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Nos. 63516-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BARCELINO CONTINENTAL CORP, a California corporation,

Defendant/Appellant,

v.

BELLEVUE SQUARE MANAGERS, INC., a Washington corporation

Plaintiff/Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY

RESPONSE BRIEF

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I. INTRODUCTION

This is a straightforward case interpreting an unambiguous commercial lease (“Lease”). The Lease prohibits “store closing” and other distress sales:

NO AUCTIONS OR DISTRESS SALES. . . . No “auction,” “fire,” “bankruptcy,” “going out of business,” “lost our lease,” “moving,” “**store closing**,” “smoke (or other casualty) damage,” or other distress **sales of any nature may be conducted on the Leased Premises**. The violation of this Section shall be a material breach of this Lease and shall **immediately** entitle Landlord to the rights and remedies set forth in Section 16.2.

(CP 917, emphasis added.)

On March 5, 2008, Tenant Barcelino posted signs in the store saying “EVERYTHING MUST GO” and disseminated radio and print advertising announcing a “store closing” (as it had done at other malls in the past). Upon learning of the sale and its advertising methods, Bellevue Square requested injunctive relief from the trial court pursuant to Section 16.2 of the Lease, which states:

Remedies in Default. In the event of any such default or breach by Tenant, Landlord may at any time after any applicable cure period, with or without notice or demand:

. . .

(b) Maintain Tenant’s right in possession, . . . , and to specifically enforce Tenant’s obligations hereunder and obtain injunctive relief from further defaults and breaches.

(CP 911.)

The trial court issued a Temporary Restraining Order. After Barcelino refused to comply and continued its sale, the trial court entered an order of contempt. Ultimately, it also entered a preliminary injunction. Barcelino vacated the premises when the Lease term expired. Barcelino filed a barrage of counterclaims, as well as third party claims against one of Bellevue Square's officers, F. Kemper Freeman, and one of its attorneys, David Nold.

The trial court repeatedly rejected Barcelino's arguments that Bellevue Square's actions to stop the sale violated the Lease and various other laws. Ultimately, the trial court dismissed all of Barcelino's counterclaims and entered a final order on summary judgment. It then awarded Bellevue Square its attorney fees under the Lease.

The Lease unambiguously allows Bellevue Square a procedure through which to immediately protect its interests and avoid the obvious injury connected with "store closing" sales. None of the three trial court judges reaching this conclusion abused their discretion or committed other reversible error.

This Court should affirm the trial court in all respects.

II. STATEMENT OF THE CASE

A. Background on the Parties.

Bellevue Square leases commercial space to over 200 tenants. It is generally recognized among the top 20 shopping centers out of over 53,000 centers of all types in the United States. Bellevue Square has been a premier shopping center with the same ownership at the same location for over 40 years. (CP 878.)

Barcelino was a tenant at Bellevue Square for ten years. It sells men's clothing. It is based out of San Francisco, California, where all of its other stores are now located. Robert Browning was its Vice President and Director of Stores. (CP 336; CP 966.)

B. Barcelino Admits to Holding Lengthy and Profitable "Store Closing" Sales, Which Violate Washington Law.

Barcelino had a store in Rainier Square in Seattle. As Mr. Browning testified, Barcelino began a "store closing" sale at the location in 2006. The Landlord, Unico Properties, took issue with the signage posted in the store, which was different from the signage posted before the "store closing" sale. (CP 977.) Unico sued and obtained a temporary restraining order. (CP 976-977.) However, before Barcelino vacated the premises, it had conducted its "store closing" sale for five months and

quadrupled its revenue during the “sale period.” (CP 979; 981.)

Browning admitted that at the time of this sale, he had no knowledge of Washington’s laws regulating going out of business sales. (CP 981.) However, he also admitted that he learned of them at that time, and thus was aware of them from that point on. (CP 982.)¹ Barcelino also conducted a “store closing” sale at a location in Portland, Oregon. This “store closing” sale lasted for about a year. (CP 982-983.)²

These store closing sales were extremely profitable. For example, Mr. Browning testified that the annual sales of the downtown store was approximately \$500,000 prior to the sale. During the “going out of business sale,” Barcelino sold \$800,000 of merchandise in five months. This translates to at least \$2,000,000 per year at sale prices and possibly as much as \$3,300,000. This equates to a seven fold increase in sales. (CP 980-981.)

¹ Going out of business sales are governed by RCW Chapter 19.178. Such sales are defined to include “closing out sales,” “loss of lease sales”, or any other “description suggesting price reduction due to the imminent closure of the business.” RCW 19.178.010. There are specific registration procedures to be allowed to conduct such sales at all. RCW 19.178.020-050. Even if the statute is followed, no such sale may continue for more than sixty days. RCW 19.178.060.

² Oregon also regulates going out of business sales. They are limited in duration to ninety days. ORS 646A.102.

C. Barcelino Operates a “Barcelino per Donna” Store in Bellevue Square – Governed by a Different Lease.

Barcelino opened a store in Bellevue Square named “Barcelino per Donna” (“per Donna”). This store closed on March 1, 2008, after holding a storewide sale of merchandise. However, both the signs used during the per Donna sale and the operative lease were different than that of the Barcelino store. (CP 1040-1041.)

The per Donna store operated under a short-term lease, far more abridged than Bellevue Square’s standard lease. (CP 1150.) The per Donna lease did not have a Section 26 granting Bellevue Square the authority to immediately enjoin a distress sale. Nevertheless, Bellevue Square objected to the signs and the location of signs used for its sale.

Robert Browning testified:

14 Q There was a sign that went up at Perдона?

15 A Correct.

16 Q That Mr. Bockman [sic] objected to in some fashion or another,

17 correct?

18 A That is correct.

(CP 646.)

