

NO. 65003-3-I

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

HOUSING AUTHORITY OF THE CITY OF SEATTLE,
WASHINGTON, a public body corporate and politic,

Plaintiff / Appellant

v.

KADJA BIN, ET. AL.,

Respondent / Respondent

APPELLANT'S REPLY BRIEF

Linda J. Brosell, WSBA #22260
Seattle Housing Authority
P.O. Box 19028
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Appellant/Seattle Housing Authority

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I. INTRODUCTION

The primary issue in this appeal is whether the trial court, in an unlawful detainer action, had authority to award costs and attorney fees when the issue of possession was not decided.

If the award of costs and attorney fees was proper, should defendant have been awarded costs and fees upon issues which were not decided by the trial court.

II. RESPONSE TO RESPONDENT

1. **A lease alone is insufficient to authorize an award of attorney's fees in an unlawful detainer action.**

Bin asserts that her claim for attorney fees does not arise out of the unlawful detainer statute. Bin's Reply (BR) 10, 13-14. "But the attorney fee award in this case was based on Ms. Bin's lease, not RCW 59.18.290." The statute authorizing jurisdiction provides that the superior court "shall have jurisdiction of proceedings under this chapter." RCW 59.12.050. Bin fails to cite any authority to establish that the court has greater authority to award attorney fees when the parties have a contract or leasehold clause that addresses this issue, but instead alludes to such authority by citing a case, Ernst Home Center, Inc., v. Sato, 80 Wn.App 473, 910 P.2d 486 (1996). BR 11. At first blush, the citation supports Bin's proposition that the court has greater authority to award costs and

fees if there is a leasehold clause that awards costs and attorney fees. Upon reading Ernst, it is immediately apparent that the issue does not fall under the unlawful detainer statutes, but is a contract dispute in a court of general jurisdiction where the merits of the case were adjudicated. Bin cites to another case, Walji v. Candyco Inc., 57 Wn.App 284, 288-89, 787 P.2d 949 (1990), to support the same proposition. BR 11. This case is substantially similar in its results as Council House v. Hawk, 136 Wash.App 153, 147 P.3d 1305 (2006) which provides that if a plaintiff (landlord) takes a non-suit (thus abandoning its claim), the defendant is the prevailing party for the purposes of the award of costs and attorney fees. The commercial lease between the parties in Walji had a clause for arbitration and for the award of costs and fees. The defendant's in Walji prevailed at arbitration and the landlord sought a trial de novo under the unlawful detainer statutes. The appellate court concluded that the trial "court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo." Walji, 289, 949. Neither Ernst or Walji provides any authority to support Bin's proposition that the presence of a clause in a lease awarding costs and attorney fees provides the court with more authority to award such costs and fees when the trial court dismisses the case before the merits of the unlawful detainer are addressed.

The definitive case on this issue is *Housing Authority of Everett v. Kirby*, 154 Wash.App 842 226 P.3d 222 (March 2010). In *Kirby*, the court lacked jurisdiction to pass on the merits of the case, but explained that the consideration of whether the court has the authority to enter an award of attorney fees is not limited cases where the court lacks jurisdiction. The test is whether the court has the authority to address and actually makes a finding on the merits of the case. *Kirby* at 226, citing *State v. Northwest Magnesite Co.*, 28 Wash.2d 1, 42 182 P.2d 643 (1947).

The Order in the case at bar does not address any issues under the unlawful detainer statutes except that the case can not go forward to the merits at this time. CP 153. The Order addresses the federal housing termination process including the grievance hearing process and finds that Ms. Bin's grievance hearing rights were violated. The order "dismissed" the case without prejudice (as required by CR 41(a)(4)). The only finding regarding the unlawful detainer action is found on the final page of the order concluding that "SHA is barred from bringing is [sic] unlawful detainer action against Ms. Bin at this time." CP153.

2. Bin was not a Prevailing Party.

Bin asserts that "the superior court had sufficient information to resolve the case." BR 17. But in dismissing the action, the trial court did not address the merits of the case nor did it find that there was a

“Prevailing Party” CP 149-153. At the hearing, Bin prevailed on a motion in which she argued that she did not receive a proper administrative grievance hearing. The court, finding that SHA was barred from bringing the action “at this time,” precluded the court from addressing the merits of whether Ms. Bin was or was not in unlawful detainer. The case was dismissed without prejudice and the court lacked the authority to address any other issue, including the award of costs and attorney fees. CP 153.

