any error is harmless – Feigenbaum received all pleadings and was granted continuance at his request that allowed him to timely respond as provided in the statute.

III. Did the Trial Court Abuse its Discretion Issuing the Pre-trial "Stand-Still" Orders?

A. Error Assigned: Feigenbaum assigns error to the Order Issuing Temporary Restraining Order and the Order Issuing Preliminary Injunction, plus the Order Denying Motion to Set Injunction Bond (entered after Feigenbaum failed to appear).

B. Standard of Review: The issuance of the Orders was an exercise of the court's discretion. Feigenbaum failed to allege or establish that there was an abuse of the court's discretion.

C. Discussion: Upon filing of the action, Hall was very concerned that the Premises and the personal property inside would be removed or damaged. The court issued a Temporary

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following the mailing.

[66] RCW 4.28.080.

[67] Answer period is irrelevant for Defendant did not appeal the issuance of the default, the only order that was affected by the answer time period.

Restraining Order (TRO) on December 1, 2010 requiring that Feigenbaum not remove any personal property from the Premises. The order specifically provided that it did not restrict Feigenbaum's access to the Premises and that no bond was required. On December 22nd, and upon motion by Hall, the court entered an Order Granting Preliminary Injunction.[68] This Order used identical language as the TRO. As noted by the judge, the Injunction simply required all the parties to leave the premises as-is during the litigation.[69] Feigenbaum never submitted any factual evidence to establish that the concerns and emergency asserted by Hall were not accurate.

i. *Scope of Court's Jurisdiction Relative to Stand-Still Orders.*

Feigenbaum never raised before the trial court the issue of a TRO/Preliminary Injunction being outside the jurisdiction of an unlawful detainer. Feigenbaum is barred from asserting new arguments on appeal.[70]

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[68] CP 1102-3.
[69] VR December 22, 2010, page 28.
[70] Bellevue School Dist. V. Lee, 70 Wash.2d 947,950, 425 P.2d 902 (1967). (*"The trial court must have an opportunity to consider and rule upon a litigant's theory of the case before this court can consider it on appeal."*)

ii. *Issuance of TRO Proper Exercise of Trial Court Discretion.*

The TRO was within the court's jurisdiction. Our courts have confirmed that unlawful detainer actions are limited to landlord's right to possession:

> *In so holding, the courts have acknowledged the Legislature's intent to create a summary procedure and limit the issue to the landlord's right of possession.*[71]

The TRO was directed exactly at Hall's right of possession of the items in and connected to the Premises. The court must have jurisdiction in an unlawful detainer action to issue orders to preserve the Premises during the resolution of possession.

Hall did establish all the elements necessary for the issuance of a TRO in the affidavits/declarations reviewed by the court. An emergency existed because Feigenbaum had threatened to damage the premises and the personal property by tearing out the improvements. This emergency was heightened because of Feigenbaum's failure to pay rent and that the filing of the lawsuit creates a risk of reprisal. Immediate irreparable injury was established to occur if Feigenbaum ripped out the fixtures/personal

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[71] Granat v. Keasler, 99 Wash.2d 564, 570-1, 663 P.2d 830 (1983).

property (through damage to the premises and interference with Hall's statutory lien that is dependent upon possession). There was no need for a bond for there was no possible damage to Feigenbaum – the order simply kept everything "as-is" pending the issuance of the Writ/payment of rent.[72] The commissioner exercised her discretion and checked the box "without posting of bond by Plaintiff."[73] At no time has Feigenbaum alleged that the Commissioner was aware of facts that defeated or put into question any of the foregoing.

Regardless, any error was harmless. The TRO expired and Feigenbaum has never asserted any facts that, during the term of its existence (December 1st to December 15th as asserted by Feigenbaum), he suffered any damage.

iii. Issuance of Preliminary Injunction was Correct.

