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No. 66207-4

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

TROIANI SEATTLE, LLC, PAUL S. (S/C) MACKAY SR. AND GAIL MACKAY,
CHAD MACKAY AND JENNIFER MACKAY, KENNETH SHARP AND JANE
DOE SHARP AND RICHARD TROIANI ,

Appellants,

v.

EXPEDITORS INTERNATIONAL OF WASHINGTON, INC.,

Respondent.

BRIEF OF APPELLANTS

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Introduction

This case is about a restaurant lease. As lessee, the defendants retained their right to assign the lease to a third party. When their restaurant revenue could no longer support the lease payments, defendants exercised their rights and contracted with a third party to take over the lease and operate a new restaurant. But the plaintiff lessor rejected the assignment. The plaintiff asserted a right it never had: To bar assignment of the lease to a third party. After brief, unsuccessful efforts to renegotiate the lease, defendants' restaurant folded and the lessor sued for breach of the lease.

On motion for partial summary judgment to declare defendants in breach, the trial court interpreted the lease as including a provision that is not there: A provision prohibiting assignment to third parties. Because Washington law is well established in declaring that no such provision can be inferred unless the parties expressly agreed to it, the trial court erred. Rather than proceed with trial on plaintiff's damage claims before seeking appellate review, defendants moved for discretionary review, which this Court accepted.

Assignments of Error

1. The trial court erred by entering partial summary judgment declaring defendants in breach and dismissing defendants' claims, where defendants' nonperformance was justified by, and was the result of plaintiff's breach of the Lease. The trial court erred by failing strictly to construe the express language of the Lease (discussed in Section I, *infra*), and by interpreting the Lease in violation of the parol evidence rule (discussed in Section II, *infra*). Because plaintiff's breach was material, partial summary judgment against Troiani and the guarantor defendants on plaintiff's claims, and dismissal of defendants' counterclaims, was error (discussed in Section III, *infra*).

2. For substantially the same reasons as it erred in entry of partial summary judgment, the trial court erred in denying defendants' motions for reconsideration and for CR 60(b) relief from the Order of partial summary judgment.

Statement of the Case

Plaintiff Expeditors International owns the office building located on the northwest corner of Third and Madison in downtown Seattle. CP 2-3 & 81.

Defendant Troiani is a Washington limited liability company formed by the Mackay family and Mackay Restaurant Management Group. CP 137. The Mackays create and operate first-class restaurants in the Puget Sound area, including El Gaucho restaurants in Seattle, Bellevue and Tacoma, and the Waterfront Seafood Grill at Pier 70 in Seattle. CP 137.

In late 2002, Expeditors approached Paul Mackay (the creator of El Gaucho and the senior restaurateur in the Mackay family) to solicit his interest in opening a restaurant in Expeditors' office building. CP 137-38. The Mackays were busy operating their other restaurants and declined Expeditors' solicitation. CP 137-38.

Expeditors nevertheless continued aggressively soliciting the Mackays, promising they would do "whatever it takes" to get the Mackays to open a restaurant in their building. CP 138. The Mackays ultimately did market research of high-end Italian

restaurants, and developed the concept for what would become Troiani Restaurant. CP 138.

The parties approached the prospect of opening Troiani in Expeditors' building knowing that most new restaurants fail, and that Expeditors' location was far from ideal. CP 138. The previous restaurant tenant in that space had been Fleming's Steakhouse, which had gone out of business. CP 138.

Expeditors and the Mackays negotiated a Lease for Troiani. Expeditors was the sole drafter of the Lease. CP 138. Expeditors requested (and eventually received as part of the lease) personal guarantees from the individual defendants for performance of the Lease. CP 113. Expeditors also sought severe restrictions on Troiani's right to assign the Lease to anyone else. Expeditors initially wanted (and drafted) a prohibition against assignment by Troiani to any third party, plus a provision allowing assignment to an affiliate of Troiani only under certain conditions and with Expeditors' permission. But as part of doing "whatever it takes" to get the Mackays to open a restaurant in their building, Expeditors agreed to strike (and did indeed strike) the clause against assignment to any third party:

12. ASSIGNMENT AND SUBLETTING.

~~12.1 Landlord's Consent. Tenant shall not sublet or encumber the whole or any part of the Premises, nor shall this Lease or any interest thereunder be assignable (for security purposes or otherwise) or transferable, voluntarily or involuntarily, by operation of law or by any process or proceeding of any court or otherwise without the prior written consent of Landlord, which consent shall not be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing, Tenant shall have the right to assign or sublease the Premises under this Lease to an affiliate ("Affiliate") provided that (i) Landlord determines that the Affiliate is an entity which is controlled by, controls, or is under common control with Tenant, or an entity into which Tenant is merged or with which Tenant is consolidated, (ii) Landlord determines that the net worth of the Affiliate is no less than the greater of a) net worth of Tenant upon execution of this Lease or b) net worth of Tenant immediately prior to said transfer, (iii) Tenant notifies Landlord of any such assignment or sublease at least thirty (30) days prior to its effective date, and (iv) Tenant promptly supplies Landlord the following in connection with any such request:~~

CP 199, reproduced in Appendix p. A-1.

The Assignment provision in the Lease, as ultimately drafted by Expeditors and signed by the parties, therefore addresses only assignments to any affiliate of Troiani:

12. ASSIGNMENT AND SUBLETTING.

12.1 Landlord's Consent. Tenant shall have the right to assign or sublease the Premises under this Lease to an affiliate ("Affiliate") provided that (i) Landlord determines that the Affiliate is an entity which is controlled by, controls, or is under common control with Tenant, or an entity into which Tenant is merged or with which Tenant is consolidated, (ii) Landlord determines that the net worth of the Affiliate is no less than the greater of a) net worth of Tenant upon execution of this Lease or b) net worth of Tenant immediately prior to said transfer, (iii) Tenant notifies Landlord of any such assignment or sublease at least thirty (30) days prior to its effective date, and (iv) Tenant promptly supplies Landlord the following in connection with any such request:

CP 87, reproduced in Appendix p. A-2.

The Lease, as finally agreed upon and signed on July 18, 2003, is an integrated agreement. It says: "This Lease constitutes the entire agreement between the parties and may not be modified except in writing signed by both parties." CP 98. It conveyed a leasehold estate in roughly 8,500 square feet of commercial, storefront space on the main floor of plaintiff's building. The Lease provided for Expeditors to make tenant improvements, and for Troiani to operate the space as a restaurant. CP 81. The Lease

provided that the premises could be used solely for a first-class restaurant operation, as envisioned by Expeditors: "The Premises shall be used for the operation of a first class, full service, sit-down restaurant and bar. No other use shall be made of the Premises."

CP 82.

Troiani built out the restaurant space and opened in November 2003, in time for the Thanksgiving and holiday season. CP 138. For nearly two years the restaurant struggled to become profitable. Then in September 2005 the City closed the downtown bus tunnel and severely restricted non-bus traffic on Third Avenue. Troiani's business plummeted. CP 139. The recession that began in 2007-08 further depressed Troiani's business. Despite putting \$1.4 million of their own money into keeping the restaurant afloat, by Spring 2009 defendants could no longer sustain Troiani's losses. CP 139.

Troiani's principals therefore sought a buyer to take over the restaurant space. They found one, and in July 2009 Troiani signed a Business Opportunity Purchase & Sale Agreement with Cerro Blanco, a company owned and run by restaurateur Tammy Armijo. CP 144, 159. Cerro Blanco agreed to buy Troiani's Lease and its equipment for a purchase price of \$600,000, with \$100,000 down

and the balance amortized monthly over the course of the next five years. CP 145-46.

As part of the Purchase and Sale to Cerro Blanco, Troiani represented that it had the authority to assign its Lease with Expeditors: "Seller represents and warrants to Buyer that (i) it has the authority to sign this Agreement and complete the sale to Buyer," and "Seller knows of no . . . contract provision, or other matters that could restrict its ability to perform hereunder". CP 149. Because the Purchase would commit Cerro Blanco not only to paying the \$600,000 purchase price but also operating an expensive restaurant for at least five years with Expeditors as its landlord, Cerro Blanco required Troiani to get Expeditors' consent to the Lease assignment. CP 154 (paragraph 'E').