Where the court “lacked power to decide the merits of the case it was precluded from making any rulings regarding the merits of the litigation other than dismissal without prejudice.” Kirby at 851, 226. The court in Kirby continued to explain that where a plaintiff “did not move to voluntarily dismiss the action, and the superior court, sitting as a special statutory tribunal, lacked the authority to proceed under the unlawful detainer statutes...[the court lacked the authority to address any other issue]. Id. Kirby further explains the rule in the below:

In this case, the court lacked authority to proceed under the unlawful detainer statute and decide the merits of the case. It never decided whether EHA's notice terminated Kirby's lease. Therefore, Kirby, like the tenants in *Laffranchi* and *Terry*, has not satisfied the requirements of RCW 59.18.290(1) or (2) and is not entitled to fees under either subsection. *Kirby*, 854 228. ¹

¹ *Laffranchi v. Lim*, 146 Wash.App. 376, 190 P.3d 97 (2008); *Housing Authority of Everett v. Terry*, 114 Wn.2d 558, 789 P.2d 745 (1990).

The statute clearly states that the issue of unlawful detainer must be resolved and the party that prevailed on such issue is the “prevailing party.” RCW 59.18.290. Bin argues that she prevailed “when the court granted her motion for summary judgment on January 14, 2010.” BR 10. CP 149-153. The judgment was not entered on the merits of the unlawful detainer action, it was passed on a procedural error of an informal grievance hearing. Bin continues to state that the trial court then had authority to enter the costs and attorney fees based on the lease, citing Ernst as her authority. BR 10-11. This argument is the quintessential argument of form over substance. The form of the dismissal was on a Motion for Summary Judgment, but the dismissal was based on the court finding that there was a violation in a grievance hearing that prohibited the case from continuing to trial. The Order on Summary Judgment does not address the merits of the unlawful detainer action, therefore it is not a basis for the entry of award of costs and attorney fees.

Bin asserts that that the “Superior Court did adjudicate the right to possession in the proceedings ...” BR 16 (caption of section c). Bin argues that since her tenancy continued after the dismissal of the lawsuit, her tenancy had not been terminated. BR 17. The fact that the default position was that she possessed the premises is not a court finding that Bin was entitled to possession of the property. The entry of the order did not

preclude SHA from re-filing, nor did it raise any issues of res judicata or collateral estoppel on the issue of possession. SHA did not abandon its claim and there is no finding that Ms. Bin was entitled to retain possession. Because possession was never litigated or decided, the trial court lacked the authority to award costs and attorney fees to either party.

3. The logical conclusion of Bin's arguments regarding her right to possession is to find that the court lacked subject matter jurisdiction. If her analysis is correct, the trial court lacked jurisdiction to award attorney's fees.

Bin asserts that she is the "Prevailing Party" because she was granted a dismissal of the action and that the merits of the case were addressed by the trial court because, "she proved that SHA has not terminated her tenancy." BR at 15. Bin explains this victory by stating that HUD regulations require the public housing authority to continue the tenancy until the grievance hearing procedure is completed as contemplated by 24 CFR 966.4(1)(3)(iv).

The expedited statutory remedy of unlawful detainer depends on compliance with the notice requirements of the state statute. The question here is whether the provision of the federal regulations that provide *that the tenancy shall not terminate until the grievance process is complete*, is a prohibition to being in "unlawful detainer status" under the state statute. Bin fails to establish how the termination of the tenancy relates to the

tenant being “in unlawful detainer” as defined by RCW 59.12.030. Nonetheless, she claims that she was victorious in the action because her tenancy was not terminated, because it could not be terminated until the grievance hearing process was complete and she proved the termination had not occurred because the court dismissed the action based on a defective grievance hearing. BR 17.

Ms. Bin confuses “termination of tenancy” with the right to possess the unit while in unlawful detainer status. The grievance hearing process does not extend the tenancy, it prohibits the tenant from being dispossessed from the unit until the full hearing process and the court process are complete. HUD regulations specifically provide that the grievance hearing process and the state termination process may run concurrent. See, 24 CFR 966.4(l)(3)(iii).

Notwithstanding the HUD regulation above, the logical conclusion to Bin’s argument is that the court lacked jurisdiction for the filing of the unlawful detainer when the hearing process was not complete, putting the court in the same position as Kirby or Terry. If the court lacked jurisdiction to enter any finding except a dismissal, without prejudice, the court lacked the authority to award costs and attorney fees. Yet, as stated above, Bin asserts that the court had the authority under the lease (contract) to award costs and attorney fees, but the rationale of her

arguments requires the court to find that the court lacked jurisdiction over the controversy because the invalidation of the hearing officer's finding left the grievance hearing process incomplete, which prohibited SHA from bringing the unlawful detainer action. BR 17.

Bin's circuitous argument can not be reconciled with the unlawful detainer laws. SHA either properly filed the case and the court had jurisdiction and the court was required to determine the right to possession before costs and attorney fees can be awarded or, SHA improperly filed the case before a condition precedent was met and the court lacked the authority to do anything but dismiss. Bin's argument is that the court had authority when the case was filed, but the invalidation of the grievance hearing vitiated the right to go forward, and since Bin's possession became unchallenged by the dismissal, the court's dismissal made her the prevailing party. This can not be sustained.