The signs were then changed. (CP 646-647.) No advertising was done for that sale, other than a postcard to customers (which was not disclosed to Bellevue Square). (CP 648.) Based on the applicable Lease

and the facts known to Bellevue Square, it took no further action with respect to per Donna and it is uncontested that no lawsuit was initiated with respect to that store.

D. Barcelino Commences an Improper “Store Closing Sale” at Bellevue Square.

On March 5, 2008, Barcelino began holding what it called a “Store Closing Sale.” It advertised the sale with large signs and posters on the leased premises, claiming “EVERYTHING MUST GO.” (CP 48, emphasis in original.)

Barcelino sent out a news release to customers stating that Barcelino was closing the Bellevue Square store because Barcelino had “lost its Lease”. (CP 31.) In bold lettering, the news release announced Barcelino’s “**Store Closing Sale**”. (CP 31, emphasis in original.) It announced that Barcelino “will sell off and liquidate the entire store inventory at our Bellevue location.” (CP 31.)

Barcelino made no effort to comply with Washington law governing “going out of business” sales; Robert Browning claimed (despite the language in his own signage and advertising) that he did not need to do so because it a “store moving” sale and not a “store closing” sale. (CP 758.)

As with Barcelino's other "store closing" sales, the sale at Bellevue Square was immensely profitable. Barcelino averaged approximately \$4,000 per day in sales prior to its sale. According to Browning, the sale ran from March 5 to March 17. (CP 506.) Browning testified that the store's revenues during that period were \$258,309; an average of \$19,100 per day. (CP 506.) Barcelino's motives in flouting the Lease and Washington law are clear: sheer greed.

Under Section 26 of the Lease, this breach entitled Bellevue Square to immediate relief:

NO AUCTIONS OR DISTRESS SALES. Landlord and Tenant acknowledge that Tenant's use of the Leased Premises as a continuing business in compliance with the provisions of this Lease specifically including but not limited to the terms and provisions of Article 5 above is an essential part of the bargained-for consideration of this Lease. Tenant further acknowledges that its failure to comply with the terms of Article 5, including the failure to maintain the business within the Leased Premises as a going concern, will have a material adverse impact on Landlord and the other tenants of the Shopping Center. Therefore, it is an express condition and part of the consideration of the Lease that Tenant shall not conduct or permit to be conducted any sale by auction upon or from the Leased Premises, whether the auction is voluntary, involuntary, pursuant to any assignment for the payment of creditors, or pursuant to any bankruptcy or other insolvency proceeding. **No "auction," "fire," "bankruptcy," "going out of business," "lost our lease," "moving," "store closing," "smoke (or other casualty) damage," or other distress sales of any nature may be conducted on the Leased Premises.** The violation of this Section shall be a material breach of this Lease and shall **immediately** entitle Landlord to the

rights and remedies set forth in Section 16.2.

(CP 917, emphasis added.)

The Lease governing Barcelino's operations at Bellevue Square clearly prohibits any auctions or distress sales. The term "distress" in the heading is a term of art. Further, the Lease specifically avoids any possible confusion arising from a strict, literal reading of a heading when it provides in Section 30.18:

Captions. Any section or paragraph titles or captions are for convenience only and shall not be deemed to define, limit or otherwise modify the scope and intent of this Lease or any provision thereof.

(CP 924.)

Despite being told to cease operating and advertising the sale by Bellevue Square, Barcelino continued to do so. (CP 878.)

E. Bellevue Square Enjoins the Store Closing Sale with a Temporary Restraining Order.

When counsel for Bellevue Square entered the store to speak with Robert Browning on March 12, 2008, there were multiple signs on the premises with the words "store closing" and "everything must go" on them. (CP 8; CP 52.) On March 13, 2008, Bellevue Square informed Barcelino in writing that it intended to enjoin the improper sale. (CP 40-42.) Barcelino received this notice after being asked to remove the signs

and stop holding the store closing sale immediately. Barcelino refused.³ Barcelino also received appropriate notice of the hearing, and service of the summons and complaint, by being served with the pleadings at the premises.

On March 14, 2008, Bellevue Square commenced a lawsuit and moved for a Temporary Restraining Order (“TRO”). (CP 928.) Barcelino was present at the hearing when Bellevue Square sought the TRO ex parte.⁴ The TRO was granted, conditioned on a \$50,000 bond. (CP 7.)

F. An Error Occurred with Respect to the Bond, but It Was Timely Corrected and a Bond Retroactively Valid Was Posted, Obviating Any Potential Damage Caused by the Error.

For four weeks, there was a discrepancy between the amount of the TRO bond ordered by the Court (\$50,000) and the amount of the bond issued (\$10,000). (CP 7.) At the TRO hearing, Bellevue Square’s attorney David Nold believed that he had the \$100,000 bond authority customarily granted Bellevue Square by Parker, Smith & Feek (“PSF”), and therefore volunteered to post a \$50,000 bond. (CP 216.) Accordingly,

³ Barcelino has repeatedly maligned Bellevue Square attorney David Nold with regard to his conversation with Barcelino employees and Mr. Browning on March 12, 2008. Barcelino went as far as to sue Mr. Nold personally, only to have all claims against him summarily dismissed. (CP 930.)

⁴ Barcelino alleges, without any evidence whatsoever, that the Judge was “handling a busy ex parte calendar that day,” implying that a hectic courtroom prevented the Court from addressing the motion effectively. (Opening Brief, p. 18.) In fact, the courtroom was empty except for counsel for both parties.

Judge Halpert ordered bond in that amount. (CP 13.)

