

NO. 63912-9-I

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

TERRY TERRACE APARTMENTS, LLC,
a Washington limited liability company,

Appellant,

v.

TERRY TERRACE CONDOMINIUM OWNERS ASSOCIATION,
a Washington non-profit corporation,

AND

VERA FELIX, JOY & GARRETT BENDER, PETER ONG LIM,
JUSTIN R. IRISH, GEORGE M. ABEYTA, CARY R. PETTY, KURT
KLINGMAN, VICTORIA DIAZ & MICHAEL EASTON, AARON J.
MUNN, AAMER HYDRIE & HABIBUDDIN SALONE, LAWRENCE
LADUKE, JAMES & MADELINE HANDZLIK, ALAN BULLER,
DEREK SWANSON, AIMEE SCHANTZ, TORGER OAAS,
ROLDAN V. DIN, VINCENT LIPE, ROMAN LOPEZ JR. & SUMMER
GOTHARD-LOPEZ, ANN M. GOTHARD, REBECCA DEXTER,
JEFFREY T. GILBERT, RHIANNON HOPKINS, HARVINDER &
ARADH CHOWDHARY,

Respondents.

SEATTLE SMSA LTD. PTP., d/b/a VERIZON WIRELESS, a limited
liability company,

Cross-Respondent.

BRIEF OF CROSS-RESPONDENT
SEATTLE SMSA LTD. PTP., d/b/a VERIZON WIRELESS

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 FEB -9 AM 10:47

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I. INTRODUCTION

Seattle SMSA Limited Partnership, d/b/a Verizon Wireless (“Verizon Wireless”) respectfully submits this opposition to portions of the Brief of Respondent Terry Terrace Condominium Owners’ Association (“Association”). Verizon Wireless is caught in the crossfire of a dispute between the Association, the individual condominium owners (“Individual Owners”) and the creator of the condominium, Terry Terrace Apartments, LLC (“TTA”) over who is entitled to Verizon Wireless’s lease payments. At the same time, Verizon Wireless has been conspicuously omitted as a party in the title, caption and identification of respondents in all of the briefs filed thus far in this appeal.¹

TTA—the only party to file a notice of appeal—did not raise any issues that challenged the trial court’s rulings that Verizon Wireless’s lease was valid and could not be terminated. No response to Appellant’s opening brief by Verizon Wireless was necessary. However, in its respondent’s brief, the Association—without filing a notice of appeal—has requested alternative relief seeking reversal of portions of the trial

¹ According to RAP 3.4, the title of a case in the appellate court is the same as in the trial court, except that the party seeking review is identified as the “appellant” and responding parties are “respondents.” The trial court caption identifies Terry Terrace Condominium Owners Association (a Respondent in this appeal) as plaintiff, and Terry Apartments (Appellant) and Verizon Wireless as co-defendants. *See* Appendix A (title page of summary judgment order). Terry Apartments in turn filed a third-party claim against several individual condominium owners (also Respondents herein).

should affirmatively reverse on appeal the provisions favoring Verizon Wireless, declaring that the Lease is either void or terminated.

The Association's request for reversal fails because the Association has not appealed the trial court's order and this court has no jurisdiction to consider the Association's new assignments of error related to Verizon Wireless's interest in its leasehold. Even if the court were to consider the Association's attempt to appeal, there is no persuasive basis to find that the Lease is void or could have been terminated. Paragraphs 1(a) through 1(g) of the October 18, 2007 Summary Judgment Order should be upheld.

Verizon Wireless asks that this Court accept and consider this brief because Verizon Wireless's substantive rights are directly affected by the Association's arguments and requests for affirmative relief in its responding brief.

**II. ISSUES PERTAINING TO RESPONDENT
TERRY TERRACE CONDOMINIUM OWNER'S ASSOCIATION'S
ASSIGNMENTS OF ERROR**

Verizon Wireless's opposition is limited to the Association's Assignments of Error no. 1 & 4. *See* Amended Brief of Ass'n, at 3-4. The Association's Assignment of Error no. 1 states that the trial court erred by ruling that the Lease was not void under RCW 64.34.348(1) & (4). The Association's Assignment of Error no. 4 states that the trial court erred by

ruling that the Lease was not subject to termination under RCW 64.34.320. These assignments of error were not placed at issue by the appeal of TTA. To the contrary, the Association attempts to place at issue portions of the trial court order granted in favor of Verizon Wireless and which were not challenged by TTA. Verizon Wireless thus responds here to defend these portions of the Order, and in connection with its own defense. Verizon Wireless expresses no opinion on the remaining assignments of error, including Assignment of Error no. 1 (whether Lease proceeds from the date of the Condominium creation were an asset of the Association under RCW 64.34.348(1) and .348(4)); and no. 3 (whether the trial court erred by ruling that TTA did not owe the Association restitution of the Lease proceeds received after the Lease became part of the Condominium).

Verizon Wireless asserts the following issues pertaining to the following Assignments of Error raised by the Association:

A. With respect to the Association's Assignments of Error nos. 1 & 4:

1. Whether the Association can seek affirmative relief in its cross-review of the trial court's Summary Judgment when it has not perfected review by filing a notice of appeal.

B. With respect to the Association's Assignment of Error no. 1:

2. Whether the Verizon Wireless lease was conveyed by the owner of real property prior to the creation and existence of a condominium.

3. Whether RCW 63.34.348(4) applies to conveyances of real property made prior to the creation and existence of a condominium.

4. Whether the Verizon Wireless Lease was valid, binding and enforceable when entered into on June 28, 2002, prior to the creation of a condominium.

5. Whether a lease that is validly entered into before the creation and existence of a condominium can be subsequently declared void *ab initio*.

6. Whether title to the condominium is subject to the real property leasehold interest of Verizon Wireless.

C. *With respect to the Association's Assignments of Error no. 4:*

7. Whether the Verizon Wireless lease for a telecommunication antenna falls within the definition of a "management contract, employment contract, or lease of recreational or parking area or facilities" under RCW 64.34.320.

8. Whether there is any evidence before the Court on summary judgment that the rooftop of the Terry Terrace Condominium was a recreational facility.

9. Whether the definition of “facilities” under the Washington Condominium Act are identical to “common areas.”

10. Whether a pre-declaration conveyance is void when it is not ratified.

This brief of Verizon Wireless is also submitted generally in reply to the Respondents’ Brief filed by the 31 individual condominium owners and spouses (“Individual Owners”). Although no assignments of error or related issues in the Individual Owners’ Brief appear to directly attack the validity of the Verizon Wireless Lease, certain arguments within their brief appear to support the Association’s brief.

III. VERIZON WIRELESS’S CROSS-STATEMENT OF THE CASE

A. Verizon Wireless’s June 28, 2002 Lease with Terry Terrace Apartments, LLC for Rooftop Space.

Verizon Wireless owns and operates a wireless telecommunication network. To provide quality transmission, Verizon Wireless must establish wireless antenna sites throughout all subscriber areas. Verizon Wireless invests a considerable amount of time and capital in locating, planning and installing wireless communications antenna sites. CP 604 ¶ 7. In 2001-early 2002, Verizon Wireless identified a possible antenna site for the Seattle area on a building then known as the Terry Terrace Apartments, near Harborview Hospital, at 403 Terry Avenue, Seattle,

Washington. At the time Verizon Wireless identified the lease location, the building's owner of record was Terry Terrace Apartments, LLC. CP 603-05.