An injunction may be granted any time after commencement of the lawsuit and at the discretion of the trial court.[74] The expiration of the TRO is irrelevant. A bond is not mandatory for the issuance of an injunction, in that RCW 7.40.080

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[72] CP 1153-55, Declaration of Kane Hall in Support of TRO/Show Cause.
[73] CP 1153-5.
[74] RCW 7.40.040. Feigenbaum's claims about lack of service are incorrect (Appellant's Brief, page 31). The TRO and Order to Show Cause were received by Feigenbaum on December 9th and then served upon him on December 17th. Feigenbaum asked for continuance regarding this matter and then was heard.

leaves the sum to the discretion of the court. The court exercised its discretion (at least twice) and ruled that no bond was required. As noted by the judge, the Injunction simply required all the parties to leave the premises as-is during the litigation.[75]

Further the denial of the motion to set bond for the injunction has not been shown to be an abuse of discretion. The matter was set for hearing on April 22nd, but Feigenbaum failed to appear and argue in opposition.[76] Upon the facts before the court, and the very limited nature of the Injunction, there was no abuse of discretion when the motion was denied.

IV. Did the Trial Court Abuse its Discretion when it Issued the Writ of Restitution?

A. Error Assigned: The Order Issuing Writ of Restitution.

B. Standard of Review: The court exercised its discretion when issuing the Order Issuing Writ of Restitution. This is reviewed on an abuse of discretion standard.

C. Discussion: On December 22, 2010, the court ordered Feigenbaum to pay all past due rent by December 27th and all future rent as it became due. The court also ordered, in open court

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[75] VR December 22, 2010, page 28.
[76] CP 762 — a finding of the court in response to Feigenbaum's subsequent motion.

directly to Mr. Feigenbaum, that if the rent was not paid as ordered, a writ would be issued *ex parte*. That was the order that set the due process requirements if rent was not paid. Feigenbaum has failed to assign error to this aspect of the court's December 22nd Order.[77] Further, Feigenbaum did not discuss this aspect of the December 12th oral order in his brief. Any issue regarding the validity of due process has been waived for Feigenbaum did not appeal the applicable order.

Regardless, Feigenbaum received a full measure of due process. He was allowed all the required time prior to the Show Cause Hearing. He received direct and specific instructions on what he had to do to prevent the Writ issuance, and then provided even more time to comply.

Feigenbaum admits that he failed to pay rent as ordered and had violated the court's December 22nd order and was in unlawful detainer.[78] There is no showing of abuse of discretion since, as a matter of law, the court was correct when it entered the Order Issuing the Writ.

Finally, the requiring of a bond for a Writ of Restitution is

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[77] Feigenbaum only appealed that portion of the December 22nd order regarding the issuance of the preliminary injunction. Feigenbaum's Appellate Brief, page 4, paragraph 7.

[78] VR January 21, 2011, page 12.

entirely discretionary.

> *...plaintiff shall execute to the defendant and file in court a bond in such sum as the court or judge may order...*[79]

There has been no argument that there was any valid reason for the court to require a bond. Feigenbaum has failed to allege, let alone prove, that the issuance of the Writ on January 7th and without a bond was an abuse of discretion.

V. Did the Trial Court Abuse its Discretion when it Entered the Order Converting the Case to an Ordinary Civil Action?

A. Error Assigned: The Order on Defendant's Motion... Clarifying Case Status.

B. Standard of Review: The order converting the case was an exercise of the court's discretion. Munden v. Hazelrigg[80] established that once the right to possession ceases to be at issue, the matter may be converted to an ordinary civil suit.[81] The court acknowledged the discretion held by the trial court:

> *We also note that the trial court has inherent power to fashion the method by which an unlawful detainer action is converted to an ordinary civil action.*[82]

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[79] RCW 59.12.090.
[80] 105 Wash.2d 39, 45 (1995) *emphasis added.*
[81] Munden *at* 45-46.
[82] Id *at* 47.

C. Discussion: Feigenbaum invited the error he now alleges: He brought the motion to "clarify status of the case," which was objected to by Hall.[83] In that motion, Feigenbaum failed to bring to the trial court's attention all the arguments he is now asserting why the matter should not have been converted. Whether invited error or waiver for failure to assert before the trial court, reversal is inappropriate.[84]

There is no showing that the trial court abused its discretion in converting the case. Possession was no longer an issue since the Writ of Restitution had been entered a year before, Feigenbaum had agreed to an order allowing him to recover his personal property,[85] Hall, in an effort to mitigate its damages, re-let the premises to a third party and Feigenbaum was allowed to stay the action pending discretionary review (which was denied). Most important, Feigenbaum never made any effort to regain possession.[86] Possession was no longer of issue.