Troiani submitted the Purchase & Sale Agreement and all related documentation to Expeditors for its consent on July 15, 2009. CP 140. Expeditors stalled for five weeks before responding. *Id.* Then, by email on August 19, Expeditors declared that under the "Assignment" section of the Lease, Troiani had no right of assignment to a third party. CP 140-41 & 158. "As a result," said Expeditors in its email, "the Landlord elects to withhold its consent thereto." *Id.*

Cerro Blanco refused to proceed with its purchase, solely because Expeditors refused to allow assignment of the Lease. CP 160. Cerro Blanco instead leased the vacant restaurant space on the top floor of Pacific Place in downtown Seattle, where it now operates a first class restaurant known as PNK Restaurant & Ultra Lounge. *Id.*

In an attempt to mitigate its damages from Expeditors' refusal to let Cerro Blanco take over Troiani's Lease, Troiani spent the next two months negotiating with Expeditors over remodeling and reopening the space as a new restaurant, under a renegotiated rent structure. CP 141-42. But after initial encouragement by Expeditors (including indications of renegotiation terms that could make a new restaurant feasible), in October 2009 Expeditors reversed course and insisted on terms far more onerous to Troiani. *Id.*

In late October Troiani submitted a counterproposal. Expeditors' response was to declare Troiani in default. Unable to keep its doors open, in November 2009 Troiani closed its doors. CP 142.

Expeditors commenced this suit in February 2010 against Troiani and against the individual defendants on their personal

guarantees. CP 1. Troiani answered and asserted counterclaims for breach of contract and interference with a business expectancy, based on Expeditors' breach in blocking the Lease assignment to Cerra Blanco. CP 6 & 12-13. In September 2010, Expeditors moved for partial summary judgment declaring Troiani in breach of the Lease, and dismissing Troiani's counterclaim on the theory that no breach occurred from Expeditors' refusal to permit the Lease assignment. CP 38-39. Expeditors' motion said virtually nothing about its supposed entitlement to block any assignment by Troiani to a third party, although Expeditors did confirm its position from its August 19, 2010, email to the effect that Troiani had no right to assign the Lease to a third party: "Troiani had no right to assign and Expeditors had no obligation to consent to any assignment unless the assignee was a corporate affiliate of Troiani Seattle and certain other conditions were satisfied." CP 41.

Expeditors' entire summary judgment argument for dismissal of Troiani's counterclaims was that under the "plain language" of the assignment provision in Section 12.1 of the Lease, Troiani had no right to assign the Lease to anyone other than an affiliate. "The Lease . . . unambiguously limited Troiani Seattle's right to assign the lease to corporate **affiliates**, which Cerra Blanco is not." CP 47

(bold in original). Expeditors' brief acknowledged that the Lease "was a product of the parties' negotiation," but was silent about what occurred in those negotiations. CP 47. Expeditors disclosed nothing about having sought, and ultimately agreeing to remove, a clause that would have restricted Troiani's right to assign to third parties. Indeed, Expeditors' motion and supporting papers said nothing one way or the other about the existence or relevance of extrinsic evidence regarding negotiation of the Lease.

Troiani opposed Expeditors' motion, arguing that Expeditors' position was both legally unsupportable (a lessee has the right to assign to third parties except to the extent expressly restricted in the Lease), and factually unsupportable (the Lease expressly says nothing restricting assignment to third parties; the only assignment provision in the Lease relates to conditions for an assignment to an affiliate). CP 121. The trial court nevertheless granted Expeditors' motion. CP 344-46. The summary judgment order declared defendants in default for nonpayment under the Lease, and dismissed defendants' counterclaim for breach of contract. *Id.* The order effectively dismissed defendants' counterclaim for tortious interference with a business expectancy, which the parties memorialized by agreed Order entered by the Court. CP 354-55.

Troiani moved for reconsideration, and three days later moved under CR 60(b) for relief from the partial summary judgment Order. CP 173 & 180. Troiani submitted Expeditors' draft Lease, showing its original inclusion of a general prohibition against assignment to third parties, and Expeditors' strikeout of that provision as part of reaching the final terms of the Lease. CP 199. Troiani's defense counsel at the time explained he had been unaware of that evidence at the time of the summary judgment Order. CP 183, 222-23. Troiani's motions argued that the draft Lease supported Troiani's position all along: That the express language of the assignment clause in the final Lease did not restrict (or even address) assignment to a third party such as Cerra Blanco. CP 182-83. The trial court nevertheless denied Troiani's motions. CP 349 & 352.

Troiani sought discretionary appellate review, which this court granted by Commissioner's Ruling of January 31, 2011.

Argument

This Court's review of summary judgment rulings is *de novo*. See *Hulbert v. Port of Everett*, 159 Wn. App. 389, 398 245 P.3d 779 (2011) ("The court reviews summary judgment decisions *de*

novo, engaging in the same inquiry as the trial court."). Denial of a motion for reconsideration or of a motion for relief from judgment under CR 60(b) is reviewed for abuse of discretion. See *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985) (CR 60(b) rulings are reviewed for abuse of discretion); *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008) ("We review a trial court's denial of a motion for reconsideration for abuse of discretion.").

I. Troiani never agreed to surrender the right every lessee has to assign its leasehold estate to third parties. The only restraint on alienation in Troiani's Lease is on assignment to an affiliate.

A lease represents the transfer of a leasehold estate in real property. See *Reilley v. Anderson*, 33 Wash. 58, 62, 73 P. 799 (1903) ("a leasehold is an interest in real estate"); *Moeller v. Gormley*, 44 Wash. 465, 469, 87 P. 507 (1906) ("a leasehold for a term of years was an 'interest in lands.'"). A 'lease' is the instrument conveying a leasehold estate, as distinguished from a 'demise,' which conveys the grantor's interest in real estate without retaining a reversionary interest. *Weander v. Claussen Brewing Assoc.*, 42 Wash. 226, 228, 84 P. 735 (1906) ("A term signifies not only the limitation of time, or period granted to the lessee for the

occupation of the premises, but it includes also the estate and interest in the land that pass during such period. The words 'lease' and 'demise' are often used to signify the estate or interest which is conveyed, but they properly apply to the instrument or means of conveyance.").

Leases are therefore a special form of contract. See *Lane v. Wahl*, 101 Wn. App. 878, 883, 6 P.3d 621 (2000) ("[A] lease is not a typical contract. Leases are conveyances whose covenants are interpreted under contract law."); *Preugschat v. Hedges*, 41 Wn.2d 660, 663, 251 P.2d 166 (1952) ("A lease is both a present conveyance and an executory contract. If the subject matter is real property, it transfers to the lessee a right of possession to the lands and tenements."); Washington Real Property Deskbook, § 27.2(4) (3d ed. 1996) ("[A] lease is a conveyance, the grant of an estate, and normally also a contract because of the covenants it contains").

By longstanding Washington law disfavoring restraints on the free alienation of real property, a lessee has the right to freely assign its leasehold interest except to the extent that the lease explicitly restrains that right. "The rules against restraints on alienation have as their concern the removal of direct restraints

upon the free transferability of vested interests in property." *Robroy Land Co. v. Prather*, 95 Wn.2d 66, 68, 622 P.2d 367 (1980).

A. A leasehold estate is freely assignable. Restraints on alienation are strictly construed, and exist only to the extent expressly agreed to.

Where enforceability is challenged, "Washington courts have . . . held that restrictive covenants, being in derogation of the common law right to use land for all lawful purposes, will not be extended to any use not clearly expressed, and doubts must be resolved in favor of the free use of land."

Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 120, 118 P.3d 322 (2005), quoting *Riss v. Angel*, 131 Wash. 2d 612, 621, 934 P.2d 669 (1997).