After it conducted a lengthy investigation into this potential site, Verizon Wireless, as lessee, and TTA, as lessor, entered into a Building and Rooftop Lease Agreement, dated June 26, 2002, ("Lease" or "Verizon Wireless Lease"). CP 604; 606-26. Under the Lease, Verizon Wireless was entitled to place an antenna on the rooftop of the building for lease payments of \$24,000 per year to the lessor. CP 604 ¶ 4. Because Verizon Wireless invests a considerable amount of time and capital in identifying, locating, planning and installing an antenna, and an installed antenna is difficult to move, it typically negotiates long-term lease rights. In this case, the Verizon Wireless Lease extended for a 25-year lease term (including an initial term of five years and four automatic extensions for five years each.) CP 604 ¶ 7; CP 607-08.

In the Lease, TTA represented that it had good and marketable title and could therefore grant a lease conveyance:

[TTA] covenants that [TTA] is seized of good and sufficient title and interest to the property and has full authority to enter into and execute this Agreement. [TTA] further covenants that there are no other liens, judgments or impediments of title on the Property, or affecting [TTA'] title to the

same and that there are no covenants, easements or restrictions which prevent the use of the Premises by [Verizon Wireless] as set forth above.

CP 604; CP 611 ¶ 14. Verizon Wireless also confirmed that as of the execution of the Lease, TTA held good and marketable title to the rooftop of the apartment building, unencumbered by any prior conveyances. CP 604 ¶ 4.

The Lease was amended by a Lease Amendment that was also signed on the same day as the Lease. CP 604 ¶ 5. Both documents were signed on behalf of the lessor by Wayne Knowles, identified by a notary's acknowledgement as "the member of Terrace Apartments, LLC." CP 616; CP 624. A "Memorandum of Building and Rooftop Lease" was signed and notarized by Verizon Wireless and TTA on June 28, 2002 (although this Memorandum was not recorded until September 16, 2002). CP 78-85.

No mention was made in the Lease or Amended Lease that TTA or Mr. Knowles intended to create a condominium. CP 606-19, CP 621-26. It is undisputed that as of the execution of the Lease and Lease Amendment, TTA was the sole owner of record of the building and that no condominium declaration had been recorded. As of June 28, 2002, the Terry Terrace Apartments building was not encumbered by a declaration of condominium or any restrictive covenant or restriction. CP 604. In

fact, there is no evidence that Verizon Wireless knew of Mr. Knowles' intent to convert the building to a condominium at all until longer after the conversion took place.

B. Subsequent Condominium Conversion by TTA and Sale of Units.

Wayne Knowles executed a Declaration of Condominium ("Declaration") on July 9, 2002, and subsequently recorded the Declaration in the King County Auditor's Office on July 10, 2002. CP 19-70. The legal description of the property conveyed to the condominium in the Declaration referred to a rooftop leasehold for a wireless antenna. *Exhibit A* to the Declaration excepts from the legal description of the real property a "Building/Rooftop Lease Agreement between Declarant as Lessor and [Verizon] as Lessee, pursuant to which the annual rental during the first year shall be \$24,000" to be entered into by the lessor. CP 384.

The first condominium unit sale closed on October 2002, *after* the Verizon Wireless Lease and Amendment had been executed, notarized and the Memorandum of Building and Rooftop Lease was recorded in the King County records office. CP 304-08 ¶7. The declarant had also issued a Public Offering Statement to all prospective purchasers before the sale of any units of the condominium. CP 304-08. This disclosure statement, which included a copy of the Verizon Wireless Lease, was given to all

purchasers. CP 304-08. Amy Schantz, president of the Condominium Association and an early purchaser of a condominium unit testified that she received a “Terry Terrace Disclosure Packet” prior to her purchase of a condo unit. CP 636. In the disclosure packet she saw a copy of the Verizon Wireless lease agreement. *Id.* In declaration testimony introduced by the individual condominium owners, many of the owners admitted they knew of the existence of the Verizon Wireless Lease before they closed on their purchases². Thus, all purchasers of individual condominium units had either actual or constructive notice of the recorded Verizon Wireless Lease before their purchases.

Three years after Verizon Wireless executed its Lease, the Association sent a letter purportedly terminating the Lease. Because Verizon Wireless was contractually bound to TTA under the Lease, the

² See CP 636 (deposition of Aimee Schantz); CP 415-16 ¶ 3 (“I first learned of the cell phone tower lease by browsing through the Public Offering Statement [before the purchase]”); CP 438-40 (“[a]t the time that I entered into my purchase agreement with the developer, I knew that Verizon was interested in a cell phone tower lease at the building.”); CP 435-37 ¶ 3-4 (“[d]uring the course of our discussions about the condominium, he told me about a cell phone tower lease. I was told by the developer/declarant that there would be a cell phone tower on the roof of the Terry Terrace Condominiums and that the area of the rooftop was located would be leased to Verizon.”); CP 417-19 ¶ 3 (“[s]ometime before our purchase transaction closed, our real estate agent mentioned the fact of the cell tower lease on the roof,”); CP 423-25 ¶ 3 (“We learned of the possibility of a cell tower lease at the Terry Terrace Condominium prior to the time that George [Abeyta’s] purchase transaction closed”). The remaining unit owners testifying, who were on constructive notice, failed to make adequate inquiry to their own detriment.

demand was refused. The Association then filed suit against TTA and Verizon Wireless.

On October 18, 2007, the trial court entered an Order on Plaintiff's Motion for Summary Judgment Regarding Lease Termination (the "Summary Judgment Order"). CP 1026-32. The Summary Judgment Order provided, among other things, that: (a) the Verizon Wireless Lease was valid, binding, and enforceable when entered into between Verizon Wireless and TTA; (b) Verizon Wireless's right, title and interest in the Lease remains valid, binding, and enforceable; (c) the Lease is not void under the Washington Condominium Act; (d) the Lease was not terminated by the Association; and (e) the Lease remains in full force and effect. CP 1030-31. A final Judgment was entered on July 17, 2009.

TTA filed and served a Notice of Appeal on July 31, 2009. CP 1527-85. No other parties either filed a notice of appeal or cross-appeal. Only TTA filed an appellant's brief. No other party filed or served an opening brief or a cross-appellant's brief asserting issues on any purported cross-appeal. However, the Brief of Respondent, filed in opposition to TTA's brief, seeks reversal of portions of the October 18, 2007 brief for the first time on appeal.

IV. ARGUMENT

The Association's request for review of the trial court's Summary Judgment Order in favor of Verizon Wireless presents three major issues relative to Verizon Wireless's interests: (A) whether the Association properly perfected a cross-appeal of the Summary Judgment Order; (B) whether Verizon Wireless's lessee's interest in the Lease, which was valid, binding and enforceable when entered into before the creation of a condominium, can subsequently be declared void under the Washington Condominium Act after conversion; and (C) whether Verizon Wireless's lessee's interest in the Lease can be terminated under the language of RCW 64.34.320 after a condominium conversion when Verizon Wireless's rooftop is not a "lease of parking or recreational areas or facilities." This Court should affirm the trial court's holding on Summary Judgment that there is no genuine issue of material fact that the Verizon Wireless Lease is valid, binding and enforceable and its lessee's interest cannot be terminated under RCW 64.34.320.