The bond has two parts. The first part is the actual bond, which states that the amount of the bond is \$10,000. (CP 13.) The second part is the "order" portion, which states the amount of the order set by the Court. Significantly, only this second part was changed to \$50,000, to correctly comply with the court's order. This was done prior to obtaining Judge Halpert's signature. (CP 216.) Here is the bond itself, as found in CP 13:

Bond No. 023-011-832

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF King

Bellevue Square Managers, Inc. No. 08-2-09274-7 SEA

a Washington corporation Plaintiff TEMPORARY RESTRAINING ORDER BOND

Barcelino Continental Corp.

a California Corporation Defendant

KNOW ALL BY THESE PRESENTS, That we, Bellevue Square Managers, Inc.
as Principal Barcelino Continental Corp. and Liberty Mutual Insurance Company
a corporation organized and existing under the laws of the State of Massachusetts, and authorized
to transact business in the State of Washington, as Surety, are held and firmly bound unto the above named Defendant
Barcelino Continental Corp.

in the full and just sum of Ten Thousand Dollars And Zero Cents
Dollars (\$ 10,000.00) lawful money of the United States, for the payment of which well and truly to be made, we
hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of March, 2008.

WHEREAS, the above named Plaintiff Bellevue Square Managers, Inc., has
this day filed suit in the above entitled Court against the Defendant Barcelino Continental Corp. above named, and has applied for a temporary
restraining order against the Defendant Barcelino Continental Corp. above named, and, WHEREAS, the Court has by its order heretofore entered herein and
fixed the bond to be given herein in the sum of 50 Thousand Dollars And Zero Cents
50,000.00 Dollars (\$ 50,000.00);

NOW, THEREFORE, if the said Principal Bellevue Square Managers, Inc.
shall pay all damages and costs which may accrue by reason of the wrongful issuance of said temporary restraining order, not exceeding,
however, the penalty of this bond, then this obligation to be null and void, otherwise to be and remain in full force and effect.

Bellevue Square Managers, Inc. (Seal)
Principal

Liberty Mutual Insurance Company (Seal)
By Karen P. Daver
Karen P. Daver

Approved this 14 day of March, A.D. 2008

J. Halpert
Judge

Thus, rather than having engaged in fraud with respect to the bond, Mr. Nold's interlineations actually rendered the order portion accurate; he was simply mistaken with respect to the amount of bond authority granted to him by PSF as of that morning. (CP 216.)

When this mistake was discovered, PSF promptly agreed to increase the stated bond amount to \$50,000 and apply it retroactively to the date of the original bond. (CP 227.)

Any lingering ambiguity was clarified on May 14, 2008, when the Court recognized that the Preliminary Injunction was effectively entered on March 25, 2008; a date selected by Barcelino. (CP 363-365.) At Barcelino's request, the Court also required Bellevue Square to increase the amount of the bond to \$300,000, with a retroactive effective date to March 25, 2008, as reflected in Barcelino's proposed order, which was used by the trial court. (CP 364.) This increase of the bond amount was ordered after Barcelino realized that its remedies would be limited to the bond amount. Barcelino then successfully argued that the bond should be increased. (CP 364.)

G. Barcelino Violates the TRO and the Trial Court Enters an Order of Contempt.

Despite the entry of a TRO, Barcelino continued to post signs in violation of the Lease and to air radio advertising of the store closing sale.

(CP 1208.) Consequently, Bellevue Square sought and obtained an Order of Contempt against Defendant on March 17, 2008. (However, Bellevue Square never sought monetary sanctions against Barcelino for its contempt or other violation of the TRO.) Barcelino was represented by counsel at this hearing. (CP 63-64.) Before the hearing, Mr. Browning stated that he had been told that the signs could remain by his counsel. Counsel for Barcelino, Robert Kaufman, appeared at the hearing. Another attorney, Michael Zeno, filed a Notice of Appearance for Barcelino two days later. (CP 73.)

H. Barcelino Violates the Order of Contempt, and the Trial Court Enters a Preliminary Injunction with Formal Findings of Fact and Conclusions of Law.

Despite the entry of the Contempt order, another radio commercial advertising a “store closing sale” aired on the day after the order for contempt was issued. (CP 1208.) Material obtained from a subpoena issued to Clear Channel was particularly telling of Barcelino’s intentions; it showed 245 and 487 radio minutes purchased from Clear Channel on two different stations, advertising Barcelino’s store closing sale. (CP 205-206.)

On March 25, the trial court entered a preliminary injunction prohibiting Barcelino’s store closing sale. (CP 940-943.) The order clarified that *any improper advertising* was prima facie evidence that the

store closing sale was continuing to take place. (CP 942.) Therefore, any advertising of a store closing sale was also prohibited. However, the parties agreed to a particular sign design that could be used at Barcelino. (CP 942.)

I. The Trial Court Affirms the Preliminary Injunction.

On May 14, 2008, the Court heard oral argument from the parties regarding the sufficiency of the bond and the validity of the temporary restraining order and preliminary injunction. After reviewing the parties' briefs, the Court found that all preliminary relief was appropriate and correct. (CP 928-929; CP 984-985.) At the hearing, Barcelino argued that there was no evidence regarding any actual or substantial injury to Bellevue Square. However, and very importantly, Judge McBroom stated this issue was argued and included language addressing injury squarely in the order. During the hearing he stated:

14 MR. ZENO: Then Finding I which says:
15 Allowing a tenant to violate the lease and conduct a
16 store closing sale will result in actual and substantial
17 injury to plaintiff.

18 I don't think there is any finding that you
19 have any evidence before you and have ever had any
20 evidence before you in this proceeding of actual and
21 substantial injury to plaintiff.

22 THE COURT: That was argued, but there was no
23 testimony. I don't know if you take testimony. I
24 remember the argument that Mr. Nold made on that.

25 I do remember signing this injunction. I
26 signed it on the basis of the pleadings I read in my

27 conviction that Barcelino was outside the plain language
28 of the lease.

(CP 984-985.)