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[83] CP 278-288, 324-327.
[84] Nearing v. Golden State Foods Corp., 114 Wash.2d 817, 792 P.2d 500 (1990); King Aircraft v. Lane, 68 Wash. App. 706, 716, 846 P.2d 550 (1993); Bellevue School Dist. v. Lee, *supra*.
[85] CP 255-56.
[86] Feigenbaum never tendered any payment of rent after December 27, 2010 and never brought a single motion to regain possession.

Feigenbaum asserts that the matter could not be conversion because he did not "relinquish" his claim to possession. This is disingenuous, for Feigenbaum never entered a pleading asserting that he still had the right to possession.[87] Instead, he did and continues to assert that the Lease was terminated by Hall's actions. There is no right to possession if the Lease had been terminated. There was no showing that the decision to convert was an abuse of discretion.[88]

Even if there was error, such error was harmless. Nothing happened after conversion that could not have happened had the court limited jurisdiction to just the unlawful detainer statute.

VI. Whether the Award of Damages was Correct.

A. Error Assigned: The Order on Summary Judgment and associated Judgment;

B. Standard of Review: A ruling granting summary judgment is reviewed *de novo.* Because there is no dispute as to

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[87] Even after conversion, Feigenbaum elected to not file a counterclaim asserting a counterclaim for re-possession of the Premises.

[88] Finally, the defendant identifies no harm from this alleged error. Feigenbaum was on notice of the conversion, and was represented by counsel who could advise him as to the right to file counter-claims and pursue other actions once it was a civil case. For whatever reason, Feigenbaum elected not to do so and has shown no damage from such failure. Accordingly, even if the conversion was in error, such error is harmless.

any of the facts, the review is limited to whether the judgment was appropriate as a matter of law.

C. Discussion: Feigenbaum's entire argument is based upon the unsupported proposition that the Lease was terminated because of Hall's legal actions.

i. *No Termination of the Lease Limiting Damages.*

The 3 Day Notice did not terminate the Lease. The Lease specifically provides that Hall holds the right to either:

> *...terminate the Lease and re-enter the Premises, or...**WITHOUT TERMINATING THIS LEASE**, re-enter and relet the premises.*[89]

The 3 Day Notice to Feigenbaum specifically provided that the Lease was not terminated:

> *Vacation and surrender of the premises will not terminate your obligations pursuant to the Lease. Failure to comply fully with the terms and conditions of this notice and the Lease will result in you being in unlawful detainer of the premises described and judicial proceedings will be instituted for your eviction. You are further notified that the Hall reserves its right under any lease agreement, including but not limited to the right to recover rent reserved in the future and other damages.*[90]

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[89] CP 732, Affidavit of Robert Hall in Support of Summary Judgment, exhibit 1, paragraph 21 (emphasis added).
[90] CP 1176-77, Complaint for Unlawful Detainer, Exhibit C.

In light of these uncontested facts, Feigenbaum asserts the Lease was terminated three days after service of the Notice to Pay Rent.[91] There is no statute, case or secondary source that even closely supports this proposition. Feigenbaum's reference to the secondary source even contradicts what Feigenbaum asserts: Professor Stoebuck makes it perfectly clear that termination is permissive and at the option of the landlord.[92]

The courts have resolved this issue — all past and future rent is due to Hall if there is not a termination and the lease provides such a remedy.

> *As has been said, there is nothing illegal or improper in an agreement that the obligation of the tenant to pay all the rent to the end of the term shall remain notwithstanding there has been a re-entry for default; and if the parties choose to make such an agreement there is no reason why it should not be held to be valid as against both the tenant and his sureties*[93]
>
> *...It is only when the forfeiture or surrender is qualified, as in the case of a lease which expressly saves a lessor's right to also recover damages based upon accrued rent (citation), or when the notice of forfeiture communicates to the lessee the lessor's intention to hold the lessee for such damages,*

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[91] CP 204, Feigenbaum's Opposition to Halls' Motion for Summary Judgment, page 6, lines 5-7.
[92] William Stoebuck, Unlawful Detainer as a Means of Termination, 17 Wash. Practice Series, § 6.79.
[93] Metropolitan Nat. Bank v. Hutchinson Realty Co., 157 Wash. 522, 529, 289 P. 56 (1930); Hargis v. Mel-Mad, 46 Wash. App. 146, 730 P.2d 76 (1986).

notwithstanding the forfeiture (citation), that the lessee is not released from liability therefore.[94]

The court's award of rent and damages through the balance of the lease term after service of the Notice to Pay Rent is correct as a matter of law.

ii. The Lease and RCW 59.12.170 Specifically Allow for Award of the Rent/Damages.