Lease covenants restricting the lessee's rights of assignment restrict the alienation of real estate. "[Lease] covenants against assignment constitute a restraint against alienation and are not favored in the law." *Shoemaker v. Shaug*, 5 Wn. App. 700, 704, 490 P.2d 439 (1971).

Because anti-assignment provisions are disfavored, Washington law for over a century has been that such clauses will be construed strictly against the lessor, and are enforced only to the extent required by the literal language in the lease. The

Washington Supreme Court has enunciated that principle repeatedly, in remarkably forceful expression:

[Anti-assignment provisions in a lease] are to be strictly -- **even literally** -- construed.

Burleson v. Blankenship, 193 Wash. 547, 549, 76 P.2d 614 (1938)

(emphasis added).

Restrictions of this character, upon alienation by the lessee, are not favored and are, it is said, to be construed strictly, and a particular mode of alienation is, it has been stated in a leading case on the subject, not to be regarded as prohibited **unless it is 'by words which admit of no other meaning.'**

Burns v. Dufresne, 67 Wash. 158, 161, 121 P. 46 (1912) (emphasis added) (*quoting with approval* *Tiffany, Landlord and Tenant*).

Covenants of this description are construed by courts of law **with the utmost strictness, to prevent the restraint from going beyond the express stipulation.**

Burns v. Dufresne, 67 Wash. 158, 161, 121 P. 46 (1912) (emphasis added) (*quoting with approval* *Taylor, Landlord and Tenant*). See also, *Alby v. Banc One Financial*, 119 Wn. App. 513, 523, 82 P.3d 675 (2003) ("At common law, 'reasonable restraints upon the alienation of property are enforceable, but **will be construed to operate within their exact limits.**' This is the rule followed in Washington.") (Citations omitted, emphasis added).

Washington courts have a long history of rigorously enforcing the strict construction of anti-assignment provisions against the lessor. Where a provision states that a lease may not be assigned, but is silent about whether the premises may be *subleased*, the Supreme Court holds that the lessee has the right to sublease without the lessor's consent. *Burns v. Dufresne*, 67 Wash. 158, 161, 121 P. 46 (1912) ("A marked and well-recognized distinction exists between a covenant against an assignment of the entire lease, and a covenant against the subletting of a portion of the premises. An expressed covenant against the one privilege will not restrain the lessee from enjoying or exercising the other.").

Where a lease provides that the lessee may not sublet without the owner's consent but is silent about assignment, the Supreme Court holds that the lessee has the right to assign without the owner's consent. *Willenbrock v. Latulippe*, 125 Wash. 168, 172, 215 P. 330 (1923) ("[P]rohibitions in leases against assignments and against subletting are not looked upon with favor by the courts, and will be strictly construed; and a prohibition in one of these respects will not amount to a prohibition in the other respect.").

Where a lease provides that the entire premises cannot be sublet without the lessor's consent but is silent about sublease of a *portion* of the premises, the Supreme Court holds that a portion of the premises may be sublet without consent. *Cuschner v. Westlake*, 43 Wash. 690, 695-96, 86 P. 948 (1906) ("The lease provided that the entire premises could not be sublet without the written consent of the lessor. It was not provided, however, that a part of the premises could not be sublet.").

Where a lease prohibits assignment without the lessor's consent, but is silent about whether one lessee could assign his leasehold interest to the other lessee, the Supreme Court holds that assignment between lessees does not require the lessor's consent. *Burleson v. Blankenship*, 193 Wash. 547, 551, 76 P.2d 614 (1938) ("[T]he stipulation against assignment without the consent of the vendor must be construed to refer to assignment of the entire interest of the vendees. . . . If the parties had intended such partial assignments to be the basis of forfeiture, it would have been an easy matter to have so stipulated in the contract.").

B. The anti-assignment clause in Troiani's Lease is unambiguous, and addresses only assignment to an affiliate. It creates no limitation on assignment to an unrelated third party.

The Lease the parties signed has just one affirmative declaration on the subject of assignment: "Tenant shall have the right to assign or sublease the Premises under this Lease to an affiliate ("Affiliate") provided that" This case is about Expeditors' desire that the Lease be deemed to read very differently: "Tenant shall have the right to assign or sublease the Premises under this Lease only to an affiliate"

Expeditors' position contradicts all of the Supreme Court precedent discussed above. Nothing in the assignment section of the Lease prohibits Troiani from assigning to an independent third party. Indeed, nothing in the assignment section of the Lease speaks *at all* to assignment to a third party:

12. ASSIGNMENT AND SUBLETTING

12.1 Landlord's Consent. Tenant shall have the right to assign or sublease the Premises under this Lease to an affiliate ("Affiliate") provided that (i) Landlord determines that Affiliate is an entity which is controlled by, controls, or is under common control with Tenant, or an entity into which Tenant is merged or with which Tenant is consolidated, (ii) Landlord determines that the net worth of the Affiliate is no less than the greater of a) net worth of Tenant upon execution of this Lease or b) net worth of Tenant immediately prior to said transfer, (iii) Tenant notifies

Landlord of any such assignment or sublease at least thirty (30) days prior to its effective date, (iv) Tenant promptly supplies Landlord the following in connection with any such request:

- a. True and complete copies of the proposed sublease, assignment and all side letters and other agreements pertaining thereto;
- b. Current financial statements, including income and expense statements and balance sheets, or other adequate financial information, for the then current year-to-date and two most recent years for the prospective sublease or assignment;
- c. Current credit report from a recognized credit agency identifying the credit history of the prospective sublessee or assignee; and,
- d. Any other documents or information requested by Landlord regarding such assignment or sublease or such Affiliate.

CP 87, reproduced in Appendix p. A-2.

Troiani never bargained away its right to assign to a third party. The Lease contains no provision restricting Troiani's right of assignment to a third party. Troiani retained that right, whether or not the Lease expressly recited it. So the fact the Lease is silent about the lessee's entitlement to assign to a third party neither restricts nor eliminates that right.

The Lease's silence on assignments to third parties does not – even by implication – express an intent that the lessee surrenders that right.

Restrictions, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed. Doubts must be resolved in favor of the free use of land.

Parry v. Hewitt, 68 Wn. App. 664, 668, 847 P.2d 483 (1992) (quoting with approval *Burton v. Douglas County*, 65 Wn.2d 619, 621, 399 P.2d 68 (1965)). Not even the heading for the affiliate assignment section of the Lease ("Assignment and Subletting") offers any basis to imply an intent to forbid assignments to other entities. The parties agreed that the Lease's headings have no effect on the interpretation of the Lease:

35. HEADINGS. The headings of the paragraphs of this Lease are inserted solely for the convenience of the parties, and are not a part of and are not intended to govern, limit or aid in the construction of any term or provision hereof.

CP 95.

Expeditors drafted the Lease in this case, knowing that Washington law would not provide it with any anti-assignment power beyond the literal language in the Lease, strictly construed against Expeditors.

"Contractual language also must be interpreted in light of existing statutes and rules of law." *Tanner Electric Coop.*, 128 Wn.2d at 674 (citing *CORBIN*, *supra*, § 551, at 198)[.]

Bort v. Parker, 110 Wn. App. 561, 575, 42 P.3d 980 (2002). In drafting the Lease Expeditors either knew, or chose to ignore, that the words it used would be construed "with the utmost strictness, to prevent the restraint from going beyond the express stipulation." *Burns v. Dufresne*, 67 Wash. 158, 161, 121 P. 46 (1912) (quoting with approval *Taylor, Landlord and Tenant*).