Contrary to Barcelino's assertion that Judge McBroom "opined" during the hearing that Bellevue Square would not be harmed⁵, Judge McBroom signed an order and added language that, in fact, Barcelino's store closing sale could result in injury to Bellevue Square. (CP 365.)⁶

In its Motion to Dissolve the Preliminary Relief, Barcelino argued that the restraining order, and thus the Order of Contempt and Injunction itself, were procured by fraudulent behavior by Mr. Nold. The Court rejected that argument.⁷

At the May 14, 2008 hearing, Barcelino also argued that Bellevue Square breached the lease by not providing an adequate "20-day" cure period. The Court denied Barcelino's request to dissolve the injunction. (CP 929.)

⁵ Opening Brief, p. 21.

⁶ In addition, the Lease expressly provides that the parties each stipulate that a distress sale will have a "material adverse impact on Landlord and the other tenants of the Shopping Center." (CP 95.)

⁷ The Court specifically stated at the May 14, 2008 hearing that Mr. Nold "is a well reputed lawyer, and he is not going to forge any bond or deliberately mislead the Court or commit any fraud." (CP 984-985.)

J. Barcelino Files Frivolous Counterclaims and Third Party Claims.

On March 28, 2008, Barcelino filed an amended answer asserting multiple counterclaims against Bellevue Square and multiple third party claims against Mr. Nold and F. Kemper Freeman. Barcelino asserted breach of contract, wrongful preliminary relief and tortious interference against Bellevue Square. Against Mr. Freeman and Mr. Nold, Barcelino asserted fraud and civil conspiracy. (CP 281-292.)

K. The Trial Court Denies Summary Judgment and Dismisses Barcelino's Third Party Claims Against David Nold and F. Kemper Freeman.

On January 2, 2009, the Court entered an order granting Barcelino's motion to voluntarily dismiss the claims against Mr. Nold without prejudice, and the trial court *sua sponte* dismissed the claims against Freeman with prejudice. (CP 959-960.) The trial court ultimately denied Bellevue Square's motion for summary judgment with respect to all the counterclaims, despite the fact that during the hearing even Barcelino's counsel made statements strongly suggesting that at least two of the counterclaims should be dismissed:

12 MR. BERNSTEIN: That's the second cause of
13 action. Well, I have to be honest with you, these next
14 two, I want to call Mr. Zeno⁸ and say, gone, gone. Civil
15 conspiracy, gone.

⁸ Barcelino was on its third attorney by this point. (CP 1004.)

16 THE COURT: Yes, there's nothing there.

(CP 988.)

Then, the trial court specifically expressed disapproval at the entirety of the complaint against Bellevue Square:

1 THE COURT: This is the weirdest pleading I
2 have ever seen. I would like you to start all over. If
3 you have a lawsuit, I would like the issue of summary
4 judgment as requested by Mr. Nold, and then have you
5 start over, **if you have a claim against Bellevue Square**
6 **or against Mr. Nold personally, and start all over** and
7 give him a chance to answer your specific claim instead
8 of all this, you know, the complaint comports to the
9 proof or whatever.

(CP 990-991.)

Finally, the trial court explicitly stated that it wanted to sign Bellevue Square's order dismissing the claims against that entity:

6 THE COURT: I'm trying to puzzle out what kind
7 of an order I can sign here to preserve your case and to
8 grant his motion for summary judgment. That's what I
9 want to do.

(CP 994-995.)

During the hearing, Judge McBroom stated that more discovery needed to take place and that the litigation, save for the injunctive relief previously granted, needed to begin anew:

THE COURT: Okay, you asked me what I wanted
3 to see here. What I want to see is an actual viable
4 lawsuit pled and answered and discovery proceeds. If

5 it's there, it's there. But right now there is no
6 notice as to what anybody is being sued for that I can
7 see.

For whatever reason, Bellevue Square's summary judgment was denied. The trial court ordered both parties to move forward with discovery so that their cases could be presented at a later time. (CP 991.)

L. The Court Enters Summary Judgment Dismissing All Counterclaims and Declining to Vacate or Dissolve Any Prior Order of Injunctive Relief; Because the Store Closed, the Preliminary Injunction Became Moot and Is No Longer in Effect.

After additional discovery, Bellevue Square filed a second motion for summary judgment to be heard by the newly assigned judge, the Honorable Chris Washington. The second motion for summary judgment included a statement of facts presenting the previous motion for summary judgment, including the date of oral argument, the order itself, and the additional facts discovered through the numerous depositions that had taken place since October of 2008. (CP 997-1011; CP 928-930.)

In its summary judgment response, Barcelino joined in Bellevue Square's request to interpret the Lease as a matter of law. "The court should find that as a matter of law BSM was required to give Barcelino notice in the manner required by the lease before taking action to enforce that agreement." (CP 1157.) "The court can and should find as a matter of law that BSM was required to give 20 days' notice to Barcelino in

writing . . .” (CP 1161.)

The Court entered summary judgment holding that Bellevue Square did not have a duty to give Barcelino a 20-day notice to cure period as a matter of law. (CP 1314-1315.) The trial court dismissed all of Defendants’ counterclaims. (Id.) As Bellevue Square sought no further relief, a final order was entered. (Id.)

M. The Trial Court Awards Attorney Fees and Costs to Bellevue Square.

On June 5, 2009, the Court granted Bellevue Square \$126,757.58 in attorneys’ fees and costs. (CP 1412-1413.) It later entered findings of fact and conclusions of law to support that award. (CP 1644-1647.)

III. ARGUMENT AND AUTHORITY

A. Standard of Review.

Summary judgments are reviewed *de novo*. *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). The interpretation of an unambiguous contract is a question of law and reviewed *de novo*. *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006). The parties’ intent in an unambiguous contract is determined by the contract language itself. *Barnett v. Buchan Baking Co.*, 45 Wn. App. 152, 159, 724 P.2d 1077 (1986), *aff’d*, 108 Wn.2d 405, 738 P.2d 1056 (1987).