A. Terry Terrace Condominium Association Did Not Perfect an Appeal and Cannot Seek Affirmative Relief of the October 18, 2007 Summary Judgment Order.

The Association is precluded from seeking a reversal of the trial court's October 18, 2007 Summary Judgment Order on the issue of the validity of the Verizon Wireless Lease because the Association failed to

file a notice of appeal of the trial court's ruling on that issue within the time required by the Rules of Appellate Procedure.

Appellant TTA filed and served its Notice of Appeal seeking review of the trial court's Order and Judgment on July 31, 2009. CP 1527-85. In its appeal, TTA does not challenge or raise as an issue the validity of the Verizon Wireless Lease.

However, Respondent Association urges this court to review and reverse the trial court's decision in at least three major issues relative to Verizon Wireless's Lease. First, "the Association requests that this Court reverse the trial court and rule the Lease is void under RCW 64.34.348(4)." Amended Brief of Ass'n, at 11³. Second, "the Association requests that this Court reverse the trial court and rule that the Lease is subject to termination under RCW 64.34.320(1) and (3) and was terminated by the Association." *Id.* at 12. Finally, the Association asks in an alternate ruling that the court "must rule that the Condominium does not exist and remand the case for further proceedings⁴." *Id.* at 15. These

³ "Alternatively, the Association requests that this Court affirm the trial court's ruling that the Lease proceeds collected from the date the leased property became a common element are an asset of the Association." *Id.* at 12.

⁴ It is, at various times in the Association's Brief, difficult to ascertain which of various inconsistent forms of relief the Association is seeking. For example, in another part of its brief, the Association points out that "the Association does not argue that the Lease did not survive the passing of the Condominium from the declarant to the Owners. Rather . . . all property of the unit owners must be

requests for reversal are contained within the Association's Assignments of Error nos. 1 and 4, and its Issues Pertaining to Assignments of Error nos. 5, 6, 8 & 9. *See* Amended Brief of Ass'n, at 3-4, 4-5.

A party seeking cross review must file a notice of appeal within the time allowed by rule 5.2(f). *See* RAP 5.1(d). Under RAP 5.2(f), if a timely notice of appeal or for discretionary review is filed by one party, any other party who seeks relief from the trial court's decision must file a notice of appeal or for discretionary review within the later of: (1) 14 days after service by the trial court clerk of the notice filed by the party initiating review; or (2) the time within which notice must be given under 5.2(a), (b), (d) or (e) (generally 30 days from final judgment). Here, the Association failed to file a notice of appeal on cross-review within 14 days after service of TTA's notice of appeal or 30 days after final judgment. The Association is therefore precluded from appealing the provisions of the Summary Judgment Order or Final Judgment.

A party must seek review of a court's order before this court will entertain an appeal arising from that order. *North Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 647, 151 P.3d 211 (2007). The appellate court will generally not grant a respondent *affirmative* relief (normally meaning a

transferred to the Association upon termination of declaration control.”
Amended Brief of Ass'n, at 16.

change in the final result at trial) unless the respondent timely files his or her *own* notice of appeal, commonly termed a notice of cross-appeal, or unless demanded by the necessities of the case⁵. *Wagner v. Beech Aircraft Corporation*, 37 Wn. App. 203, 680 P.2d 425 (1984); *Simpson Timber Co., Inc. v. Aetna Cas. & Surety Co.*, 19 Wn. App. 535, 576 P.2d 437 (1978); *see also, Smoke v. City of Seattle*, 79 Wn. App. 412, 902 P.2d 678 (1995).

A judgment is composed of distinct parts, each requiring a cross-appeal if the respondent, successful on one part, seeks reversal of some other part. *Smoke*, 79 Wn. App. at 421-22. For example, a respondent who prevails on one claim but does not prevail on another must file a notice of cross-appeal to assure review of the portion of the order denying relief. *See id.*

A respondent who does not file a notice of appeal cannot obtain affirmative relief in the court of appeals, and its assignments of error and accompanying arguments will be construed as urging affirmance of the trial court's judgment. *See Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn. App. 81, 173 P.3d 9 (2007). “Failure to cross-appeal the superior court's judgment precludes further review” of issues decided by that court

⁵ Respondent's brief does not establish any necessities of this case that demand that this Court accept review when a notice of appeal was not filed.

and not raised by the appellant. *Happy Bunch*, 142 Wn. App. at 91 n.3., quoting *Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 775, 134 P.3d 234 (2006). Therefore, on this basis alone, the Association is precluded from seeking review of the validity of the Verizon Wireless's interest in the Lease. Thus, the Association's Assignments of Error nos. 1 and 4, and its Issues Pertaining to Assignments of Error nos. 5, 6, 8 & 9 must be disregarded.

B. Standard of Review of Summary Judgment Order.

On appeal from summary judgment, the appellate court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyard Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). The standard of review is de novo. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted. *LaMon v. Butler*, 112 Wn.2d 193, 199, 770 P.2d 1027 (1989). This court will consider only evidence and issues called to the attention of the trial court. RAP 9.12. There is no genuine issue of fact on the record before

the trial court that the Verizon Wireless Lease is valid, binding and enforceable and not subject to termination by the Association under the Washington Condominium Act, as a matter of law.

C. The Verizon Wireless Lease Was Not Void When Conveyed and Cannot Subsequently Be Declared Void Under the Condominium Act.

The Association argues that TTA's conveyance of the Verizon Wireless Lease is void because the Lease violates RCW 64.34.348(1) & .348(4). *See* Amended Brief of Ass'n, at 24-28. The Association argues that: (i) only the "Association" had authority to enter into a lease, notwithstanding that the lease was executed before the condominium existed and the building was an apartment complex; (ii) because a lease is an executory contract, the lease could be voided at any time before expiration under *Shepard v. Sullivan*, 94 Wn. 134, 135, 162 P. 34 (1916); (iii) TTA's failure to record a ratification or failure to assign the proceeds voided the Lease; and (iv) voiding a pre-existing lease does not violate RCW 64.34.348(6). These arguments are unavailing.

1. Prior to the Creation of a Condominium, No "Condominium Association" Existed or Could Have Existed.

It is axiomatic that prior to the creation of a condominium, no "condominium association" can exist. Under RCW 64.34.300, a condo association is created by organizing unit owners of a condominium, and

the membership shall consist of all of the “unit owners” entitled to distribution of proceeds under RCW 64.34.268. On the date the Lease was conveyed, the building located at 403 Terry Avenue in Seattle was nothing more than an apartment building. The only persons with an interest in the building on the date the Lease was executed were the landlord and tenants.

No association existed at Lease inception because no condominium existed. Under RCW 64.34.200(1), a condominium does not exist until a property owner: (i) executes and records a condominium declaration; (ii) records the condominium’s accompanying survey map and plans; and (iii) issues a public offering statement. These tasks were all accomplished after the date of the Verizon Wireless Lease conveyance. It is undisputed that the Verizon Wireless Lease was properly executed as of June 28, 2002 by Wayne Knowles, in his capacity as managing member of Terry Terrace Apartments, LLC, and that his signature was notarized. CP 616, 624. It is also undisputed that all three requirements of the Washington Condo Act necessary to create the Terry Terrace Condominium were completed after June 28, 2002. The Declaration was executed and

recorded on July 9, 2002⁶. The public offering statement was issued on or about July 10, 2002.