In *Perkins v. Children's Orthopedic Hospital*, 72 Wn. App. 149, 864 P.2d 398 (1993), this Court addressed the significance that Washington law has on construction of a party's choice of explicit contractual language. *Perkins* involved a release of all the doctors alleged to have committed medical malpractice, prepared as part of a settlement that included one of the hospitals the doctors worked for, but not a second hospital for which some of the doctors were agents. Following the settlement, the second hospital obtained summary judgment that the plaintiff's release extinguished its vicarious liability by release of its agents. After determining that *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 658 P.2d 1230 (1983), stated the relevant legal principle (that release of a solvent agent extinguished the vicarious liability of the principal), this Court held:

In the face of *Glover*, plaintiffs are charged with the knowledge that as a matter of law they cannot release the doctors/agents and preserve the vicarious liability of the hospital/principal. If plaintiffs truly intended not to release Drs. Cohen, Furman, McCroskey, and Morray they could easily have added the phrase, "except Drs. Cohen, Furman, McCroskey, and Morray" immediately after the word "agents" in the release. Whether the University defendants would have agreed to such a release may be doubtful, but the release, if accepted, would have expressed what plaintiffs now claim their intent was. If rejected, the plaintiffs would realize they cannot have it both ways: release the unnamed agents to achieve a settlement with the University defendants, but rely on their alleged negligence for vicarious liability against Children's Hospital.

110 Wn. App. at 163-64.

Similarly in the present case, Expeditors knew or should have known that it obtained no power to restrain the free alienation of Troiani's Lease to anyone other than an affiliate, where the literal language of the Lease conveyed no such restraint. Having drafted the Lease that way, Expeditors is bound that the Lease be enforced that way.

II. Because the Lease is an integrated contract, its language cannot be added to or contradicted, as would be required to achieve Expeditors' desired outcome.

An integrated contract is an instrument intended by the parties as the final expression of their agreement. See *Berg v. Hudesman*, 115 Wn.2d 657, 670, 801 P.2d 222 (1990) (An

integrated contract is "a writing intended as a final expression of the terms of the agreement.") A partially integrated contract is, by contrast, one reciting some but not all of the terms agreed by the parties in their contract. *Id.*

The Lease in this case is an integrated contract. It says: "This Lease constitutes the entire agreement between the parties and may not be modified except in writing signed by both parties." CP 98.

A. The parol evidence rule bars the assertion of conflicting or additional terms beyond what the Lease provides.

The parol evidence rule applies to integrated contracts. *Id.* While a party could offer evidence of an agreed term missing from a *partially* integrated contract, the parol evidence rule makes that evidence inadmissible with an integrated contract. *Id.*

The parol evidence rule precludes the use of extrinsic evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract; that is, a contract intended as a final expression of the terms of the agreement.

Brogan & Anensen, LLC v. Lamphiear, 165 Wn.2d 773, 775, 202

P.3d 960 (2009).

Extrinsic or parol evidence is only allowed to help interpret what was written in an integrated contract, not what a party may, in hindsight, claim was intended to have been written:

[P]arol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted 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. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written.

Berg, 115 Wn.2d at 669; see *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005) ("We do not interpret what was intended to be written but what was written.").

Consequently, the parol evidence rule forbids resort to contract interpretation as a vehicle for adding a term that is missing from an integrated contract.

Parol evidence cannot be used to add provisions to written contracts. While extrinsic evidence is admissible to interpret contracts and to determine intent, that evidence cannot be used to vary the terms of the contract. Evidence is admitted to "elucidat[e] the meaning of the words employed" not "for the

purpose of importing into a writing an intention not expressed therein."

Syputa v. Druck, Inc., 90 Wn. App. 638, 645, 954 P.2d 279 (1998) (footnotes and citations omitted); see *Lehrer v. DSHS*, 101 Wn. App. 509, 515, 5 P.3d 722 (2000) ("If the language is clear and unambiguous, the court must enforce the contract as written; it may not modify the contract or create ambiguity where none exists.").

B. Post-Berg caselaw confirms that the parol evidence rule is fatal to parties making the same arguments as Expeditors is making here.

This Court applied the principles governing contract interpretation and parol evidence in *Save Sea Lawn Acres Assoc. v. Mercer*, 140 Wn. App. 411, 166 P.3d 770 (2007). Half a century before that suit began, a developer created two separate, adjacent subdivisions. Plat one was an uphill subdivision of 36 residential lots. Plat two was a downhill subdivision of 66 lots. The developer marketed the lots in Plat one with a brochure representing that the lots in Plat one enjoy an "unobstructed and sweeping view of Puget Sound and the Olympic mountains. The lower portion [Plat 2], comprising another 50 lots, offers a partial view." 140 Wn. App. at 414.

The plats were recorded within a month of one another, with identical sets of restrictive covenants. Each set of restrictive covenants expressly provided that it applied to its own plat, and that, "The owner of any lot *in said plat* shall have the right and power to enforce" those covenants. Apparently, each set of restrictive covenants included height restrictions for homes constructed on the lots of each plat.

In later years, homes built in a newer development known as Blakely Court obstructed the views in Plat two. The owners of Plat two voted to revoke the restrictive covenants for Plat two, apparently to construct additions that would have been prohibited by the height restrictions in the original covenants. The owners of Plat one, foreseeing that taller houses in Plat two would impair their views, sued to contest the revocation of the Plat two restrictive covenants.

The trial court granted summary judgment dismissing the suit, and this Court affirmed. The restrictive covenants for Plat two provided only that the owners "of said plat" could enforce them. Entirely missing from those covenants was any provision that the owners of Plat one could enforce the covenants for Plat two. The sales brochure, proffered to show that the developer of both plats

intended the restrictive covenants for Plat two to benefit the homeowners in Plat one, could not create an issue of fact over the scope or terms of the Plat two covenants because the brochure was being offered to add a term missing from the covenants: Namely, that the Plat two covenants were enforceable not only by the owners in Plat two, but also by the owners in Plat one. "Extrinsic evidence to interpret a covenant is limited to the interpretation of the covenant itself and may not be used to show an intention independent of the instrument." 140 Wn. App. at 412.

Another case on point is *Paradise Orchards v. Fearing*, 122 Wn. App. 507, 94 P.3d 372 (2004). Although the claim in that case was for legal malpractice, at issue was interpretation of the remedies clause in an underlying integrated contract selling plaintiff's orchard to a third party:

Upon any default by the buyer, under this earnest money agreement, seller shall have the right to immediately repossess the property [interlineated part: after providing buyer with 15 days written notice of default]. In such event, seller shall have the right to maintain for itself, and to sell on its behalf, keeping the proceeds thereof, of any crop on the property. Seller shall have no obligation to reimburse buyer for any of the earnest money deposit.

When the purchaser defaulted the seller sued for specific performance, contending that the remedies clause provided for

available – but not exclusive – remedies. The defense contended the remedies clause should be interpreted as granting the seller **only** the remedies set out there: Repossession and retention of the earnest money. The trial court in the suit against the purchaser made an initial, discouraging ruling on the scope of the seller's remedies. The seller settled on unfavorable terms, and sued the attorney who had drafted the remedies clause.

The trial court in the malpractice suit ruled as a matter of law that the remedies clause did *not* impose exclusive remedies, and did not preclude the seller from seeking specific performance.

Reviewing *de novo*, the court of appeals affirmed:

By using the clauses "shall have the right" and "shall have no obligation" the paragraph unambiguously implies that the buyer has discretion to invoke the enumerated remedies. In other words, paragraph 24 of the agreement does not specify mandatory and exclusive remedies. Rather, it reserves the seller's right to invoke the enumerated remedies. *No language in the agreement states the remedies are exclusive.*

122 Wn. App. at 518 (emphasis added).

Just as in *Paradise Orchards*, where one party attempted under the guise of contract interpretation to add a term providing that the **only** remedy was what the contract affirmatively recited, Expeditors seeks to add to the parties' integrated Lease a provision

that the **only** assignments allowable are assignments to an affiliate. As Expeditors asserted to the trial court: "Section 12 permits an assignment only to affiliates, provided that certain net worth and operational thresholds are met" Reply Brief, p. 2, CP 163. But just as in *Paradise Orchards*, where the contract contained no such limiting language and the contract therefore allowed whatever other avenues of recourse were available under the law, the Lease in this case includes no language prohibiting assignment to third parties.

