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No. 66537-5-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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HENRY ROGERS  
Respondent,

v

DARRON CAGE  
Appellant.

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. BRIAN GAIN)

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BRIEF OF RESPONDENT

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I. Introduction. Respondent/plaintiff Henry Rogers requests the affirmance of the judgment in this unlawful detainer action. Substantial evidence supports the trial court's findings regarding an oral lease. Since the judgment rests entirely on credibility of the parties, it was properly one solely for the trial court. On this record, there is no basis for reversal of the judgment. The appeal is totally devoid of merit.

II. Counterstatement of the Case. This is a simple case and for the most part the facts are not in dispute. The plaintiff, Henry Rogers, was the owner of a condominium located in Renton, Washington, which he had purchased in August 2008 from the defendant, Darron Cage. RP 6, 5-6. Mr. Cage leased back the condominium from Mr. Rogers. Mr. Cage made all lease payments agreed to and required by Mr. Rogers from August of 2008 until June of 2010. RP 7, 1-7. In June of 2010, Mr. Cage ceased making any lease payments, after a dispute arose between them. RP 9, 14-20, Ex. 1. Mr. Rogers commenced this proceeding of unlawful detainer and for default rent on October 12, 2010. CP 1. The matter came on for hearing before Judge Brian Gain of the King County Superior Court on December 17, 2010. Judgment in favor of Mr. Rogers for a writ of restitution, default rent, and attorneys' fees was entered. CP 63-68.

III. Argument in Support of Judgment. During the course of the hearing, on October 17, 2010, Mr. Rogers presented clear, cogent, credible and convincing evidence supporting his claims. He testified:

MR. ROGERS: Well, the reason why I bought the condo in the first place is Darron came to me and said that his nephew, Bernard Cage, was going to prison and he was going to lose some property that he had over in Covington if he didn't make the payments on it. And so I agreed I would buy the condo from Darron, Darron was going to take the money and pay for whatever he had to bail his nephew's property out.

He was supposed to make all the payments, all the condo assessment fees and all the utility bills, it wasn't going to cost me anything. And that when Bernard got out of prison, he was going to sell off some of his assets and buy the condo back from me. And that never happened.

RP 8, 2-15.

Even Mr. Cage admits that he made lease payments in accordance with this agreement until June of 2010. RP 7, 1-7.

Mr. Rogers testified that the lease (mortgage payments) had not been made for the months of July, August, September, October, November and December in the amount of \$1,522.11 per month, RP 12, 1-2, RP 12, 15-18, and that condominium assessments of \$302.29 and unpaid utility bills of \$129.00 were outstanding. RP 12, 18-24.

IV. Argument in Opposition to that of Mr. Cage.

**A. Mr. Cage's first Assignment of Error is addressed to a Motion for Continuance filed on behalf of Mr. Rogers at the trial court on November 16, 2010.**

The continuance motion was filed prior to the time that the undersigned represented Mr. Rogers. The trial court granted the

three-week continuance for the reason that Mr. Rogers was outside the country and would not return to the United States from Thailand until the month of December. Mr. Cage now argues that this continuance should never have been granted because:

a. The motion was apparently prepared and filed by a non-party;

b. The person filing the motion was not an attorney and operating only under a power of attorney executed by Mr. Rogers. CP 54; and

c. The trial court abused its discretion in granting a Motion for Continuance.

Mr. Roger's response to this Assignment of Error is to refer the Court to Mr. Cage's reply in opposition to the Motion for Continuance which he filed on November 17, 2010. CP 61-62. Mr. Cage's four-item argument against the granting of the Motion for Continuance was only that Mr. Rogers was not entitled to a continuance. The trial court judge ruled otherwise. None of Mr. Cage's present arguments in Assignment of Error No. 1 were raised at the trial court.

THESE ARGUMENTS ARE RAISED FOR THE FIRST TIME ON THIS APPEAL.

Assignments of Error and arguments raised for the first time on appeal and not presented to the trial court cannot be considered on appeal.

*Daniels v. Pac. NW. Bell Tel. Co.*, 1 Wn. App. 806, 463 P.2d 795 (1970).

In *Postema v. Postema Enters., Inc.*, 118 Wn. App. 185, 193, 72 P.3d 1122 (2003), where the court stated:

An appellate court may refuse to review any claim of error which was not raised at the trial court level. The purpose of this general rule is to give the trial court an opportunity to correct errors and avoid unnecessary retrials.

Appeals of orders granting a continuance are rare. As one treatise states:

The grant of a continuance is not likely to be a ground for reversal on appeal; nor is it likely to find its way into a reported decision for any other reason. Thus, the published cases discussing why a continuance was granted are relatively few in number. Those that exist reflect a wide variety of the district court found it appropriate to grant a delay.

9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2352, at 388-89 (2008). That general observation applies in this case.

Even if the Court were to consider these new arguments on appeal, they fail on the merits. First, in support of a continuance motion, “the affidavit may be made by the applicant’s authorized agent or attorney, if possessed of the necessary facts.” 17 C.J.S *Continuance* § 103, at 332-34 (2011). Thus, an individual holding a power of attorney may make a request for a continuance. Second, “a party’s privilege to be present at the trial of the cause should not be denied on a proper application, except for a weighty reason.” *Id.* § 37, at 285. Third, “the motion should be granted

where nothing in the record controverts a sufficient showing made by the moving party.” *Id.* § 344, at 344. There was no countervailing prejudice to Mr. Cage; he made no showing of a violation of any right. *Accord, State v. Duggins*, 121 Wn.2d 524, 852 P.2d 294 (1993) (ruling granting of continuance was not reversible error, when juvenile was tried within the speedy trial period specified by court rules). Any error was harmless, and his arguments are idle speculations about what might have happened.