In reviewing the grant of a preliminary injunction or other preliminary equitable relief, an appellate court applies the abuse of discretion standard. A trial court abuses its discretion when its decision is based on untenable grounds, is manifestly unreasonable, or is arbitrary. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 153, 157 P.3d 831 (2007).

Whether a contract or statute authorizes an award of attorney fees is a question of law reviewed de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 210 P.3d 318 (2009).

B. The Trial Court Correctly Ruled That Barcelino’s Store Closing Sale Violated Section 26 of the Lease and Granted Summary Judgment to Bellevue Square.

The Lease is unambiguous as a matter of law. However, as it is a matter of *de novo* review, analysis of its unambiguity is necessary.

Commercial leases are interpreted and construed as express contracts. *Elliott Bay Seafoods v. Port of Seattle*, 124 Wn. App. 5, 98 P.3d 491 (2004). “A trial court may resort to parol evidence for the limited purpose of construing the otherwise clear and unambiguous language of a contract in order to determine the intent of the parties.” *Bort v. Parker*, 110 Wn. App. 561, 573, 42 P.3d 980, *review denied*, 147 Wn.2d 1013, 56 P.3d 565 (2002) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)). Extrinsic evidence is admissible “for the purpose of aiding in

the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument.” *Berg*, 115 Wn.2d at 669. The intent of the parties in an unambiguous contract is determined by the language of the contract itself. *Barnett*, 45 Wn. App. at 159.

The Lease governing Barcelino’s operations in Bellevue Square clearly prohibits “distress sales.” Despite Barcelino’s lengthy argument that Barcelino was not in any economic distress, and that therefore the store closing sale could not have been a distress sale, the term “distress” in the heading of Section 26 is a term of art. The Lease clarifies any confusion possibly stemming from a heading in Section 30.18. That section states:

Captions. Any section or paragraph titles or captions are for convenience only and shall not be deemed to define, limit or otherwise modify the scope and intent of this Lease or any provision thereof.

(CP 924.)

Section 26 is entitled “No Auctions or Distress Sales”. It subsequently explains that the intent of the Lease through this section is to Bellevue Square, and lists examples of tenant actions that are considered distress sales and thus entitle Bellevue Square to immediate relief. Included as “distress sales” are auction, fire, bankruptcy, going out of business, lost our lease, moving and store closing sales. (CP 917.) In this

case, Barcelino advertised through mailers, radio advertising, newspapers and in-store signage that it was selling all of its merchandise because it “lost its Lease.” (CP 31.) It is irrelevant whether Barcelino was actually in financial “distress;” it conveyed distress to the public through its signage and advertising. The notion that its dishonesty in making those statements should somehow validate its actions is incongruous.

For obvious reasons, there was no cure period for a breach of Section 26. It provides for **immediate** relief. Section 16.2 of the Lease states that the remedies provided in that section may be pursued **after** “any applicable cure period;” i.e., if there is one. Here, Section 26 clearly states that any violation of it “shall be a material breach of this Lease and shall immediately entitle Landlord to the rights and remedies set forth in Section 16.2.” (CP 917.)

The Lease is unambiguous with respect to the requirements of written notice and the opportunity for a tenant to cure specific breaches. There is no need to construe the Lease in any particular light - either against or in favor of the Landlord. There is no ambiguity or contradiction between Section 26 and Section 16.1.

While Section 16.1 states that Barcelino “shall cure any default under this Section 16.1(c) [failure to perform] within ten (10) days” after receiving written notice, and Barcelino has repeatedly urged the

applicability of this language to their improper sale, Barcelino has completely ignored the next seven words in Section 16.1(c). That section reads as follows:

Tenant shall cure any default under this Section 16.1(c) within ten (10) days (**except as otherwise provided in this Lease**).

(CP 92, emphasis added.)

The Lease clearly provides for other cure periods; or, as in the case of Section 26, no cure period.

Washington courts have repeatedly upheld situations where no notice to cure a default provision is clearly delineated in a writing. *See Coast to Coast Stores v. Gruschus*, 100 Wn.2d 147, 667 P.2d 619 (1983); RCW § 19.100.180(2)(j) (providing that in certain circumstances the franchisor may terminate a franchise without giving notice or an opportunity to cure the default).

In *Gray v. Gregory*, 36 Wn.2d 416, 218 P.2d 307 (1950), cited by Barcelino, a lease referred to defaults generally, and the tenant's actions were curable. The court there found that the landlord was not entitled to termination on account of a clear notice-to-cure-default provision in the lease applicable to the default at issue. *Gray*, 36 Wn.2d at 419. Here, however, Section 26 is specific as to the default and the timing of available remedies.

Additionally, despite Barcelino's contention that the trial court erred in interpreting the Lease because it constituted a question of fact, Barcelino argued in its response to the motion for summary judgment that it was a question of law. "The court should find that as a matter of law BSM was required to give Barcelino notice in the manner required by the lease before taking action to enforce that agreement." (CP 1157.) (See also CP 1155, where Barcelino rhetorically asks: "shall the court enter in order in which it finds that as a matter of law that BSM was required to give Barcelino notice in the manner set forth in the parties [sic] lease.")

The Lease did not require Bellevue Square to sit idly for ten days while Barcelino conducted a distress sale in patent violation of the Lease. Such an interpretation of the Lease defies both its plain language and common sense. The Lease gave Bellevue Square the right to seek immediate relief as a matter of law. All of the judges who so concluded did so correctly. They should each be affirmed.

C. The Trial Court Did Not Abuse Its Discretion in Entering a TRO, Entering a Preliminary Injunction, or Denying Barcelino's Motion to Dissolve the Injunction; Notwithstanding the Error in the Bond.