Feigenbaum signed a contract that obligated him to the remedy requested by Hall:

> *... or, Lessor may, without terminating this Lease, re-enter said Premises, and sublet the whole or any part thereof for the account of the Lessee upon as favorable terms and conditions as the market will allow for the balance of the term of this Lease and* ***Lessee covenants and agrees to pay to Lessor any deficiency arising from a re-letting of the Premises*** *at a lesser amount than herein agreed to.*

RCW 59.12.170 provides that the landlord is entitled to all damages "occasioned by plaintiff (landlord)", plus all of the rent due.

There was no dispute as to any material fact that Feigenbaum's failure to pay rent was the cause of all of these damages. As a matter of law (the Lease and the statute), Hall was entitled to all damages including the decrease in future rent and the cost of re-letting.

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[94] Heuss v. Olson, 43 Wash.2d 901, 905, 264 P.2d 875 (1953).

VII. Whether Hall Should be Awarded its Attorney's Fees and Costs on Appeal.

The Lease provides for attorney's fees and costs to the prevailing party.[95] In the event Lessor prevails on appeal, Hall requests an award of attorney's fees and costs, pursuant to RAP 18.1.

CONCLUSION

The appeal should be denied and Hall awarded attorneys fees and costs on appeal.

DATED this 30 day of January, 2013.

BELCHER SWANSON LAW FIRM, PLLC

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900 Dupont Street
Bellingham, WA 98225
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Attorney for Respondents

[95] Lease, Paragraph 23. Clerks Papers (CP) 1167-1175.

APPENDIX

SCANNED 6

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WHATCOM COUNTY
WASHINGTON
BY

IN THE SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

ROBERT K. HALL, a single man and DAYLIGHT PROPERTIES, LLC, a Washington limited liability company, Plaintiffs, vs. MATTHEW FEIGENBAUM and JANE DOE FEIGENBAUM, husband and wife and the marital community comprised thereof, Defendants	Case No.: 10-2-03030-8 ORDER DENYING DEFENDANT'S MOTION TO VACATE AND TO DISMISS FOR LACK OF JURISDICTION AND CERTIFICATION FOR APPEAL Hon. Steven J. Mura

THIS MATTER came before the court on August 12, 2011, on Defendant Matthew Feigenbaum's Renewed Motion to Vacate Writ of Restitution and to Dismiss for Lack of Jurisdiction.

The Court reviewed the pleadings and records on file and takes notice of the following procedural history:

1. Defendant personally appeared at the December 17, 2010 show cause hearing and objected to the proceedings based upon lack of personal jurisdiction resulting from improper service of process by mail. The court set the matter over for further proceedings on December 22,

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2010 and allowed the Defendant to submit a written response to Plaintiffs' Summons and Complaint by that date.

2. On December 21, 2010, Defendant articulated his contest to jurisdiction by filing a Notice of Limited Appearance and Motion to Dismiss, together with a supporting Declaration. The parties presented argument at hearing on the matter on December 22, 2010. Defendant's motion to dismiss was not granted and the Court ordered that Defendant pay uncontested amounts of Plaintiffs' claimed damages into the court registry as well as continuing monthly rents during the pendency of the case. Defendant was further orally ordered to file additional briefing on the jurisdictional issues by January 10, 2011 for hearing on January 21, 2011. No written order was entered.

3. After failing to make payment into the court registry for January rent, the Court issued an Order for Writ of Restitution ex parte on January 7, 2011. Defendant had been previously advised in open court that the Plaintiff would be entitled to issuance of a writ of restitution if he failed to pay continuing rent into the court registry.