Mr. Case’s present arguments were more properly raised at the trial court level where if they had merit could have avoided a needless trial and appeal.

**B. Mr. Cage’s second, third and fourth Assignments of Error address the trial court’s determination that he was responsible for 100% of the lease payments.**

As set out above, Mr. Rogers in clear, cogent, and convincing testimony stated more than once that the original agreement called for Mr. Cage to make 100% of the lease payments. RP 8, 10-15, RP 11, 18-21. Mr. Cage did in fact make 100% of the lease payments until June of 2010 when a dispute arose. RP 12, 7-8. Mr. Cage on appeal argues a number of alleged facts in an effort to support his contention that the lease agreement was other than that testified to by Mr. Rogers and as found by the court. His primary contention rests on a payment of \$3,000 made to him by Mr. Rogers in June of 2010.

The facts behind this payment are: Mr. Rogers was in Thailand and required his 2009 federal tax return to be prepared and filed. Mr. Cage and an accountant he retained prepared Mr. Rogers' tax return in which they included a claim for a first time home buyer's tax credit in the amount of \$7,483.04 arising from his purchase of the condo and which on the return amounted to a tax refund. RP 8, 25-RP 9, 1-3. Mr. Rogers, relying on Mr. Cage (his former son-in-law, RP 21, 21-23) signed and filed the return. When the refund arrived, Mr. Cage claimed that it belonged to him as he was making all the payments on the condo. RP 9, 14-20. This was in June of 2010 and was the basis of the dispute between the parties.

Mr. Cage threatened Mr. Rogers that he would report him to the IRS if Mr. Rogers did not give him the refund. Mr. Rogers, frightened, paid Mr. Cage \$3,000, and then immediately consulted another accountant who advised Mr. Rogers that he was not entitled to the refund because he had never lived in the condominium. Mr. Rogers immediately sent the refund back to the IRS (Ex. 2). The \$3,000 payment had nothing to do with the lease.

At the hearing, when it became obvious that he was getting nowhere with his arguments over the \$3,000 check, Mr. Cage attempted, as an offset to lease payments, reference to alleged debts owed to him by Mr. Rogers, debts that he alleged arose prior to the lease. Respondent's

counsel objected as no such claims had been pled. (Civil Rule 12). The trial court agreed. RP 24, 5-10. This was the court's reference to Mr. Cage's taking further action. RP 24, 5-10. Mr. Rogers denied that he owed Mr. Cage any of the amounts claimed. RP 22, 10-13.

The significant facts are not those Mr. Cage now attempts to foist on the Court, but are:

From August 2008 to June 2010, Mr. Cage paid 100% of the mortgage and other costs attributable to the condominium, just as he had agreed in the oral lease, RP 7, 1-3, RP 12, 5-10, a period of 21 months. Mr. Cage never once in those 21 months made a claim that Mr. Rogers should pay half the rent. RP 12, 9-14. Contracts should be construed in the manner that the parties construe them prior to commencement of difficulties. *Accord, Boules v. Gull Indus. Inc.*, 133 Wn. App. 85, 86, 134 P.3d 1195 (2006) (parties' conduct subsequent to formation of the contract); *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) (context rule includes reasonableness of each party's position and their actions).

The issues on this appeal are essentially the credibility of the parties. The general rule is that disputes about oral contracts cannot be decided on summary judgment, "[b]ecause resolution of disputes over oral contracts depends on the credibility of the witnesses." *Maschersky v.*

*Countrywide Funding Corp.*, 150 Wn. App. 846, 852, 22 P.3d 804 (2001).

On these credibility issues, Mr. Rogers won hands down at the trial court.

In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wash.2d 150, 155, 385 P.2d 727 (1963). In evaluating the persuasiveness of the evidence and the credibility of witnesses, we must defer to the trier of fact. *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 108, 864 P.2d 937 (1994). “[C]redibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal.” *Morse v. Antonellis*, 149 Wash.2d 572, 574, 70 P.3d 125 (2003).

*Marriage of Akon*, 160 Wn. App. 48, 57, 248 P.3d 94 (2011).

V. RAP 18.1(b) Request for Fees and Expenses.

Mr. Rogers requests fees under RAP 18.9(a) since this appeal is frivolous. “[T]here are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *State v. Quick-Ruben*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998). The continuance issue was not preserved below and is generally a disfavored issue. The other three issues are solely credibility determinations that the trial court made. The appeal as a whole is totally devoid of merit.

VI. Conclusion. On this appeal, Mr. Cage attempts to retry issues that were resolved against him at the trial court level. The trial court understood perfectly the testimony presented and found in favor of Mr. Rogers. That should be sufficient for this matter.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of June, 2011.

  
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Dale E. Kremer, WSBA No. 1412  
Attorneys for Respondent

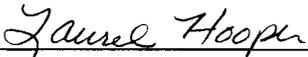
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 17, 2011, I caused to be served a copy of the foregoing *BRIEF OF RESPONDENT* by the method indicated below addressed to the following counsel:

Joseph O. Baker Attorney for Appellant Darron Cage Van Sicen, Stocks & Firkins 721 45 <sup>th</sup> Street NE Auburn, WA 98002	<input type="checkbox"/> by <b>CM/ECF</b> <input type="checkbox"/> by <b>Electronic Mail</b> <input type="checkbox"/> by <b>Facsimile Transmission</b> <input type="checkbox"/> by <b>First Class Mail</b> <input checked="" type="checkbox"/> by <b>Hand Delivery</b> <input type="checkbox"/> by <b>Overnight Delivery</b>

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

Executed this 17<sup>th</sup> day of June, 2011, at Seattle, Washington.

  
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Laurel Hooper