1. The Trial Court Did Not Abuse Its Discretion in Entering the TRO or the Preliminary Injunction.

Barcelino fails to establish that the trial court abused its discretion in entering the Temporary Restraining Order or Preliminary Injunction.

Barcelino cites *Turner v. Walla Walla*⁹ for the proposition that the “underlying order(s)” contained “deficiencies on their face.” (Opening Brief, p. 45.) Barcelino offers no additional authority in support of this position. Neither *Turner* nor any other authority demonstrate that the trial court abused its discretion in entering the preliminary relief.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

CR 65(d).

There is no dispute that Barcelino had prior notice of the hearing. (CP 40-42.) Thus, CR 65(a) was satisfied. As for the elements of CR 65(d); they were also satisfied. The TRO was specific in the actions being restrained and did not purport to bind anyone other than the Defendant. (CP 6-7.)

Contrary to Barcelino’s assertion, there is no requirement in CR 65(d) that a finding of immediate and irreparable harm be included on the record. See CR 65(d); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 62, 738 P.2d 665 (1987).

⁹ 10 Wn.App. 401, 517 P.2d 985 (1974).

The argument that there was a lack of “immediate and irreparable harm” is additionally groundless based on the language of the Lease itself. As set forth above, Barcelino agreed in writing that holding a distress sale would have a “material adverse impact on Landlord and the other tenants of the Shopping Center.” (CP 95.) Finally, the trial court expressly addressed the “harm” issue in its order denying the motion to dissolve the preliminary injunction. (CP 365.)

Barcelino appears to conflate CR 65(d) with CR 65(b). The latter rule does require a showing that “immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party can be heard in opposition.” CR 65(b). However, this only applies to a TRO without notice; as set forth above, adequate notice was provided to Barcelino prior to the hearing.

Barcelino seems to argue that the TRO violates CR 52(a), because it does not delineate formal findings and conclusions. However, this position is internally inconsistent. It is true that CR 52(a)(2)(A) requires findings and conclusions when “granting or refusing temporary injunctions”. However, CR 52(a)(5)(C) specifically states that formal findings and conclusions are not necessary “on the issuance of temporary restraining orders issued ex parte”.

Here, Barcelino took great pains to establish that the original TRO

was entered *ex parte*. Thus, by the unambiguous language of the rule, CR 52(a) does not apply to the TRO. The notion is dubious that a judge would be so oblivious to the applicable standard that the court would sign a TRO without findings and conclusions if they were necessary.

The preliminary injunction entered by the Court eleven days later specifically contains the findings and conclusions required by CR 52(a). (CP 188-190.) Thus, Barcelino's oblique reference to the insufficiency of the "order(s)" does not withstand analysis.

Even if the Court were to somehow find the original TRO deficient in some technical respect, the rationale in *Turner* would not apply to compel a reversal. In *Turner*, the court's articulation of the need for remand demonstrates why it does not apply here:

we are unable to determine the basis for the trial court's ruling from the record before us. We cannot determine whether the court abused its discretion in entering that order. It is necessary to remand this action for the taking of additional testimony, if necessary, the entry of findings of fact and conclusions of law, and the required inclusion of reasons within the order granting a temporary injunction. Only then would this court be in a position to review an alleged abuse of the trial court's discretion.

Turner, 10 Wn.App. at 405.

Here, there is ample basis in the record to support the granting of the temporary injunction. Less than two weeks later, both sides fully briefed the issue and an order with formal findings and conclusions was

entered. There is no prejudice from any alleged deficiency in the original order. The trial court unambiguously found a violation of the Lease and the other requirements for the entry of injunctive relief.

2. Barcelino Never Argued the Failure to Comply with CR 52 and CR 65 Below, Despite Filing a Motion to Dissolve the Preliminary Injunction on Other Grounds; Thus the Argument Should Be Disregarded Pursuant to RAP 2.5.

RAP 2.5(a) governs errors raised for the first time on appeal. It provides that: “the appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). The rule then enumerates three exceptions, none of which apply.

Here, Barcelino never argued the insufficiency of the TRO. That this argument was never raised below is rendered most evident by Barcelino’s “Motion to Dissolve Preliminary Injunction.” (CP 311-326.) Barcelino was focused below mainly on two arguments: the alleged failure to post an appropriate bond and its alleged entitlement to a cure period. (See CP 314 for a concise list of the “issues” raised in that Motion.) Barcelino only addressed one other issue; alleging that the TRO was insufficient solely because a finding of “harm” was required. That argument constituted less than two pages in the motion and cited no Washington authority. (See CP 320-321.) (That argument is addressed above.)

Had Barcelino raised this argument below, the trial court could have squarely considered whether a TRO requires formal findings and conclusions, or whether the order was otherwise deficient. Barcelino failed to do so. As such, this Court should decline to consider those arguments now.

3. The TRO Is Not Invalid Based on the Error Connected with Entering the TRO Bond.

Civil Rule 65(c) requires the posting of a bond before a temporary restraining order is issued. It states:

Except as otherwise provided by statute, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

CR 65(c); *Cedar-Al Prods. v. Chamberlain*, 49 Wn. App. 763, 748 P.2d 235 (1987).

Similarly, RCW 7.40.080 provides:

No injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such a sum as shall be fixed by the court or judge granting the order, with surety to the satisfaction of the clerk of the superior court, to the adverse party affected thereby, conditioned to pay all damages and costs which may accrue by reason of the injunction or restraining order.

RCW 7.40.080.

The purpose of CR 65(c) and RCW 7.40.080 is to provide indemnification for parties who are wrongfully restrained or enjoined. A

party may seek indemnification from the bonding company only for the damages it sustained, if any, during the period the TRO or injunction was in effect. *Evar, Inc. v. Kurbitz*, 77 Wn.2d 948, 468 P.2d 677 (1970). This provides a remedy to the restrained party if it is later determined restraint was erroneous, in the sense that it would not have been ordered had the court been presented all the facts. *American Bible Society v. Blount*, 446 F.2d 588 (3d Cir. 1971). It is an equitable principle required by statute and enforced by the courts.