4. Defendant failed to file briefing on jurisdictional issues by January 10, 2011 and instead filed a Motion for Extension of Time on January 11, 2011 requesting an extension to January 17, 2011. Defendant filed nothing by January 17. Plaintiffs filed their opposition on January 20, 2011. Defendant filed a memorandum on January 21, 2011, the date of hearing. At hearing, the court orally denied Defendant's motion and

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found jurisdiction valid. No written order was entered.

5. Defendant failed to appear for trial setting on February 4, 2011. Plaintiffs moved for an Order of Default and provided notice of hearing to the Defendant. At hearing on March 4, 2011, Defendant failed to appear and the Order of Default was entered by the court. Default Judgment was entered ex parte on March 14, 2011

6. On March 15, 2011, Defendant filed motions asking the court to set aside the Order of Default and to dismiss the matter based upon lack of jurisdiction. Defendant noted a hearing for April 1, 2011 but failed to confirm with the clerk who struck the hearing. Defendant re-noted the hearing for April 22, 2011 but failed to appear when the matter was timely called. The court entered Plaintiffs' proposed order denying dismissal based upon lack of jurisdiction. When the court calendar was completed, Defendant was present in the courtroom and inquired as to the status of this matter. The Court informed the Defendant that the matter was called at the start of the calendar, he was found not to be present and the Plaintiffs' proposed order was signed by the Court.

7. A Praecipe for Execution was issued by the court clerk on April 1, 2011 and Plaintiffs conducted an execution sale on Defendants' personal property on May 26, 2011. Defendant did not attempt to enjoin the sale but personally appeared and voluntarily bid at the sale. Defendant was the high bidder at the sale with a bid of $60,001.00. Defendant paid those sums and the Sheriff deposited the funds into

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the court registry.

8. Counsel appeared on behalf of Defendant on June 6, 2011, and on June 8, 2011, moved to set aside the default judgment, renewed Defendant's motion to set aside the order of default, and moved to dismiss all orders and writs for want of jurisdiction by submitting corresponding pleadings. The parties appeared for hearing on June 24, 2011. At that hearing, the court granted Defendant's motions to vacate the order of default, default judgment and the sheriff's sale, and it ordered all funds still held in the court's registry be disbursed to Defendant. The court withheld ruling on Defendant's remaining motions regarding jurisdiction.

9. As to the motions not ruled upon on June 24, 2011, Defendant re-noted the matter for hearing on August 12, 2011 whereupon this Order issues.

The Court having further heard argument from Murphy Evans, attorney for defendant, and from Jeffery J. Solomon, attorney for plaintiffs. Based on the argument of counsel and the pleadings and files herein, the court makes the following findings:

1. Plaintiffs conducted a diligent search for defendant before securing an order authorizing service by mail.

2. Plaintiffs served the defendant with the 3-Day Notice to Pay or Vacate by posting the notice on the premises unlawfully held and mailing the notice to the defendant at the address of the premises unlawfully held. The

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plaintiffs did not mail the 3-Day Notice to Pay or Vacate to defendant's residence or attempt to serve the 3-Day Notice to Pay or Vacate at the defendant's residence.

3. Defendant was provided sufficient notice of the return date so as to respond to the Summons and Complaint served upon him.

Based upon the above findings, and the pleadings and files filed herein, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Defendant's motion to vacate all outstanding orders and writs, including the writ of restitution, is DENIED.

2. Defendant's motion to dismiss for lack of personal jurisdiction based upon improper service of process is DENIED.

3. Defendant's motion to dismiss for lack of subject matter jurisdiction based upon improper service of the pre-eviction notice and/or insufficient notice of the return date of the summons is DENIED.

4. Defendant's motion for costs and attorney's fees is DENIED.

5. The court certifies that this order involves controlling questions of law as to which there is a substantial ground for a difference of opinion and that immediate review of the order will materially advance the ultimate termination of the litigation.

6. Plaintiffs' motions for trial setting and for entry of discovery order is DENIED pending the outcome of defendant's motion for discretionary review of this order to the Court of Appeals.

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DONE IN OPEN COURT THIS 1 day September, 2011.

Hon. Steven J. Mura

Presented by:

BELCHER SWANSON PLLC

By: _____
Jeffery J. Solomon, WSBA #29722
Attorney for Plaintiffs

Copy Received;

BROWNLIE EVANS WOLF & LEE, LLP

By: _____
Murphy Evans, WSBA #26293
Attorney for Defendant

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