Yet another recent case on point is *Ledaura, LLC v. Gould*, 155 Wn. App. 786, 237 P.3d 914 (2010). On consecutive days the owners of real property in Tacoma entered into a lease and then an option for purchase. The option contract said nothing about the parties' lease. The option contract had no provision that it could be exercised only if the purchaser was current under its separate lease contract. The lessee moved into the property and made substantial improvements, but fell behind in paying rent. The property owner proposed an amendment to the lease, providing that the option to purchase could be exercised only if the lessee was not in default under the lease. The lessee rejected that proposal.

The lessor brought an unlawful detainer action under the lease, and while that action was pending the lessee tendered

performance under the option to purchase. The property owner rejected the tender, and the parties asserted competing claims under the option contract. The trial court entered summary judgment dismissing the lessee/purchaser's claims. Although noting that the motion hinged on "missing language" in the option contract (to the effect that the option could be exercised only on the condition that the lessee was not in default under the separate lease contract), the trial court inferred that intent as a matter of law.

The court of appeals reversed. Because the option contract did not contain the term the property owner sought to impose on the purchaser, the court held that at the very least it would be an issue of fact whether extrinsic evidence could establish that the parties had agreed to such a term. And given the paucity of extrinsic evidence showing any such *express* agreement, the appellate court indicated considerable skepticism over whether even an issue of fact might exist:

There is no express language in either agreement indicating that the parties intended the agreements to function interdependently; nor do we find any support in the record implying that the parties intended to treat the Lease and the Option as a single agreement. Thus, the record fails to support the trial court's

conclusion that these separate agreements are part of a single unified contract.

155 Wn. App. at 804-05.

This Court's decision in *Oliver v. Flow International Corp.*, 137 Wn. App. 655, 155 P.3d 140 (2006), is also directly on point. The plaintiff entered into an integrated contract selling all rights in his invention to the defendant. The purchase price was \$150,000 plus possible lump sum and royalty payments if the purchaser marketed the invention. The purchaser undertook some efforts at marketing, but made no sales. After several years the inventor sued for damages, alleging the purchaser was obligated to develop and market the invention and had breached its duty to do so.

The trial court dismissed the inventor's claims by summary judgment and this Court affirmed. The integrated contract between the parties provided only for the sale of the inventor's rights; it did not affirmatively obligate the purchaser to develop those rights and generate sales revenue.

In opposing summary judgment the inventor introduced extrinsic evidence to show that the parties intended the invention be developed and that sales revenues be generated. The plaintiff argued that when "illuminated" by that evidence, passages in the

contract referring to the pursuit of patents and to marketing and sales all revealed the contractual intent that the inventor sought to enforce. This Court rejected that evidence as an impermissible attempt to add terms that were missing from an integrated contract:

Oliver offers extrinsic evidence of negotiations leading up to the final agreement. He contends the evidence illuminates certain terms in the contract, such as Flow's obligation to pay royalties and its obligation to return the rights to the Robot upon ceasing to manufacture it. He further contends these terms, so illuminated, all presuppose or assume or contemplate that Flow would patent, manufacture, and market the Robot, and therefore they support an interpretation that the contract actually bound Flow to do so. This is an improper use of extrinsic evidence *because the result Oliver seeks is to insert new obligations into the contract*. The express terms of the contract *do not create the obligation Oliver now attempts to impose*, even in light of the context in which the agreement arose.

137 Wn. App. at 660 (emphasis added).

In the present case, where the parties' contract is integrated, extrinsic evidence cannot serve to add the missing term that Expeditors wants to impose, even if such evidence existed. And no such evidence exists. The extrinsic evidence regarding the Lease is all in favor of Troiani.

C. The extrinsic evidence admissible under the parol evidence rule supports the Lease's unambiguous language: That Troiani did not agree to restraint on assignment to a third party.

Expeditors offered no extrinsic evidence in support of its motion for partial summary judgment. It acknowledged that the assignment provision was the result of negotiation by the parties (CP 47), but said nothing one way or the other about those negotiations. Had Expeditors disclosed the negotiation context for the assignment provision, the trial court would have been immediately informed of the fact that Expeditors had sought the very clause it was arguing ought to be inferred into the Lease, and had agreed to remove that clause as part of reaching a final contract:

12. ASSIGNMENT AND SUBLETTING.

12.1 Landlord's Consent. ~~Tenant shall not sublet or encumber the whole or any part of the Premises, nor shall this Lease or any interest thereunder be assignable (for security purposes or otherwise) or transferable, voluntarily or involuntarily, by operation of law or by any process or proceeding of any court or otherwise without the prior written consent of Landlord, which consent shall not be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing,~~ Tenant shall have the right to assign or sublease the Premises under this Lease to an affiliate ("Affiliate") provided that (i) Landlord determines that the Affiliate is an entity which is controlled by, controls, or is under common control with Tenant, or an entity into which Tenant is merged or with which Tenant is consolidated, (ii) Landlord determines that the net worth of the Affiliate is no less than the greater of a) net worth of Tenant upon execution of this Lease or b) net worth of Tenant immediately prior to said transfer, (iii) Tenant notifies Landlord of any such assignment or sublease at least thirty (30) days prior to its effective date, and (iv) Tenant promptly supplies Landlord the following in connection with any such request:

CP 199, reproduced in Appendix p. A-1.

Instead, the trial court did not receive that extrinsic evidence until submission of defendants' CR 60(b) motion. But even without the benefit of that evidence during the trial court's initial review, the

summary judgment record contained substantial extrinsic evidence that weighed against assuming the parties had intended the Lease to include a prohibition of assignment to third parties.

The summary judgment record (interpreted in favor of Troiani, as the defense was entitled to) established that creating a new restaurant is expensive and extremely risky. Most new restaurants fail. Particularly where the Mackay family members were personally guaranteeing Troiani's obligations, having options for substitute performance in the event the Troiani restaurant proved unprofitable (such as the ability to assign the Lease to a third party) was critical. And the Mackays were negotiating with Expeditors from a position of relative strength: They did not need a new venture, having already established a portfolio of extremely successful restaurants.

By contrast, Expeditors was negotiating from a position of weakness. Their space was vacant, in a less-than-desirable location. The previous restaurant in that space had folded. When the Mackays explained their disinterest in doing business with plaintiff, Expeditors' Bo Peck vowed the owner would do "whatever it takes" to get the Mackays into a lease. CP 138. Leaving intact the lessee's rights of assignment, save only for conditions on

assignment to an affiliate, was ultimately part of "whatever it took" to get the Mackays' agreement on the final Lease.

The conduct of both parties during the pendency of the Lease likewise supports Troiani's position. When they could no longer keep Troiani afloat, the defendants entered into a \$600,000 sale of Troiani's leasehold interest, equipment, and assets. In their contract of sale to Cerra Blanco, defendants contractually represented what they understood to be true: That they had every right to assign the Lease to an independent third party.

As part of that same contract, Cerra Blanco required that defendants obtain Expeditors' consent to the sale. Defendants sought that consent. And at that point, Expeditors' conduct *further* confirmed that the parties had not intended the assignments-to-affiliate clause in the Lease to be the only permissible form of assignment. That clause required Expeditors to respond within 15 days to tenders of assignment governed by that Section of the Lease.

Landlord's decision with regard to acceptance or rejection of a sublease or assignment shall be given in writing within fifteen (15) days after delivery of the items specified in this Paragraph 12.1.

CP 88. The Mackays completed their submission to Expeditors by July 15, 2009. Expeditors knew the parties never intended Section 12.1 of the Lease to govern assignments to third parties, which is why Expeditors never responded within 15 days, as would have been required if Section 12.1 *had* been intended by the parties to govern all assignments by Troiani. Instead, Expeditors made no response to Troiani for five weeks. CP 140.