Thus, because no condominium existed on June 28, 2002, no “units,” no “unit owners,” and therefore no “association,” existed as of the date of the Verizon Wireless Lease.

The Association makes much of the fact that TTA formed a corporation prior to the Verizon Wireless Lease and later used the corporation as a vehicle for a condominium association. The Association implies, without support, that the act of incorporation somehow creates a condominium owners’ association. At formation, the corporation was nothing more than a corporate shell, without any shareholders or members. Under RCW 64.34.300, the association could not have existed until there was at least one unit owner, which occurred after the Verizon Wireless Lease⁷.

⁶ It is unclear when the survey and plans were recorded.

⁷ There is also no evidence that Verizon Wireless was aware that its landlord had formed a corporation. The corporation was not a party to the Lease and was not mentioned in the Lease. Because the Declaration of Condominium had not yet been filed, Verizon Wireless could not have had knowledge that 403 Terry Avenue was in the process of conversion to a condominium.

2. RCW 64.34.348 Does Not Apply Because as of the Date of The Verizon Wireless Lease, No “Common Areas” Existed.

Verizon Wireless’s interest in the Lease cannot be voided under 64.34.348(4) because as of the date the Lease was executed, no “common areas” existed in the apartment building on Terry Avenue. Under RCW 64.34.020(6), “common elements” are all portions of a *condominium* other than the units created by the condominium. As set forth above, when the Verizon Wireless Lease was executed, the Terry Terrace Condominium did not exist. Because no condominium existed as of the date of lease execution, Verizon Wireless did not lease, and could not have leased, a “common area” of a condominium. Thus, Verizon Wireless’s lessee’s interest cannot be voided under RCW 64.34.348(4).

3. The Verizon Wireless Lease Conveyance Has Priority Over the Creation of the Condominium and Conveyances to Individual Condominium Purchasers.

There is no dispute that Verizon Wireless’s Lease met the statutory requirements for a conveyance of a portion of the apartment building owner’s real estate on June 28, 2002. *See* RCW 59.04.010, 64.04.010. There is also no dispute that as of the date of the Verizon Wireless Lease, TTA owned the real estate in fee simple on June 28, 2002 and that the condominium had not been formed. CP 604. As a consequence, Verizon’s Wireless Lease has priority over any subsequent conveyances,

encumbrances or liens created by TTA, including the creation of a condominium. *See National Bank of Commerce v. Fountain*, 9 Wn. App. 727, 514 P.2d 194 (1973) (a leasehold that is prior in time takes priority over a subsequent mortgage conveyance). Because the Lease was conveyed prior to the Declaration of Condominium, Verizon Wireless's interest in the Lease cannot be extinguished or superseded by the subsequent conversion of the lessor's building into a condominium.

All subsequent purchasers of condominium units take their respective interests subject to Verizon Wireless's leasehold. Although the Lease was not formally recorded until September 16, 2002, two months after the recording of the Declaration of Condominium, the order of recording is of no consequence to the disposition of this case. The Verizon Wireless Lease remains first in time. In order for a party subsequent in time to reverse the priority of a prior *unrecorded* party, it cannot have knowledge or notice of the other party's interest in some way outside the recording system that creates the interest. *See* RCW 65.08.070; 18 W. Stoebeck & J. Weaver, 18 WASH. PRAC: REAL ESTATE TRANS. § 14.10, at 150 (2d ed. 2004) [herein, "18 WASH. PRAC."]. Washington law is well-settled in holding that a party with actual or constructive notice of a lease conveyance cannot claim to be an innocent

purchaser, but is nevertheless bound by the prior, unrecorded lease⁸. *See Nagle v. Snohomish County*, 129 Wn. App. 703, 119 P.2d 914 (2005).

As of the date the Verizon Wireless Lease was recorded, the same entity that granted the leasehold to Verizon had become the Declarant after recording the Declaration of Condominium on July 10, 2002. Because the Declarant had actual knowledge of the Lease that TTA had previously executed as owner of the pre-Declaration real estate, it could not (and does not) claim to be an innocent purchaser through creation of the condominium.

In addition, it is not disputed that “the homeowners had constructive or actual notice of the Verizon [Wireless] lease” Brief of Individual Owners, at 14. All prospective purchasers were given actual notice of the Lease through the exception in the Declaration of Condominium and the disclosures made in the Public Offering Statement. CP 636. Most condominium purchasers concede that they had actual notice of the Lease. CP 417-19, 423-25, 425-16, 438-40, 636.

⁸ This is because a subsequent purchaser is not a “bona fide purchaser.” A bona fide purchaser is one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title. *See* 77 Am.Jur.2d, Vendor and Purchaser § 368 (2009). A “bona fide purchaser” of real property is one who takes property for a valuable consideration, in good faith, and absent notice of any adverse claims. *Id.* The doctrine of bona fide purchaser for value is used in favor of title. *Id.*

Constructive notice is also established by the undisputed record on appeal. The first unit of Terry Terrace Condominiums was sold *after* the Verizon Wireless Lease was drafted, executed, and finally recorded. CP 304-08 ¶ 7. Thus, all parties to this case--the Declarant, all unit owners and the unit owners-controlled board of directors--take their respective interests with actual or constructive knowledge that the Lease was first in time and therefore first in right before the creation of the Terry Terrace Condominium.

4. Under the Text and Statutory Intent of the Washington Condominium Act, Pre-Condominium Formation Leases Are Not Automatically Voided By RCW 64.34.348.

The Association suggests that RCW 64.34.348(1) & .348(4) voids pre-condominium formation leases. This result is neither evident from the text of the statute nor obtained from the intent of the drafters. As discussed above, the Association fails to distinguish contracts and leases entered into after the formation of the condominium with those validly entered into before the condominium was created. There is no support for the conclusion that the legislature intended to reach back into the chain of title and undo all pre-condominium transactions. For several reasons, the contrary is true.

First, Washington's Condominium Act does not replace or repeal existing real property law regarding the priority of grants of interests in real property. *See* RCW § 64.34.070. Lawful conveyances, easements and restrictions made prior to the creation of a condominium are not superseded by the Act's provisions. *Id.*; *see* 18 WASH. PRAC. § 12.4, at 29 (the ordinary principles of real property law, which include the usual rules for the creation of restrictive covenants, apply to condominiums unless changed by the Condominium Act). Conveyances, easements and restrictions existing as of the date a condominium is created are incorporated into and become exceptions to the title held by the owners of a condominium. Verizon Wireless's Lease constituted a restriction in the Condominium to which the Association is now bound, irrespective of any defects in the express language of the Declaration and the Declarant's attempt to reserve special declarant rights.