The record is clear that the court deemed that the action could not go forward, and like Kirby and the other cases before Kirby, the case was dismissed without prejudice, without a finding on the merits. Ms. Bin did not prove her right to possession.

- 4. If this court finds Bin the "Prevailing Party" for the purposes of this unlawful detainer action, any award of costs and attorney fees should exclude all costs and fees for claims upon which Bin did not and could not prevail.**

Bin argues that the trial court appropriately awarded costs and fees for her demand for translated documents because the issue was raised in good faith as an alternative legal ground for the desired outcome. BR 20. Through out all of the proceedings, Bin has not asserted that she could read or understand any translated documents or that if such translated documents were provided that the documents would provide meaningful access to Ms. Bin, as contemplated in the statement and purpose of LEP. CP 49. Bin's claim, as a matter of right, to translated documents, is duplicitous, putting an onus on the resources of the Housing Authority where such onus is not required by law. Had the trial court decided the issue, it would have found Bin's argument without merit. Bin asserts that the continuing claim under the state statute for translated documents was not only "properly raised" the trial court's finding of such "seems to acknowledge a realistic possibility that Ms. Bin could have prevailed on it." BR 25, also citing the continuing interpreter case that ultimately resulted in a finding against the translation issues. See, *Kustra v. Dept. of Labor & Industries*, __ Wn.2d __, __ P.3d __, 2010 WL 2432085 (2010). The court, however, did not decide the issue. As of the date this case was dismissed, the law was clear that interpreter services required under the state statute does not impute the requirements to provide translated documents. Bin made no claim that it was appropriate for her to challenge

the unambiguous federal LEP guidelines that have no requirement whatsoever to provide translated documents on a termination. Interpretation is universal, whereas a translation benefits only those with skills to read the translated documents. To seek to enforce, carte blanc, a right to translated documents where no right exists and where no showing is made that the production will even benefit the participant is insincere. Bin should not be awarded substantial costs and attorney's fees simply for making the argument that documents are required to be translated when the authority cited does not support such conclusion. Furthermore, the state statutory issue, at the time the case was dismissed, clearly stated that there was no basis in law or fact that SHA had any obligation to provide translated documents. See, *Kustura v. Department of Labor and Industries* 142 Wash.App. 655, 175 P.3d 1117 (2008).

III. CONCLUSION

The first inquiry of this court is whether the court has authority to award costs and attorney fees in this case. The long line of unlawful detainer cases establish that it is only appropriate to award costs and fees when the merits of the unlawful detainer are determined by the action.

The trial court's post dismissal entry of a finding that defendant was the prevailing party in the award of costs attorney fees is insufficient to establish that the merits of the case were addressed. The finding that

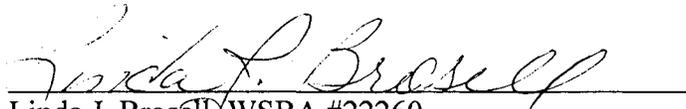
Bin is the prevailing party in the award of costs and attorney fees is pretextual to the erroneous award of such costs and attorney fees.

Defendant's arguments supporting the award are confusing and circuitous. Her first claim, that the lease (the contract between the parties) not the unlawful detainer statute, gives the court authority to make the award, has no basis in law. She then argues that SHA's failure to provide a grievance hearing that meets all standards of due process means that her tenancy was not terminated and that SHA was precluded from bringing the unlawful detainer action. BR 15-16. Bin then argues that she proved her case and that she is the "Prevailing Party" because she can continue in possession after the court found that she rightfully possess the property because SHA failed to provide an adequate grievance hearing. BR 16. (This theory, which SHA does not accept, logically concludes that the court would lack jurisdiction to enter the award of costs and attorney fees.) And finally, Bin asserts that "the superior court had sufficient information to resolve the case." BR 17. However, there are no findings to support that the merits of the case were addressed.

If Bin is found to be the prevailing party for the purposes of the award of costs and attorney fees, Bin is seeking the expenditure of public funds to translate documents that she has not claimed she could read or comprehend. SHA provide Bin with access to interpreter services which

she utilized during her tenancy and utilized through out the termination process. CP 59. SHA exceeded the requirements of LEP by having Somali staff and contract personnel available at the community on a daily basis to assist tenants with the leasehold issues. CP 59. If the court finds that the issue of possession was indeed addressed, and that it is appropriate to make an award of costs and attorney fess, such costs and fees should be limited to those issues upon which a defendant prevailed or reasonably raised (meaning reasonably could have prevailed). Any award should not include costs and fees on issues that are contrived and upon which Bin did not and could not prevail.

Respectfully submitted this 30th day of June, 2010.


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CERTIFICATE OF SERVICE

I certify that on the 30th day of July 2010, I caused a true and correct copy of Appellant's Reply Brief to be served to Eric Dunn at Northwest Justice Project, 401 Second Avenue, S., Suite 407, Seattle, WA 98104.

Dated this 30th day of July, 2010.



Sven Koehler

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