D. The contractual intent expressed by the Lease's assignment clause was commercially rational, and recites the parties' actual bargain. That interpretation of the Lease is reasonable.

The unambiguous language negotiated by the parties included no restraint on Troiani's right to assign the Lease to a third party. The extrinsic evidence presented to the trial court supported defendants' position: The context for the parties' Lease confirms that the limited, express language restricting only assignment to an affiliate was what the parties intended. Expeditors chose not to introduce any extrinsic evidence of the negotiation of that language, presumably to avoid disclosing that Expeditors had negotiated away the very term it wanted the court to read into the Lease.

In the face of explicit language in an integrated contract, unbroken Washington law strictly construing terms restraining the

alienation of leaseholds, and extrinsic evidence supporting defendants' position that the literal language of the Lease expressed what the parties intended, Expeditors argued that its proffered interpretation, inferring a prohibition against assignment to any third party, was the only reasonable interpretation of the Lease.

But no argument from reasonableness can warrant summary judgment adding a crucial term to an integrated contract that the parties had not agreed to. Even if Expeditors could find admissible parol evidence to support its interpretation in the face of the express language used in the Lease, the Lease would be susceptible to two reasonable interpretations: The one shown by the unambiguous language of the Lease, and the second suggested by Expeditors' extrinsic evidence. In that event, entry of summary judgment would still be error. *See Hansen v. Transworld Wireless*, 111 Wn. App. 361, 375, 44 P.3d 929 (2002) ("If only one reasonable meaning can be ascribed to the agreement when viewed in context, that meaning necessarily reflects the parties' intent; if two or more meanings are reasonable, a question of fact is presented.")

The literal meaning of language in an integrated contract cannot be dismissed as a matter of law because that language is itself an "objective manifestation" of the parties' intent.

Given that the written contract is itself an objective manifestation, it is deemed to have been read by the parties who signed it, and it may not be contradicted--even if the offered evidence would otherwise be an objective manifestation. Because a written contract predominates over a contradictory manifestation, a contradictory manifestation cannot alone be sufficient to raise a genuine issue of material fact.

BNC Mortgage, Inc. v. Tax Pros, Inc., 111 Wn. App. 238, 250, 46 P.2d 812 (2002); see *Litowitz v. Litowitz*, 146 Wn.2d 514, 528, 48 P.3d 261 (2002) ("The touchstone of contract interpretation is the parties' intent.' Contract interpretation must be based on the intent of the parties *as reflected in their agreement.*") (Emphasis added, footnotes and citations omitted). At most, a contract interpretation by Expeditors differing from the contractual intent objectively manifested in the contract's literal language would create a conflict of competing, reasonable interpretations. Summary judgment would remain unavailable.

Even if the Lease had not been an integrated agreement and Expeditors could escape the parol evidence rule, its interpretation would still be at most an alternate one precluding summary

judgment. Beyond the advantage of matching the literal meaning of the Lease, Troiani's interpretation is reasonable because it is *exactly what the parties negotiated*.

Because the key is what the parties negotiated for, parol evidence is admissible only if it "goes no further than to show the situation of the parties and the circumstances under which the instrument was executed" [Citations].

Spratt v. Crusader Insurance Co., 109 Wn. App. 944, 949, 37 P.3d 1269 (2002).

Troiani negotiated for and obtained a Lease that restrained only its rights of assignment to an affiliate. As explained *supra*, that result was reasonable under the circumstances. The ability to assign to a third party was extraordinarily important to defendants under the circumstances, which is why they would not enter a contract without it. By comparison, the circumstances surrounding the Lease gave them little reason to foresee any need to make an assignment to an affiliate, so giving Expeditors the power to reject such an assignment was a modest concession in the course of the negotiations.

Having the power to control assignment to an affiliate might very well have been considerably more important to Expeditors than it was to Troiani. Expeditors knew the Mackays were in the

business of developing and operating restaurants. Expeditors knew that Troiani would be an entirely new restaurant concept in the Mackay portfolio. If it proved to be a hit, Expeditors would not want to see the Mackays move that restaurant somewhere else, while the Mackays started over again with yet another experimental concept in Expeditors' space. The Lease provided Expeditors with dual protections against such a result. First, it prohibited defendants from operating another Troiani restaurant, or any other restaurant "with a substantially similar concept," within 10 miles of Expeditors' building. CP 82. And second, it prohibited Troiani from assigning the Lease to an affiliate without Expeditors' consent. Those provisions operated to protect Expeditors from seeing its space used as a test bed for startup restaurant concepts.

III. By mistakenly interpreting the Lease as including an implied prohibition on assignment to third parties, the trial court erred in granting partial summary judgment to Expeditors.

Expeditors breached the parties' contract by rejecting Troiani's assignment to Cerro Blanco. The only reason Cerro Blanco did not take over the leasehold and continue the lease payments was Expeditors' rejection. CP 160. Troiani's revenues

could not cover further lease payments, and after a brief attempt at renegotiating the terms of the Lease, Troiani folded.

The trial court interpreted into the contract a term the parties never agreed to: Restraint on Troiani's right to assign to a third party, such that Expeditors was free to reject any such assignment for any reason. The trial court therefore granted summary judgment to Expeditors, declaring Troiani in breach when it could no longer pay rent, and declaring the individual guarantors in breach for not having performed Troiani's Lease obligations. That was error.

A. Expeditors had no right to reject Troiani's assignment of the Lease to Cerra Blanco. Expeditors breached the Lease by asserting a right it did not have, causing Cerra Blanco to back out of the assignment.

As discussed *supra*, the Lease left intact Troiani's right to assign the Lease to a third party. Troiani exercised that right in its Purchase & Sale Agreement with Cerra Blanco.

Expeditors had the duty to cooperate in implementing the assignment. That duty is part of the duty of good faith implied in every contract.

There is an implied duty of good faith and fair dealing in every contract. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). This duty

obligates the parties to cooperate with one another so that each may obtain the full benefit of performance. *Metro. Park Dist. v. Griffith*, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986).

Frank Coluccio Construction Co. v. King County, 136 Wn. App. 751, 764, 150 P.3d 1147 (2007).

Instead of cooperating with Cerro Blanco's takeover of the Lease so that Troiani could enjoy the benefit of its rights of assignment, Expeditors asserted a right it did not have: The right to reject the assignment.

The case of *Ledaura, LLC v. Gould*, 155 Wn. App. 786, 237 P.3d 914 (2010), hinged on a similar issue, where the owner of real property rejected a tender of performance based on assertion of a contract right which, as determined on appeal, the owner did not have. In *Ledaura*, the property owner entered into two separate contracts with the purchasers: An option to buy, and a lease. A dispute developed under the lease, with each side contending the other was in breach. While that dispute was pending the buyer/lessee tendered performance under the option to purchase. The owner rejected the tender, based on the alleged breach under the lease. The trial court granted summary judgment in favor of the property owner.

The court of appeals reversed. The court held the parties had not agreed that the lease and option contract were interconnected. The property owner therefore had no right to reject tender of performance under the option contract based on that same party's breach under the lease. The trial court's partial summary judgment for the property owner, which was premised on the owner's entitlement to reject tender under the option contract, was therefore error.

In *Ernst Home Center, Inc. v. Sato*, 80 Wn. App. 473, 910 P.2d 486 (1996), this Court observed that substantial authority exists on the specific proposition that a lessor's breach of its obligations regarding assignment warrants termination of the lessee's remaining obligations: "Ernst properly notes that several courts have held that a landlord's breach of a lease provision regarding reasonable consent to sublease or assign entitles the tenant to declare the lease terminated." 80 Wn. App. at 489.

As in *Ledaura*, the trial court premised partial summary judgment for the lessor on the erroneous view that Expeditors had the contract right to reject an assignment to a third party.

B. Expeditors' breach went to the heart of the contract, and excused defendants from further performance.

Expeditors initiated this suit, alleging breach from Troiani's failure to pay rent. But that failure was the result of Expeditors rejecting Troiani's assignment of the Lease to Cerra Blanco. Had Expeditors cooperated in effectuating the assignment, Cerra Blanco was ready, willing and able to perform the lessee's obligations under the Lease. CP 160.