The amount of such recovery for wrongfully suing out a TRO or preliminary injunction “is limited to the face amount of the bond plus interest from the date that the action is brought”, absent a showing that the complainant obtained the TRO or preliminary injunction maliciously or in bad faith. *Jensen v. Torr*, 44 Wn. App. 207, 211, 721 P.2d 992, review denied, 107 Wn.2d 1004 (1986). The underlying public policy “is to encourage ready access to courts for good faith claims.” *Jensen*, 44 Wn. App. at 211.

Plaintiff initially obtained a \$10,000 bond. Four weeks later, PSF issued a surety rider which increased the amount of the bond retroactively as of March 25, 2008 (the date selected by Barcelino) to the full \$50,000; and even increased it to \$300,000. The rider has been filed with the Court. PSF acknowledges that the rider is effective retroactively and thus grants

Barcelino full protection. The relation back of insurance coverage is well within PSF's authority and is recognized by law. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 339, 779 P.2d 249 (1989); *Evans v. State Farm Mut. Auto. Ins. Co.*, 16 Wn.App. 704, 707, 559 P.2d 574 (1977).

Barcelino cites no authority that compels a mechanical application of these rules beyond the purposes of justice that underlie them.

To frame the issue another way, there is adequate grounds for the Court to deem the original bond to have been reformed to conform with the original intent of its contracting parties; Bellevue Square and PSF. "A party to a contract is entitled to reformation of the contract if either there has been a mutual mistake or one party is mistaken and the other party engaged in fraud or inequitable conduct." *Washington Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521, 525 886 P.2d 1121 (1994).

Here, the record is clear that there was a mutual mistake regarding the amount of the bond. The bonding company and Bellevue Square stand behind the original intent to comply with the trial court's order that a \$50,000 bond be entered. Other than the delay in posting the appropriate bond amount, Barcelino points to no prejudice that would compel reversing the TRO. Even though Barcelino was found to be in contempt of court, no sanctions were sought or issued. Thus, every conceivable prejudice arising from that defect has been avoided or corrected. It is

simply trying to use the error to achieve a manifestly unjust result; the subversion of the Lease and a chance to obtain damages from Bellevue Square for attempting to enforce its Lease to prevent a distress sale.

The purpose behind the rules has been effectuated and no prejudice was suffered by Barcelino. Thus, as a matter of law, the TRO bond is a valid \$50,000 bond.

4. Bellevue Square Had No Adequate Remedy at Law.

Barcelino argues that Bellevue Square had an adequate remedy at law for Barcelino's holding of a "store closing sale." Barcelino fails to articulate what that remedy could possibly be.

In fact, as the parties agreed *ex ante* in signing the Lease, there is no way for damages to render Landlord or its other tenants whole when a tenant conducts a "store closing sale." The harm is impossible to quantify with precision. A failing tenant communicates failure of the entire shopping center and its other tenants. One store is reaping huge revenues, only to leave dissatisfied customers without recourse if the goods are deficient. Such circumstances leaves customers with a negative impression of the entire shopping center and the other stores in it.

By even making this argument, Barcelino reveals its bad faith and provides insight into its past practices. It believes it should have been permitted to hold its "Store Closing Sale," and then pay whatever damages

the Landlord could prove out of its massive profits. The remaining tenants, whose interests the Landlord is charged with protecting through regulation of all tenants, receive nothing.

Barcelino fails to cite any authority or coherent argument that Bellevue Square had an adequate remedy at law. This assertion should be rejected. The equitable relief was appropriately entered.

D. Denial of Bellevue Square's First Motion for Summary Judgment Did Not Preclude the Filing and Granting of a Second Motion for Summary Judgment.

LR 7(b)(7) states that:

No party shall remake the same motion to a different judge without showing by affidavit what motion was previously made, when and to which judge, what the order or decision was, and any new facts or other circumstances that would justify seeking a different ruling from another judge.

KCLCR 7(b)(7).

When Bellevue Square filed its Second Motion for Summary Judgment with Judge Washington, it: 1) made clear that a previous motion for summary judgment had been argued; 2) presented a copy of the order signed by Judge McBroom; and 3) included all new information discovered through the additional depositions and discovery requests. (CP 1003-1004.) Bellevue Square faithfully complied with this rule and was well within its rights to present a second motion for summary judgment. Barcelino cites no authority that a denial of summary

judgment has any res judicata effect or otherwise impacts later motions; in fact, the law unambiguously holds to the contrary. *Zimny v. Lovric*, 59 Wn. App. 737, 739, 801 P.2d 259 (1990).

Judge Washington understood this and ruled accordingly and correctly.

E. Barcelino’s Reference to Bellevue Square’s “Standard Procedures” for Addressing Signage Issues Is Tantamount to An Argument that Bellevue Square Waived Its Right to Enforce Its Lease Through Prior Conduct; an Argument Unsupported by Law or Fact and Not Raised Below.

Barcelino has repeatedly argued that the Lease did not allow Bellevue Square to enjoin a distress sale, or that it required notice to do so. Now, for the first time on appeal, Barcelino argues that “extrinsic evidence” demonstrates that “BSM’s treatment of Barcelino was an abnormality and a departure from BSM’s lease-guided behavior.” (Opening Brief, 36.)

This new argument posits that, even if the Lease entitled Bellevue Square to obtain this relief, its past practices somehow constitute a waiver of Bellevue Square’s rights. This argument should be rejected.