Second, the statute acknowledges that a condominium may carry forward restrictions created prior to condominium formation. According to the author of Washington's treatise on Condominiums in Washington, "it seems that [condominium] restrictions may be created, not only in the declaration, but also in the original deeds or leases, . . ." *See* 18 WASH. PRAC. § 12.4, at 30 (underline added). Original deeds or leases in place prior to the creation of a condominium may impose limitations on

the use of condominium property. For example, prior deed restrictions, restrictive covenants or ground lease use restrictions may encumber and limit the use of condominium property formed later.

Third, other provisions of the Washington Condominium Act demonstrate that the legislature intended to protect and preserve pre-condominium formation interests. For example, a blanket mortgage placed by the developer against an entire parcel of real estate before a condominium declaration is filed automatically attaches to all the units and to the common elements. 18 WASH. PRAC. § 12.13. The Washington Condominium Act does not invalidate liens arising from prior mortgages⁹. A unit purchaser also takes subject to any lien for assessments and is personally liable under the statute to pay them. RCW 64.34.364(12). In addition to mortgages and liens, condominium conversions may be subject to pre-existing ingress and egress easements, utilities easements, real property and personal property leases and other contracts. Nothing in the statute suggests that, for example, all utilities easements in a building are automatically voided upon the creation of a condominium. The text of RCW 64.34.348(6) suggests that the drafters of the Washington

⁹ Instead, the Act provides that if a declarant cannot the release of a prior mortgage, lien, or other encumbrance on a unit, the declarant is required to provide title insurance around the encumbrances. *See* RCW 64.34.435(1). Verizon Wireless was under no obligation to release its Lease.

Condominium Act did not intend to disturb or impair prior encumbrances. That subsection provides that a conveyance or encumbrance of common elements under 64.34.348 cannot affect the priority or validity of pre-existing encumbrances.

In sum, a valid lease entered into prior to the creation of a condominium is not voided simply through the act of a subsequent condominium creation, as the Association suggests.

5. *Shepard v. Sullivan* is Inapposite.

The Association also argues that RCW 64.34.348(4) applies to portions of the Verizon Wireless Lease that continue in effect after the execution of the Lease and creation of the condominium. The Association's sole authority on this point is *Shepard v. Sullivan*, 94 Wn. 134, 162 P. 34 (1916). This case is inapposite. *Shepard* involved a lease in which both lessor and lessee agreed that the leased premises would be used for "a first-class saloon, and not to be used for any illegal or immoral purpose." *Id.* The lessee sought to be released from its obligations because legislation passed after the execution of the lease made saloons illegal. The court found that supervening legislation rendered full performance of the lease impossible. *Id.* Because neither the lessor nor lessee could perform a mutual covenant of the lease, the lease term was interrupted and the lessee was relieved from its obligations. *Id.* at 134-35.

The Verizon Wireless Lease did not become illegal through any supervening act or legislation or any operation of the Washington Condo Act. Verizon Wireless's role throughout the duration of this Lease has remained unchanged. Verizon Wireless is fully able to perform, and has performed, its obligations under the Lease, by paying rent on a monthly basis: first to TTA, and later to the Association. The Washington Condominium Act was not a supervening event rendering Verizon Wireless's performance impossible. Rather than asking the court to be relieved from its obligations, Verizon Wireless does not ask to be relieved from its obligations as the lessee in *Shepard* did. To the contrary, Verizon Wireless asks this Court to uphold the lessee's interest in the leasehold.

D. RCW § 64.34.320 Does Not Apply to the Verizon Wireless Rooftop Lease.

The Association also asks this Court to hold as a matter of law that it has the legal right to terminate the Verizon Wireless Lease notwithstanding the original validity of the Lease. The Association relies upon RCW 64.34.320, which states in pertinent part:

If entered into before the board of directors elected by the unit owners pursuant to RCW 64.34.308(6) takes office, [] (1) *any management contract, employment contract, or lease of recreational or parking areas or facilities*, (2) any other contract or lease between the association and a declarant or an affiliate of a declarant, . . . , may be

terminated without penalty by the association at any time after the board of directors elected by the unit owners pursuant to RCW 64.34.308(6) takes office upon not less than ninety days' notice to the other party

(*ital. added*). The Association concedes that the Verizon Wireless Lease is not a management contract, employment contract or parking-related contract.

1. Under the Plain Language of the Statute, Verizon Wireless's Cellular Antenna Lease is Not a "Management Contract, Employment Contract, or Lease of Recreational or Parking Areas or Facilities."

The Association argues that the phrase "*lease of recreational or parking areas or facilities*" includes three distinct subcategories:

(a) recreational areas; (b) parking areas; and (c) "facilities" (the Association contends the latter term stands alone, without any modifier). Respondent Association's Brief, at 33. The Association assumes that "areas" modifies both "recreational" and "parking," but that the word "facilities" stands alone and is not modified by any other word. The Association's interpretation fails based upon the plain language of the statute.

The conjunctive phrase "recreational or parking" modifies each of the conjunctive nouns "areas or facilities." Rather than repeat the modifying phrase "recreational or parking" separately for each of the two

nouns “areas or facilities,” the drafter of this statute simply used the same modifying clause once.¹⁰ If the drafter of this statute had intended the noun “facilities” to stand alone from the preceding phrase, the correct grammatical construction would have been to set that word apart with a comma (e.g., “lease of recreational or parking areas, or facilities”). That a comma was omitted lends strong support to the construction that “areas or facilities” are both modified by the antecedent clause “recreational or parking.” See e.g., *Ford Motor Co. v. Seattle*, 160 Wn.2d 32, 48, 156 P.3d 185 (2007) (the entire clause “within the City” modified the both preceding nouns “buyers or lessees”).

In his treatise on Washington property law, Professor Stoebuck also refers to the elements of RCW 64.34.320 in this manner, noting that “facilities” is modified by “recreational” in the same phrase: “typical is the lease, . . . , of *recreational facilities*.” 18 WASH PRAC. § 12.13, at 66; see also, 18 WASH PRAC., at § 12.7 (“after the board of directors elected by the unit owners takes control, it may terminate without penalty management contracts, employment contracts, *leases of recreational or parking areas* made by the association during the period of declarant control.”)

¹⁰ Any other interpretation strains linguistic rules. Plaintiff argues that the conjunction “or” separates the three nouns, making them separate elements. One can separate “parking areas” from “facilities”; however, separating the word “recreational” from “parking areas” makes little sense.

Even if the court were to assume that “facilities” is a separately defined category, it is difficult to understand how a portion of a rooftop can be considered a “facility.” Verizon Wireless owns what are arguably defined as telecommunications facilities, including one on the rooftop of what was once known as the Terry Terrace Apartments. This “facility” belongs to Verizon Wireless, not Association.

The Association also suggests that “facilities” is equivalent to “condominium facility,” which is in turn equivalent to “all common areas.” Nowhere in the language of the RCW 64.34.320 does the legislature use the words “common area” or “condominium facility.” At this point in the Association’s argument, the broad definition swallows the narrow categories set forth by the legislature in the statute. The Association would have this court engraft new modifiers and surplus language. The court should reject the Association’s strained interpretation and adopt the interpretation that makes the entire clause sensible and consistent.