One party to a contract who prevents another from performing his promise has no cause of action to recover for the nonperformance of that promise.

Hydraulic Supply Manufacturing Co. v. Mardesich, 57 Wn.2d 104, 105, 352 P.2d 1023 (1960).

One of the parties to a contract cannot avail himself of nonperformance where the nonperformance is occasioned by his acts. That is, a party may not benefit by his wrongful acts.

Wolk v. Bonthius, 13 Wn.2d 217, 219, 124 P.2d 553 (1942).

The principle enunciated in *Wolk* and *Mardesich* is an application of the general principle that a material breach of contract is sufficient to excuse the nonbreaching party from further performance.

If a party materially breaches a contract, the other party may treat the breach as a condition excusing further performance.

Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 647, 211 P.3d 406 (2009); see *Rosen v. Ascentry Technologies, Inc.*, 143 Wn. App. 364, 369, 177 P.3d 765 (2008) ("A party is barred from enforcing a contract that it has materially breached."); *Bailie Communications, Ltd. v. Trend Business Systems*, 53 Wn. App. 77, 81, 765 P.2d 339 (1988) ("A material failure by one party gives the other party the right to withhold further performance") (quoting Restatement (Second) of Contracts § 241, comment e); *Jacks v. Blazer*, 39 Wn.2d 277, 285, 235 P.2d 187 (1951) ("A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty."); *Campbell v. Hauser Lumber Co.*, 147 Wash. 140, 145, 265 P. 468 (1928) ("[I]f the breach be of a substantial part of an entire contract, as distinguished from a part that is immaterial or inconsequential, though the breach may not render a performance of the remainder impossible or impractical, an abandonment of the whole is justified.").

Whether any given breach is material presents an issue of fact.

A material breach is one serious enough to justify the other party's abandoning the contract because the contract's purpose is defeated. *Park Ave. Condo. Owners Ass'n v. Buchan Devs., LLC*, 117 Wn. App. 369, 383, 71 P.3d 692 (2003). Whether a breach is material depends on the circumstances of each particular case.

Moore v. Blue Frog Mobile, Inc., 153 Wn. App. 1, 9 n.2, 221 P.3d 913 (2009); see *TMT Bear Creek Shopping Center v. PETCO Animal Supplies*, 140 Wn. App. 191, 209, 165 P.3d 1271 (2007) ("Whether a breach is material is a question of fact, and the trial court may consider, among other factors, the extent to which the injured party will be deprived of a benefit which he reasonably expected."); *Bailie Communications*, 53 Wn. App. at 84 ("The 'standard of materiality . . . is necessarily imprecise and flexible.' However, it 'is to be applied . . . in such a way as to further the purpose of securing for each party his expectation of an exchange of performances.'").

C. In the face of Expeditors' material breach, the trial court erred both in dismissing defendants' counterclaims, and in declaring Troiani to be the party in breach.

Because it was Expeditors' own breach that precipitated the demise of Troiani, the trial court erred in entering partial summary judgment declaring Troiani in breach, and in dismissing Troiani's counterclaims. For the same reason, the trial court erred in declaring the individual guarantors in breach. *See Parsons Supply, Inc. v. Smith*, 22 Wn. App. 520, 523, 591 P.2d 821 (1979) ("a breaching party cannot demand performance from the nonbreaching party."). The guarantors could not be liable without an underlying breach by Troiani. Here, there was none.

IV. The Lease includes provision for award of attorney fees.

Section 32 of the Lease provides for the award of attorney fees, including fees in the event of appeal:

In the event that Landlord or Tenant shall institute a lawsuit to enforce any rights pursuant to this agreement, the successful party shall be entitled to, in addition to those costs and disbursements provided by statute, a reasonable sum as attorneys' fees and costs of litigation, including reasonable attorneys' fees and costs incurred in any appeal thereof.

CP 95. Pursuant to RAP 18.1, defendants request award of their attorney fees and expenses for this appeal.

The contract in *Ledaura, LLC v. Gould*, 155 Wn. App. 786, 237 P.3d 914 (2010), included an attorney fee clause. On appeal the lessee/buyer succeeded in obtaining reversal of partial summary judgment, with remand for further proceedings. The appellate court declared the lessee to be the prevailing party and awarded attorney fees incurred on appeal. 155 Wn. App. at 805.

Other authority suggests that award of fees for an appeal such as this may await the ultimate determination of the prevailing party, following remand to the trial court:

Where a party has succeeded on appeal but has not yet prevailed on the merits, the court should defer to the trial court to award attorney fees. *McClarty v. Totem Elec.*, 119 Wn. App. 453, 472-73, 81 P.3d 901 (2003). If the party prevails on the merits, the trial court may award fees for trial and appellate costs.

Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 153, 94 P.3d 930 (2004).

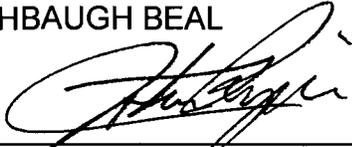
Defendants therefore request either an award of fees and expenses upon this court's reversal of partial summary judgment for Expeditors, or alternately that the award await defendants' ultimate determination as the prevailing parties in the case following remand.

Conclusion

Troiani and the individual defendants request reversal of the trial court's Order of partial summary judgment, and of the related Order dismissing Troiani's tortious interference counterclaim. CP 344 & 354.

Respectfully submitted this 4th day of April, 2011.

ASHBAUGH BEAL

By 

John S. Riper, WSBA #11161
Mark Rosencrantz, WSBA #26552
Attorneys for Appellants

Appendix

12. ASSIGNMENT AND SUBLETTING.

12.1 Landlord's Consent. ~~Tenant shall not sublet or encumber the whole or any part of the Premises, nor shall this Lease or any interest thereunder be assignable (for security purposes or otherwise) or transferable, voluntarily or involuntarily, by operation of law or by any process or proceeding of any court or otherwise without the prior written consent of Landlord, which consent shall not be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing,~~ Tenant shall have the right to assign or sublease the Premises under this Lease to an affiliate ("Affiliate") provided that (i) Landlord determines that the Affiliate is an entity which is controlled by, controls, or is under common control with Tenant, or an entity into which Tenant is merged or with which Tenant is consolidated, (ii) Landlord determines that the net worth of the Affiliate is no less than the greater of a) net worth of Tenant upon execution of this Lease or b) net worth of Tenant immediately prior to said transfer, (iii) Tenant notifies Landlord of any such assignment or sublease at least thirty (30) days prior to its effective date, and (iv) Tenant promptly supplies Landlord the following in connection with any such request:

- a. True and complete copy of the proposed sublease, assignment and all side letters or other agreements pertaining thereto;
- b. Current financial statements, including income and expense statements and balance sheets, or other adequate financial information, for the then current year-to-date and two most recent years for the prospective sublessee or assignee;
- c. Current credit report from a recognized credit agency identifying the credit history of the prospective sublessee or assignee; and,
- d. Any other documents or information requested by Landlord regarding such assignment or sublease or such Affiliate.

Landlord's decision with regard to acceptance or rejection of a sublease or assignment shall be given in writing within fifteen (15) days after delivery of the items specified in this Paragraph 12.1-. In addition, in the event the proposed assignee or subtenant is not an individual, personal guaranties shall be required of the principals as a condition to Landlord's consent.

12.2 Tenant Transfer of Lease. Any transfer of this Lease by Tenant through a merger, consolidation or liquidation, or any change in the ownership of or power to vote a majority of its outstanding voting stock or partnership interests, shall constitute an assignment for the purposes of this Section.