Waiver is the intentional abandonment or relinquishment of a known right. It must be shown by substantial evidence of unequivocal acts or conduct showing intent to waive, and the conduct must also be inconsistent with any intention other than to waive. *Guillen v. Pierce*

County, 127 Wn. App. 278, 285, 110 P.3d 1184 (2005). The party alleging waiver as the burden of proving it. *Id.* (citing *Jones v. Best*, 134 Wn.2d 232, 242, 950 P.2d 1 (1998)).

Here, there is no evidence in the record to establish that Bellevue Square intentionally abandoned or relinquished its right to enjoin distress sales. Indeed, the record is that Bellevue Square diligently enforced its signage requirements and took steps to avoid the appearance of “distress;” even under the per Donna lease, where there was no express Lease right to enjoin. (CP 646.)

Furthermore, Barcelino never argued this issue of waiver below. Therefore, it should not be considered pursuant to RAP 2.5.

No extrinsic evidence is needed to interpret the Lease. There is no evidence of waiver. The trial court correctly ruled as a matter of law that the Lease was enforceable.

F. The Trial Court Correctly Dismissed Barcelino’s Counterclaims.

Barcelino had six counterclaims against Bellevue Square, all of which were dismissed on summary judgment. Barcelino assigns error to only the dismissal of the counterclaim for breach of contract. That counterclaim was properly dismissed based on the analysis above, on the issue of law on which Barcelino also sought summary judgment. As there is no assignment of error on any of the other counterclaims, they

should also be dismissed.

The fact that Barcelino did not even bother to assign error to the dismissal of these counterclaims, or argue their merit in any way, further reinforces the frivolous nature of the tactics proffered by Barcelino throughout this litigation, and should vitiate any credibility it might otherwise have on the issues before this Court.

G. The Trial Court Correctly Awarded Bellevue Square Its Attorney Fees and Costs.

After granting Bellevue Square summary judgment, the trial court awarded Bellevue Square its attorneys' fees and costs in the amount of \$126,757.58. (CP 1575-1576.) Bellevue Square is entitled to its attorney fees and costs pursuant to RCW 4.84.330. The statute provides:

In any action on a contract . . . where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

RCW 4.84.330.

These fees and costs "shall" be awarded; the discretion of the trial court is limited to deciding the amount. *Singleton v. Frost*, 108 Wn.2d 723, 727, 742 P.2d 1224 (1987). An action is "on a contract" for purposes of awarding attorney fees if the action arose out of a contract

and the contract is “central to the dispute.” *Tradewell Group, Inc. v. Mavis*, 71 Wn.App. 120, 130, 857 P.2d 1053 (1993). In this case, the Lease contains a legal expenses provision allowing for the recovery of attorneys’ fees in the case a breach. The provision states as follows:

16.3 Legal Expenses

If either party is required to bring or maintain any action (including assertion of any counterclaim or cross claim, or claim in a proceeding in bankruptcy, receivership or any other proceeding instituted by a party hereto or by others), or otherwise refers this Lease to an attorney for the enforcement of any of the covenants, terms or conditions of this Lease, the prevailing party, or the non-breaching party if no action is filed or no decision rendered regarding the merits of the action, shall, in addition to all other remedies provided herein, receive from the other party all costs (including reasonable attorneys’ fees) incurred in the enforcement of the covenants, terms and conditions of this Lease (whether or not an action is instituted) and including any such costs and fees incurred by the prevailing party on any appeal.

(CP 1023.)

Bellevue Square was the prevailing party and was correctly awarded all of its attorneys’ fees and costs.

H. Bellevue Square Is Entitled to Its Attorney Fees and Costs on Appeal Pursuant to RAP 18.1.

Bellevue Square is also entitled to its attorney fees and costs on appeal. RCW 4.84.330 renders attorney fee provisions such as the one in the Lease enforceable. Fees incurred on appeal are also thus recoverable. Upon affirmance of the trial court’s decision, the Court should award

Bellevue Square its attorney fees and costs incurred on appeal, pursuant to (and subject to its compliance with) RAP 18.1.

IV. CONCLUSION

A landlord has both the right and the obligation to enforce its leases for the benefit of itself and all its tenants. Here, Bellevue Square and Barcelino agreed to an unambiguous provision that allowed Bellevue Square to enjoin “distress sales.” Barcelino conducted one nevertheless, as it had done in the past at other shopping centers. Bellevue Square enforced its Lease appropriately and stopped the wrongful sale.

The trial court correctly interpreted the Lease as a matter of law. All preliminary relief was properly entered and complied with all applicable law. A brief error in posting an appropriate bond does not undermine the bond, where all parties to it agree that it was enforceable by Barcelino retroactive to its date of issue; a date selected by Barcelino.

This Court should affirm the trial court in all respects. Bellevue Square should be awarded its attorney fees and costs on appeal.

Respectfully submitted this 23rd day of December, 2009.

NOLD & ASSOCIATES, PLLC



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ORIGINAL

NO. 63516-6-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

BARCELINO CONTINENTAL
CORP, a California corporation,

Petitioners,

v.

BELLEVUE SQUARE
MANAGERS, INC., a
Washington corporation,

Respondents.

NO. 63515-6-I

DECLARATION OF SERVICE
OF RESPONSE BRIEF

FILED
STATE OF WASHINGTON
2009 DEC 23 PM 3:53
[Signature]

I, Jodi Graham, declare that I am an employee of the firm of Nold & Associates, PLLC, am over the age of 18 and am not a party to the above entitled action. On December 23, 2009, I caused a true and correct copy of the RESPONSE BRIEF and this DECLARATION OF SERVICE to be served upon the following in the manner indicated:

Eric Brian Johnson
1420 5th Ave., Ste. 2200
Seattle, WA 98101-1346

Via Legal Messenger

Washington Court of Appeals
Division One
One Union Square
600 University St.
Seattle, WA 98101-1176

Via Legal Messenger

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Signed at Bellevue, Washington this 23rd day of
December, 2009.


Jodi Graham

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