68753-1

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No. 68753-1

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

4105 1ST AVENUE S. INVESTMENTS, LLC,

Respondent,

v.

GREEN DEPOT WA PACIFIC COAST, LLC,

Appellant

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

A. Applicable Standard of Review

Although Appellant Green Depot WA Pacific Coast, LLC ("Green Depot WA") believes that reversal of the trial court's underlying decision would be appropriate even under the abuse-of-discretion standard of review, Appellant accepts Respondent's insistence that the appropriate standard of review here is review *de novo* and appreciates Respondent's clarification in this regard.

B. Respondent Has Conceded the Trial Court's Jurisdiction to Award Fees and Costs to the Prevailing Party.

Contrary to the plain ruling in *Housing Authority of Seattle v. Bin*, 163 Wn.App. 367, 373, 260 P.3d 900 (2011), Plaintiff/Respondent 4105 1st Avenue S. Investments, LLC ("the Landlord") had argued to the trial court that it lacked jurisdiction to decide Green Depot WA's original Motion for Fees.[1] The Landlord now concedes that the trial court did in fact have jurisdiction to decide the underlying Motion.[2] The trial court's jurisdiction thus appears to be no longer in dispute.

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[1] CP 135, 136

[2] Brief of Respondent at 8

C. Green Depot Prevailed in the Action Below.

1. Green Depot prevailed by retaining possession during the entire lease term.

The fact remains that, despite the Landlord's efforts to evict, tenant Green Depot WA remained in possession of the entire leased premises during the entire lease term. Since Appellant and Respondent long ago agreed that the right to possession of the premises is the essence of unlawful-detainer actions (see *Granat v. Keasler*, 99 Wn.2d 564, 571, 663 P.2d 830, *cert. denied*, 464 U.S. 1018, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983)), it is easy to take the step from noting that the Landlord failed to retake possession and that Green Depot WA remained in possession for the entire lease term to acknowledging that Green Depot WA prevailed. In fact, in this factual setting, Green Depot WA could not have been any more successful than it was, and Plaintiff, having achieved nothing it set out to achieve, could not have been less successful.

Respondents' multiple references to the fact that, after the relevant lease ("the Lease") ended, Green Depot WA departed and the Landlord retook possession are irrelevant. Possession of the premises after the Lease expired is not and never has been at issue.[3] Respondents' pleas that

[3] The brief holdover agreement between the parties is similarly irrelevant to our inquiry. See CP 18. That agreement covers a different floorplan than the Lease covers and pertains only to the time period after the Lease here at issue expired.

its post-lease possession somehow diminishes Appellant's prevailing-party status are strained. If an unsuccessful unlawful-detainer plaintiff could successfully feign victory when the tenant moves out at the end of the lease, no tenant could ever prevail in an unlawful-detainer action. Respondent's arguments in this regard find no support in the law or common sense.

2. Respondent has failed to distinguish Washington case law establishing that Green Depot prevailed.

Respondent's efforts to distinguish the relevant case law have been unsuccessful. The decision in *Walji v. Candyco, Inc.*, 57 Wn.App. 284, 787 P.2d 946 (1990), reversed the trial court's denial of fees to the successful tenant in a commercial-lease dispute, noting that "a defendant who 'prevails' is ordinarily one against whom no affirmative judgment is entered." *Id.*, 57 Wn.App. at 288. Respondent has offered no reason why this well-established rule should not apply here. There is certainly no doubt that Green Depot WA had no affirmative judgment entered against it.

Although, as Respondent points out, the *Walji* landlord took a voluntary nonsuit while the Landlord here struck its trial date[4] and

[4] CP 115, 123

proposed to dismiss its action,[5] whatever distinction Respondent means to draw is a distinction in search of a difference. Both the *Walji* landlord and the Landlord here effectively dropped their actions, leaving their tenants in possession of the premises. Underlining the lack of meaningful difference between *Walji* and our case is the fact that when Green Depot WA subsequently moved to dismiss the Landlord's lingering but pointless action, the Landlord did not even oppose dismissal, writing "plaintiff too believes that an Order of Dismissal should be entered."[6]

The Landlord's efforts to distinguish *Hawk v. Branjes*, 97 Wn.App 776, 986 P.2d 841 (1999), are similarly unpersuasive. Respondent contends that "the Landlord here did not throw in the towel,"[7] but that is effectively what the Landlord did by striking its trial date and proposing to dismiss its action. The Landlord threw in any lingering threads of its "towel" when it agreed with Green Depot WA's subsequent Motion to Dismiss.[8] In a further puzzling and ineffective effort to distinguish *Hawk v. Branjes*, Respondent claims that "a decision by the Landlord to quit litigating did not leave a tenant here – Green Depot – in possession of the leased premises," yet that is exactly what the Landlord here did.