2. No Evidence Establishes That the Roof of the Condominium is a “Recreational Facility.”

The Association also argues that the Terry Terrace building rooftop is a “recreational facility.” The only support for this conclusion is the Association’s contention that “in downtown Seattle, . . . rooftops are

often recreational in nature,” and in this case, “several residents, when purchasing their unit, had *hoped* for a rooftop deck.” See Amended Brief of Ass’n, at 31 (*ital. added*). CP 571-85, 426-28, 438-42. The prospective purchasers’ subjective intent is not evidence of recreational facility. The statutory phrase “lease of recreational or parking areas or facilities” implies that there is an existing lease of a recreational facility, not that one could hope for that use in the future.

3. The Legislature Did Not Intend to Authorize the Termination of All Leases or Contracts Entered into Prior to the Change in Control.

The legislature could have encompassed all leases or contracts in RCW 64.34.320(1) but chose not to do so. Instead, the legislature clearly set out a series of specific subtypes of contracts and leases. The Washington Condominium Act is largely adopted from the Uniform Condominium Act (“UCA”). See RCWA Ch. 64.34, at 4 (2005) (“Uniform Laws”). The Official Comment to the UCA provides the clearest explanation for why only specific categories of leases were selected for inclusion in this section:

[RCW 64.34.320] provides for the termination of certain contracts and leases *made during a period of declarant control* . . . a statutorily-sanctioned right of cancellation *should not be applicable to all contracts or leases* which a declarant may enter into in the course of developing a

condominium project. For example, a commercial tenant would not be willing to invest substantial amounts in equipment and other improvements for the operation of its business if the lease could unilaterally be cancelled by the association.

UCA § 3-105 (Official Comment no. 2). To provide otherwise would permit condominium associations to terminate virtually any contract or lease, and it would be difficult to imagine a condominium developer obtaining utilities contracts or leases.

Although there are few published cases interpreting this section of the UCA, at least one other court has said, consistent with the Official Comment cited above, that not all leases entered into before a declarant transfers control to the unit owners are subject to the termination power set forth in UCA § 3-105. For example, in a Wisconsin case, the court held that contracts for coin-operated laundry machines in a condominium entered into prior to a condominium conversion do not fall within the limits of the unit owners' termination right under a similar statute. *See Hunt Club Condominiums, Inc. v. Mac-Gray Services, Inc.*, 721 N.W.2d 117 (Wis. App. 2006). In *Hunt Club*, the court noted that:

Commercial tenants or vendors could well be discouraged from entering into commercially reasonable, "arms-length" contracts with owners or developers of multi-family residential complexes because of the prospect that their contracts or leases

might be summarily terminated at the whim of an association board following conversion to a condominium.

Hunt Club, 721 N.W.2d at 123. The Wisconsin court added that condominium laws were “not [intended] to punish independent third parties having legitimate control or leasehold interests in properties that become condominiums.” *Id.*

Under the Association’s theory, if a third party had entered into any arm’s length transaction under which it provided, for example, cable television services, a coin-operated laundry, a laundromat, a satellite antenna, vending machines, an easement or license, or any commercially reasonable service, the condominium association could nevertheless unilaterally terminate such contract at anytime by issuing a simple 90-day notice of termination. The Association’s view is that it is irrelevant whether the lease or contract was a fair, arm’s length transaction when entered into. Even an objectively honest transaction can later be avoided.

If the Condominium Act is interpreted in the manner suggested by the Association, condominium owners, associations and declarants could abuse the statute by using the condominium termination right as a weapon. In a reverse of what the UCA drafters and Washington’s legislature intended, an Association could be formed to terminate a lessee’s contract if the developer or an association decided to intentionally break a

legitimate bargain previously struck, or force an honest lessee into accepting unfair financial terms in order to retain a lease validly entered into prior to the formation of a condominium, or face the loss of a substantial capital investment.

4. RCW 64.34.320 Does Not Apply Because the Landlord Was Not a Declarant as of the Conveyance of the Verizon Wireless Lease.

The scope of the termination right in RCW § 64.34.320 is further limited to certain leases made by the declarant, which, after recording a declaration subsequently transfers that control to the board of directors of an association that assumes control. 18 WASH. PRAC., § 12.12, at 66. The Association argues that “a declarant may not unilaterally convey a common element of a condominium without the approval of the association.” Amended Brief of Ass’n, at 24. The Verizon Wireless Lease does not fit within the statutory definition because it was not executed by a “declarant” as that term is defined in the Washington Condominium Act.

The Association’s conclusion contains a number of false premises. First, TTA was not a “declarant” when it executed a lease with Verizon Wireless Lease. A “Declarant” is:

- (a) Any person who executes as declarant a declaration as defined in subsection (15) of this section; or

(b) Any person who reserves any special declarant right in the declaration; or

(c) Any person who exercises special declarant rights or to whom special declarant rights are transferred; or

(d) Any person who is the owner of a fee interest in the real property which is subjected to the declaration at the time of the recording of an instrument pursuant to RCW 64.34.316 and who directly or through one or more affiliates is materially involved in the construction, marketing, or sale of units in the condominium created by the recording of the instrument.

RCW 64.34.020(13). As of the June 28, 2002 final execution of the Verizon Wireless Lease, none of the conditional events described above that make one a declarant had occurred. No person had signed a declaration, reserved special declarant rights, exercised or received special rights or had marketed a unit subject to a declaration. As of June 28, 2002, there was no condominium in existence for which TTA could be a declarant.

Under RCW 64.34.320(9), a “condominium” cannot exist until “the undivided interests in the common elements are vested in the unit owners, and unless a declaration and a survey map and plans have been recorded pursuant to this chapter.” *Id.* As of June 28, 2002, none of those events had taken place. The declaration, survey map and plans had not

been recorded. Thus, TTA executed the Verizon Wireless Lease in its individual capacity and not a “Declarant.”

5. The Verizon Wireless Lease Was Not Unconscionable as Viewed Between the Contracting Parties.

Washington courts have recognized two types of unconscionable contracts, *i.e.*, those that are substantively unconscionable and those that are procedurally unconscionable. *Yakima Ct. Fire Protec. Dist. No. 12 v. Yakima*, 122 Wn.2d 371, 391, 858 P.2d 245 (1993). A contract is substantively unconscionable “where a clause or term in the contract is alleged to be one-sided or overly harsh.” *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 259-60, 544 P.2d 20 (1975). In another case, a court described contracts that contain terms that are “[s]hocking to the conscience,” “monstrously harsh,” and “exceedingly calloused” as substantively unconscionable. *Montgomery Ward & Co. v. Annuity Bd. Of the South. Baptist Conv.*, 16 Wn. App. 439, 556 P.2d 552 (1976). The Association fails to point out any unconscionability as between the parties to the contract. The undisputed record is that the Lease terms were at market rates, fairly bargained by both sides in an arm’s length transaction. The Association’s complaint is not that the lease agreement itself or any of its terms were unfair; rather, the argument is that the failure to assign the Lease and its proceeds was unfair.

E. The Court's Ruling on Appeal Should Not Require Verizon Wireless to Pay Twice.

Verizon Wireless has complied with the Summary Judgment Order. No supersedeas bond has been filed, and Terry Apartments has not sought to stay the trial court's ruling. Verizon Wireless has recognized the Association as its new landlord under the transferred Lease and has paid and will continue to pay the Association rent payments according to the court's order.