12.3 Continued Responsibility. Regardless of any approved assignment or sublease of this Lease, Tenant shall not be released from liability nor shall any guaranties be affected or releases as a result of such assignment or sublease. However, in the event of a default by any such assignee or sublessee, Landlord shall give Tenant notice of the default, shall accept cure of the default by Tenant within ten (10) days after such notice and shall permit Tenant to reenter and repossess the Premises for the then unelapsed portion of the Lease Term subject to all of the provisions of this Lease. Subsequent amendments or modifications of this Lease without notice to or consent of the Landlord will not relieve the Tenant of any liability under this Lease.

that Landlord shall have no obligation to provide such services in amounts in excess of those reasonably deemed by Landlord to be standard for Tenant's use as permitted under this Lease.

9.2 Landlord shall immediately give notice to Tenant of an impending interruption of any utility services to the Premises of which Landlord has or should have had knowledge. Landlord shall use its best efforts to minimize and promptly cure all utility interruptions that are caused by Landlord or subject to Landlord's control. In no event shall Landlord be liable for an interruption or failure in the supply of any utilities to the Premises, provided however, that to the extent such interruption or failure in the supply of utilities to the Premises is due solely to the negligence of Landlord, its agents or employees, and such interruption continues for more than three (3) consecutive days, Tenant shall be entitled to a pro rata abatement of Rent retroactive to the first day of the interruption or failure and continuing until services have been restored.

10. **ALTERATIONS AND IMPROVEMENTS.** Tenant shall not, without Landlord's prior written consent, which consent shall not be unreasonably withheld, make any structural alterations, additions or improvements in, on or about the Premises. Tenant shall provide to Landlord, prior to commencement of improvements, copies of the plans and specifications for such improvements. Tenant covenants that any such improvements and alterations shall be made in a workmanlike manner and in compliance with all applicable federal, state and municipal laws and regulations. At Landlord's option, Tenant shall be required to remove any improvement erected or made by Tenant which was not approved by Landlord as part of the Tenant's original Tenant Improvements, provided that Tenant may elect to remove all items containing Tenant's name or logo. Tenant shall repair any damage to the Premises caused by such removal, as set forth in Paragraph 24.2(b). The requirement herein to obtain Landlord's consent shall not apply to non-structural modifications which can be accomplished without closing the restaurant for more than forty eight (48) hours in any twelve (12) month period.

11. **LIENS.** Tenant shall keep the Premises and the Building free from any liens arising out of work performed, materials furnished or obligations incurred by Tenant and shall indemnify, hold harmless and defend Landlord from any liens and encumbrances arising out of any work performed or materials furnished by or at the direction of Tenant. Tenant may in good faith contest any such lien by providing Landlord with a bond in an amount equal to twice to the lien issued by a bonding company qualified to do business in the State of Washington.

12. **ASSIGNMENT AND SUBLETTING.**

12.1 **Landlord's Consent.** Tenant shall have the right to assign or sublease the Premises under this Lease to an affiliate ("Affiliate") provided that (i) Landlord determines that the Affiliate is an entity which is controlled by, controls, or is under common control with Tenant, or an entity into which Tenant is merged or with which Tenant is consolidated, (ii) Landlord determines that the net worth of the Affiliate is no less than the greater of a) net worth of Tenant upon execution of this Lease or b) net worth of Tenant immediately prior to said transfer, (iii) Tenant notifies Landlord of any such assignment or sublease at least thirty (30) days prior to its effective date, and (iv) Tenant promptly supplies Landlord the following in connection with any such request:

a. True and complete copy of the proposed sublease, assignment and all side letters or other agreements pertaining thereto;

b. Current financial statements, including income and expense statements and balance sheets, or other adequate financial information, for the then current year-to-date and two most recent years for the prospective sublessee or assignee;

c. Current credit report from a recognized credit agency identifying the credit history of the prospective sublessee or assignee; and,

d. Any other documents or information requested by Landlord regarding such assignment or sublease or such Affiliate.

Landlord's decision with regard to acceptance or rejection of a sublease or assignment shall be given in writing within fifteen (15) days after delivery of the items specified in this Paragraph 12.1. In addition, in the event the proposed assignee or subtenant is not an individual, personal guaranties shall be required of the principals as a condition to Landlord's consent.

12.2 Tenant Transfer of Lease. Any transfer of this Lease by Tenant through a merger, consolidation or liquidation, or any change in the ownership of or power to vote a majority of its outstanding voting stock or partnership interests, shall constitute an assignment for the purposes of this Section.

12.3 Continued Responsibility. Regardless of any approved assignment or sublease of this Lease, Tenant shall not be released from liability nor shall any guaranties be affected or releases as a result of such assignment or sublease. However, in the event of a default by any such assignee or sublessee, Landlord shall give Tenant notice of the default, shall accept cure of the default by Tenant within ten (10) days after such notice and shall permit Tenant to reenter and repossess the Premises for the then unelapsed portion of the Lease Term subject to all of the provisions of this Lease. Subsequent amendments or modifications of this Lease without notice to or consent of the Landlord will not relieve the Tenant of any liability under this Lease.

13. SIGNS. Tenant may install signs on the Premises and in designated common areas in the Building pursuant to the Rules and Regulations attached as Exhibit "D" hereto and also pursuant to the Building's Signage Criteria attached hereto as Exhibit "E", as they may be amended from time to time, and in accordance with applicable sign codes and regulations. All signs and symbols installed by Tenant or any Subtenant shall be removed by Tenant or the Subtenant at the termination of this Lease or the subtenant's lease, respectively. Should the removal of the signs cause damage to the Premises or the Building, Tenant or Subtenant shall repair the damage at Tenant's or Subtenant's expense. If Tenant or Subtenant does not repair the damage within thirty (30) days after notification of same, Landlord may repair the damage at Tenant's or Subtenant's expense.

14. TENANT'S AND SUBTENANT'S PERSONAL PROPERTY.

14.1 All personal property, including trade fixtures owned or leased by Tenant and any Subtenant and used upon the Premises in Tenant's or Subtenant's business operations, shall be at the risk of Tenant or Subtenant.

14.2 Tenant or any Subtenant may remove its personal property, at any time, unless in default under the Lease, provided that Tenant or Subtenant shall repair, as set forth in Paragraph 24.2(b), any damage to the Premises caused by such removal or by the original installation of said personal property. If, after thirty (30) days written notice from Landlord to repair such damage, Tenant does not repair the same, Landlord may repair the damage at Tenant's or Subtenant's expense.

15. DAMAGE OR DESTRUCTION.

15.1 Subject to Paragraph 15.6, if the Premises are damaged or destroyed and the cost of repairing or reconstructing the Premises to the condition and form prior to such damage or destruction is not in excess of fifty percent (50%) of the then replacement cost of the Premises, and such repairs or reconstruction of any such damage or destruction can be made under then existing laws, ordinances, statutes or regulations of any governmental authorities applicable thereto, Tenant shall repair and reconstruct the Premises to be in substantially the same condition as its condition prior to said damage or destruction. This Lease shall remain in full force and effect and the rental payable hereunder shall not abate during such repair and restoration, except for space which cannot be used by Tenant for operation of Tenant's business prior to the repair and restoration.

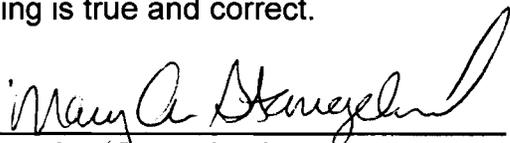
15.2 Subject to Paragraph 15.6, if the cost of repairing or reconstructing any damage or destruction to the Premises to its former condition and form is in excess of fifty percent (50%) of the replacement cost, and such reconstruction or rebuilding can be made under then existing laws, ordinances, statutes or regulations of any

Certificate of Service

IT IS HEREBY CERTIFIED that service of the attached BRIEF OF APPELLANTS has been made this 4th day of April, 2011, by sending copies thereof by messenger to the following counsel:

Jeffrey M. Thomas
Gordon Tilden Thomas & Cordell LLP
1001 4th Avenue, Suite 4000
Seattle, WA 98154

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



Mary Ann Stangeland