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[5] Brief of Respondent at 4

[6] CP 161

[7] Brief of Respondent at 11

[8] See CP 161

Respondent agreed to strike its trial date and proposed to dismiss its action, and Green Depot WA remained in possession of the premises for the entire lease term.

Respondent's efforts to disregard the decision in *Council House, Inc. v. Hawk*, 136 Wn.App. 153, 147 P.3d 1305 (2006), fare no better. Though *Council House* is a residential unlawful-detainer case, Respondent does not explain why that Court's holding that "when a plaintiff takes a voluntary dismissal, the defendant has prevailed for purposes of fees" is not instructive. See *id.*, 136 Wn.App. at 159-160.

Taken together, the relevant cases offer Respondent no opportunity to plausibly deny that where an unlawful-detainer plaintiff fails to evict and the defendant tenant remains in possession throughout the lease term, the tenant has prevailed.

D. As Prevailing Party, Green Depot was Contractually Entitled to its Attorney Fees and Costs.

Neither Appellant nor Respondent was an original party to the Lease.[9] Instead, Respondent took assignment of, and Appellant Green Depot WA assumed, the pre-existing Lease via the Assignment and Assumption of Lease with Consent of Landlord ("the Assignment"),[10] the

[9] CP 103, 104 and 109
[10] CP 45-48

only written agreement between the parties when this action commenced. Paragraph 4 of the Assignment provides:

> 4. Attorney's Fees. If any party commences an action against any of the parties arising out of or in connection with the Lease or this Agreement, the prevailing party or parties shall be entitled to recover from the losing party or parties reasonable attorney's fees and all costs of suit, whether or not the action is filed or prosecuted to judgment.[11]

The original Lease similarly provides for a fee award to the prevailing party.

> 24.11. **Attorney's Fees.** If either party brings an action regarding terms or rights under this Lease, the prevailing party in any action, on trial or appeal, is entitled to reasonable attorneys' fees as fixed by the court to be paid by the losing party. The term "attorney's fees" shall include, but is not limited to, reasonable attorneys' fees incurred in any and all judicial, bankruptcy reorganization, administrative and other proceedings, including appellate proceedings, whether the proceedings arise before or after entry of a final judgment, and all costs and disbursements in connection with the matter.[12]

1. Respondent cannot evade the Assignment between the parties.

The Assignment, by which these parties stepped into the pre-existing Lease, establishes the prevailing party's entitlement to fees "whether or not the action is filed or prosecuted to judgment."[13] Faced with this undeniable attorney-fee language, Respondent has chosen to flee,

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[11] CP 45-46

[12] CP 107-108

[13] CP 45-46

suggesting that this Court disregard that document in its consideration of this appeal.[14]

Respondent's suggestion is unreasonable. The basis for Green Depot WA's Motion for Fees was broader than just §24.11 of the Lease and included the Assignment. Green Depot's Motion requested "an award of its attorney fees and costs as prevailing party under the same contractual and statutory provisions upon which Plaintiff based its claims for fees and costs."[15] The contractual provisions upon which Plaintiff/Respondent based the fee claim in its Complaint and under which Green Depot WA sought fees in its Motion was "the parties' written agreement,"[16] *i.e.*, the Assignment by which the parties had stepped into the pre-existing Lease. In its Motion for Fees, Green Depot WA also relied upon, *inter alia*, "all other pertinent files and records herein,"[17] a category that included the Assignment.[18]

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[14] As a practical matter, Respondent dares not deny the force and effect of the Assignment it asks this Court to ignore. Without that Assignment, Plaintiff/Respondent would have no connection or right to enforce the original Lease and this entire matter would have ended long ago with a motion to dismiss Plaintiff's claims as frivolous. Respondent cannot disavow its legal lifeline.

[15] CP 88

[16] CP 2

[17] CP 91

[18] CP 45-48

2. Final judgment following a trial is not a prerequisite to an award of fees.

Although, in its Response in Opposition to Green Depot WA's Motion for Fees,[19] the Landlord did not dispute the availability of fees to the prevailing party, Respondent now claims that there can be no fee award absent a final judgment. See Brief of Respondent at 13. Respondent's argument, however, ignores the clear language of the Assignment that "the prevailing party…shall be entitled to recover…reasonable attorneys' fees and all costs of suit, **whether or not the action is filed or prosecuted to judgment**."[20] The Assignment postdates the Lease and is the only one of the two documents that is signed by Respondent and Appellant.