Whichever way the appellate court rules on this case, its decision should not reverse Verizon Wireless's actions taken in compliance with the Summary Judgment Order during the pendency of this appeal. It is a well-established principle that an appeal will not affect the validity of a judgment or order during the pendency of the appeal, absent a stay or supersedeas bond. *See Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 190 (9th Cir. 1977); *Matter of Federal Facilities Realty Trust*, 227 F.2d 651, 654 (7th Cir. 1955). A trial court judgment is presumed valid, and unless the judgment is superseded, a party has specific authority to act on that judgment. *Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 27 P.3d 1233 (2001). The ruling on this appeal should not disturb actions taken in compliance with an un-superseded trial court judgment, including Verizon Wireless's rent payments to the Association and any

other actions taken by Verizon Wireless in compliance with the Summary Judgment Order. Verizon Wireless should not be required to pay any lease payment twice.

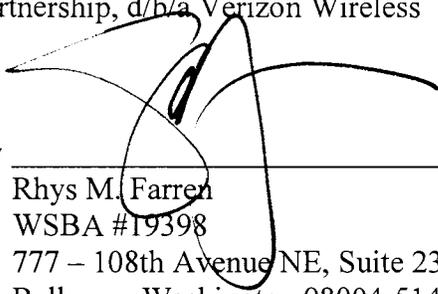
V. CONCLUSION

The Association did not perfect its cross-review of the issues raised in its brief relating to the validity of the Verizon Wireless's interest in the Lease, and thus such issues may not be considered. However, should the Court consider the arguments raised, the Court should uphold Paragraphs 1(a) through 1(g) of the Summary Judgment Order and find that Verizon Wireless's leasehold and tenant's interest in the Lease are not void or terminable under RCW 64.34.320. Verizon Wireless does not object to the transfer of its Lease to the Association. However, should this court reverse any part of Paragraphs 1(a) through 1(g) of the SJ Order, then Verizon Wireless asks that all of its taken in compliance of the Summary Judgment Order not be disturbed.

RESPECTFULLY SUBMITTED this 8th day of February, 2010.

Davis Wright Tremaine LLP
Attorneys for Seattle SMSA Limited
Partnership, d/b/a Verizon Wireless

By _____



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is over the age of 18 years, a citizen of the State of Washington, not a party herein, and able to give testimony in court. On this day, I caused to be served via hand delivery by legal messenger, a true and correct copy of the foregoing Brief of Cross-Respondent Seattle SMSA Ltd. Ptp., d/b/a Verizon Wireless in connection with the above-referenced matter, upon the following:

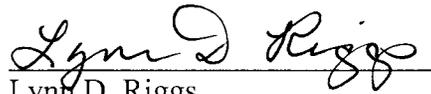
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Dated this 8th day of February, 2010.



Lynn D. Riggs

APPENDIX A

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The Honorable Chris Washington
Hearing: October 18, 2007
Without Oral Argument

OCT 23 2007

HECKER WAKEFIELD
& FEILBERG, P.S.

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

FERRY TERRACE CONDOMINIUM
OWNERS ASSOCIATION, a Washington non-
profit corporation,

Plaintiff,

vs.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company and
SEATTLE SMSA LIMITED PARTNERSHIP, a
Delaware limited partnership, d/b/a. Verizon
Wireless,

Defendant.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company,

Third Party Plaintiff,

vs.

VERA FELIX, JOY & GARRETT BENDER,
PETER ONG LIM, JUSTIN R. IRISH,
GEORGE M. ABEYTA, CARY R. PETTY,
KURT KLINGMAN, VICTORIA DIAZ &
MICHAEL EASTON, AARON J. MUNN,
AAMER HYDRIE & HABIBUDDIN SALONE,
LAWRENCE LADUKE, JAMES AND

No. 06-2-14221-7SEA

ORDER REGARDING

(1) PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT
REGARDING LEASE
TERMINATION AND
RESTITUTION OF LEASE
PROCEEDS, AND

(2) DEFENDANT/THIRD-
PARTY PLAINTIFF'S CROSS
MOTION FOR SUMMARY
JUDGMENT

[PROPOSED]

ORIGINAL

COPY

1 MADELINE HANDZLIK, ALAN BULLER,
2 DEREK SWANSON, AIMEE SCHANTZ,
3 TORGER OAAS, ROLDAN V. DIN,
4 VINCENT LIPE, ROMAN LOPEZ JR. &
5 SUMMER GOTHARD-LOPEZ,
6 ANN M. GOTHARD, REBECCA DEXTER,
7 JEFFREY T. GILBERT,
8 RHIANNON HOPKINS, HARVINDER &
9 ARADH CHOWDHARY,

10 Third Party Defendants.

11 This matter came on regularly for hearing before the Court on Plaintiff's Motion for
12 Summary Judgment Regarding Lease Termination and Restitution of Lease Proceeds and
13 Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Cross-Motion for
14 Summary Judgment.

15 The Court having heard oral argument on February 16, 2007, from counsel for
16 Plaintiff Terry Terrace Condominium Owners' Association, Defendant/Third-Party Plaintiff
17 Terry Terrace Apartments, LLC, Seattle SMSA Limited Partnership d/b/a Verizon Wireless,
18 and Third-Party Defendants, and reviewed the following pleadings and materials, together
19 with any related exhibits:

- 20 1. Plaintiff's Motion for Summary Judgment Regarding Lease Termination and
21 Restitution of Lease Proceeds;
- 22 2. Declaration of Rhiannon Hopkins in Support of Plaintiff's Motion for
23 Summary Judgment Regarding Lease Termination and Restitution of Lease
24 Proceeds;
- 25 3. Declaration of Dean Martin in Support of Plaintiff's Motion for Summary
26 Judgment Regarding Lease Termination and Restitution of Lease Proceeds,
and exhibits attached thereto;
4. Certain Third-Party Defendants' Joinder in Association's Motion for Summary
Judgment and Motion for Summary Judgment Dismissing Third-Party
Complaint;
5. Declaration of Jo M. Flannery in Support of Motions for Summary Judgment
and exhibits attached thereto;
6. Declaration of Aimee Schantz in Support of Motions for Summary Judgment;

- 1 7. Declaration of Rebecca Dexter in Support of Motions for Summary Judgment;
- 2 8. Declaration of Vincent Lipe in Support of Motions for Summary Judgment;
- 3 9. Declaration of Cary Petty in Support of Motions for Summary Judgment;
- 4 10. Declaration of Joy Bender in Support of Motions for Summary Judgment;
- 5 11. Declaration of Peter Ong Lim in Support of Motions for Summary Judgment;
- 6 12. Declaration of Jeffrey Scott in Support of Motions for Summary Judgment;
- 7 13. Declaration of Salone Habbibudin in Support of Motions for Summary
- 8 Judgment;
- 9 14. Declaration of Derek Swanson in Support of Motions for Summary Judgment;
- 10 15. Declaration of Harvinder Chowdhary in Support of Motions for Summary
- 11 Judgment;
- 12 16. Declaration of Jeffrey Gilbert in Support of Motions for Summary Judgment;
- 13 17. Declaration of Roldan Din in Support of Motions for Summary Judgment;
- 14 18. Third-Party Defendants Handzlik's Joinder in Association's Motion for
- 15 Summary Judgment and Motion for Summary Judgment Dismissing Third-
- 16 Party Complaint;
- 17 19. Declaration of James and Madeline Handzlik in Support of Motions for
- 18 Summary Judgment;
- 19 20. Defendant/Third-Party Plaintiff's Cross-Motion for Summary Judgment;
- 20 21. Declaration of Andrew C. Rapp in Support of Defendant/Third-Party
- 21 Plaintiff's Cross-Motion for Summary Judgment and exhibits attached thereto;
- 22 22. Declaration of Tim Kennedy in Support of Defendant/Third-Party Plaintiff's
- 23 Cross-Motion for Summary Judgment and exhibits attached thereto;
- 24 23. Declaration of James C. Middlebrooks in Support of Defendant/Third-Party
- 25 Plaintiff's Cross-Motion for Summary Judgment and exhibits attached thereto;
- 26 24. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Response to
- Plaintiff's and Third-Party Defendants' Summary Judgment Motions;

- 1 25. Second Declaration of Tim Kennedy in Support of Defendant/Third-Party
2 Plaintiff's Response to Plaintiff's and Third-Party Defendants' Summary
3 Judgment Motions;
- 4 26. Second Declaration of Andrew C. Rapp in Support of Defendant/Third-Party
5 Plaintiff's Response to Plaintiff's and Third-Party Defendants' Summary
6 Judgment Motions and exhibits attached thereto;
- 7 27. Defendant Verizon Wireless's Response to Motions for Summary Judgment;
- 8 28. Declaration of Tina Lewis in Support of Defendant Verizon Wireless's
9 Response to Motions for Summary Judgment and exhibits attached thereto;
- 10 29. Plaintiff's Reply in Support of Motion for Summary Judgment Regarding
11 Lease Termination and Restitution of Lease Proceeds;
- 12 30. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Supplemental
13 Brief Regarding Its Response to Plaintiff's and Third-Party Defendants'
14 Summary Judgment Motions;
- 15 31. Declaration of Felix Vera in Support of Defendant/Third-Party Plaintiff Terry
16 Terrace Apartment, LLC's Supplemental Brief Regarding Its Response to
17 Plaintiff's and Third-Party Defendants' Summary Judgment Motions;
- 18 32. Certain Third Party Defendants' Objection to Terry Terrace Apartment, LLC's
19 Supplemental Brief;
- 20 33. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Reply to
21 Certain Unit Owners' Opposition to Joinder of Verizon's Motion to Strike and
22 Supplemental Brief;
- 23 34. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Supplemental
24 Brief Regarding RCW 64.34.312 and Attorney's Fees;
- 25 35. Plaintiff's Supplemental Brief Regarding Duty to Transfer Lease to
26 Association Pursuant to RCW 64.34.312;
36. Declaration of Dean Martin in Support of Plaintiff's Supplemental Brief;
37. Plaintiff's Reply to Defendant's Supplemental Brief Regarding RCW
64.34.312;
38. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Response to
Plaintiff's Supplemental Brief Regarding RCW 64.34.312;

1 39. Motion for Entry of Order Regarding: (1) Plaintiff's Motion for Summary
2 Judgment Regarding Lease Termination and Restitution of Lease Proceeds;
3 and (2) Defendant/Third-Party Plaintiff's Cross Motion for Summary
4 Judgment; and

5 40. Declaration of Dean Martin in Support of Motion for Entry of Order
6 Regarding: (1) Plaintiff's Motion for Summary Judgment Regarding Lease
7 Termination and Restitution of Lease Proceeds; and (2) Defendant/Third-Party
8 Plaintiff's Cross Motion for Summary Judgment.

9 41. Defendant/Third-Party Plaintiff Terry Terrace Apartment LLC's Response to
10 Plaintiff's Motion for Entry of Order Regarding: 1) Plaintiff's Motion for
11 Summary Judgment Regarding Lease Termination and Restitution of Lease
12 Proceeds; and (2) Defendant/Third-Party Plaintiff's Cross Motion for
13 Summary Judgment.

14 42. Plaintiff's Reply to Defendant/Third-Party Plaintiff Terry Terrace Apartment
15 LLC's Response to Plaintiff's Motion for Entry of Order Regarding: (1)
16 Plaintiff's Motion for Summary Judgment Regarding Lease Termination and
17 Restitution of Lease Proceeds; and (2) Defendant/Third-Party Plaintiff's Cross
18 Motion for Summary Judgment;

19 43. _____
20 _____
21 _____;

22 44. _____
23 _____
24 _____; and

25 45. _____
26 _____

The Court deeming itself fully advised, NOW, THEREFORE,

IT IS HEREBY ORDERED that:

1. Partial Summary Judgment is GRANTED in favor of Seattle SMSA
Limited Partnership d/b/a Verizon Wireless, LLC ("Verizon") as follows:

a. The Verizon Wireless Building and Rooftop Lease Agreement,
dated June 26, 2002, amended by the Lease Addendum, dated June 28, 2002, and any and

1 all other amendments, modifications and extensions (hereinafter the "Verizon Lease") was
2 valid, binding, and enforceable when entered into between Verizon and Terry Terrace
3 Apartments, LLC ("Declarant"). Verizon's right, title, and interest in the Verizon Lease
4 remains valid, binding, and enforceable.

5 b. The Verizon Lease is not void under the Washington Condominium
6 Act, RCW Ch. 64.34.

7 c. The Verizon Lease was not terminated by the Association.

8 d. Provided that all prior payments were fully and timely made as
9 called for in the Verizon Lease, Verizon shall have no liability to the Association or
10 Declarant for any lease payments due under the Verizon Lease prior to the date of this
11 Order.
12

13 e. Other than as set forth in this Order, the Verizon Lease shall remain
14 in full force and effect, and the Association shall be entitled to all rights, title, and interest
15 in and to the Declarant's interest in the Lease.

16 f. Aside from the foregoing provisions, the Verizon Lease shall be
17 unaffected by this Order.

18 g. The Association shall notify Verizon of the new payee account
19 information at least fifteen (15) days prior to the first direct lease payment by Verizon to
20 the Association.
21

22 2. IT IS FURTHER ORDERED that Verizon's Motion to Strike Evidence as
23 Inadmissible is hereby deemed to be MOOT as a result of the decision set forth herein.
24
25
26

1 3. IT IS FURTHER ORDERED that Partial Summary Judgment is
2 GRANTED in favor of Plaintiff Terry Terrace Owners' Association ("Association") as
3 follows:

OPW
Defendant Terry Terrace Apartments LLC

4 a. Pursuant to RCW 64.34.312(p), ~~the Declarant~~ must transfer the
5 Verizon Lease, and any proceeds from the Verizon Lease received on or after
6 July 10, 2002, to the Association.

7 b. Verizon shall make all future lease payments to the Association.

8 3. IT IS FURTHER ORDERED that the remainder of the Association's, the
9 Declarant's, and Verizon's summary judgment motions are denied.

10 DONE IN OPEN COURT this 18th day of October, 2007.

11
12 
13
14 The Honorable Chris Washington

15 Presented by:

16 BARKER - MARTIN, P.S.

17
18 
19 Dean Martin, WSBA No. 21970
20 Inge Fordham, WSBA No. 38256
21 Attorneys for Plaintiff
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