Respondent's current argument also ignores and directly contradicts its own arguments to the court below, when it sought a fee award for itself without imposing a final-judgment prerequisite on itself. In its Motion to Show Cause,[21] in its Amended Motion to Show Cause,[22] and again in its Second Amended Motion to Show Cause,[23] the Landlord repeatedly sought an order to show cause "why the relief sought in the

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[19] CP 131-137

[20] CP 45-46 (emphasis added)

[21] CP 4-5

[22] CP 8-9

[23] CP 10-11

Complaint should not be granted,"[24] including "reasonable attorneys' fees as authorized by the parties' written agreement...."[25] At no time when the Landlord was seeking fees for itself without trial did it seem to think a final judgment was a prerequisite to fees. The Respondent's double standard is unappealing.

Respondent also provides no support for its interpretation of §24.11 that the phrase "on trial or appeal" modifies and limits "any action." Respondent simply asserts this to be so. But Green Depot WA reads the same language more reasonably as a list of three circumstances in which fees may be awarded, i.e., an action, a trial or an appeal. In contrast to Appellant's reading, Respondent's effort to restrict fees is inconsistent with the language later in §24.11 that specifically includes as recoverable all fees "incurred in any and all...bankruptcy, reorganization, administrative and other proceedings,"[26] *e.g.*, arbitrations. Respondent's interpretation thus contravenes the practice of Washington courts to avoid interpreting contract provisions to be inconsistent and to instead seek to "harmonize clauses." See *Certain Underwriters at Lloyd's London v. Travelers Property Casualty Co. of America*, 161 Wn.App. 265, 278, 256

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[24] CP 4, 8, 12

[25] CP 2

[26] CP 107-108

P.3d 368 (2011). Appellant's reading appropriately harmonizes the parts of §24.11 of the Lease and is thus preferable.

3. In addition to establishing that it prevailed, Appellant does not need to separately establish that Respondent lost.

Respondent's argument that §24.11 of the Lease establishes a two-part test, requiring proof not only that Green Depot WA prevailed but also, independently, that the Landlord lost, is baseless and may not merit serious response. Not surprisingly, Respondent offers no case law or factual history to support its novel theory. Appellant suspects that there is no such support.

At a conceptual level, it is difficult to envision one party in litigation "prevailing" without the other party necessarily being prevailed over, *i.e.*, losing. Inherent in one party's prevailing is the opposing party's losing. In addition, Respondent's new theory raises the unreasonable possibility of a prevailing party being "entitled to reasonable attorneys' fees as fixed by the court" under the Lease, but there being no one responsible to pay such fees. Such a scenario would eviscerate the Lease's fee-shifting provision, contrary to the provision's entire purpose. Respondent's theory runs counter to the rule that Washington courts read a contract "as an average person would, giving it a practical and reasonable

meaning, not a strained or forced meaning that leads to absurd results." *Certain Underwriters*, 161 Wn.App. at 278 [citation omitted].

4. The separate action for breach of contract is irrelevant to the question of fees in this matter.

The possibility of a separate fee award in the separate breach-of-contract action between these parties has no bearing on the appropriateness of fees in this action. The *Walji* Court addressed this issue and deemed it "essential" to award fees in the action at hand, whether or not the same fee provision might later be at issue in a separate action.

> [I]t is essential to apply the attorney fee provision of the lease at the time of dismissal to effectuate the intent of the parties. If the litigation is renewed, the attorney fee provision might once more come into play and be applied to the plaintiff's benefit. There would be no inconsistency in such a result. This interpretation will inhibit frivolous or badly prepared lawsuits and will protect parties from the expense of defending claims which do not result in liability.

Walji, 57 Wn.App. at 288-289. Consistent with *Walji*, Green Depot WA requests that the Court protect it "from the expense of defending claims which [did] not result in liability." See *id.* at 289.

The pendency of the separate breach-of-contract action also does not alter the fact that Respondent seeks a ruling in this matter that would effectively immunize landlords who file unlawful-detainer actions late in a

lease term from liability for fees. As Appellant's Opening Brief points out, under Respondent's view, a landlord filing an unlawful-detainer action late in a lease term could recover fees if successful (assuming a fee provision in the relevant lease) but would not need to pay any fees if unsuccessful. Such a rule would effectively rewrite bilateral fee-shifting provisions into one-way fee provisions in any unlawful-detainer actions comparable to this one.

II. CONCLUSION

For the above reasons and consistent with relevant Washington law, Appellant Green Depot WA respectfully requests that this Court reverse the trial court's denial of Green Depot WA's Motion for Fees as Prevailing Party, remand for a determination of fees to be awarded and grant Green Depot WA's request under RAP 18.1 for its fees and costs on appeal, in an amount to be determined by subsequent submission.

RESPECTFULLY SUBMITTED this 8th day of March, 2013.

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DECLARATION OF SERVICE

I hereby certify that I am over the age of 18 years and not a party to the above action and that, on the date below, I served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** on the party listed below in the manner indicated:

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DATED: March 8th, 2013.

Marcia Kording

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