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No. 70038-3-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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MICHAEL S. KENNARD and BETTY S. KENNARD,  
husband and wife,  
Appellants,

v.

CAPTAIN JACK JR.'S FAMILY ENTERTAINMENT CENTER INC.,  
STACY STANG and MICHAEL STANG, husband and wife,  
Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY  
# 12-2-02806-7

**REPLY BRIEF OF APPELLANT**

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COURT OF APPEALS  
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## INTRODUCTION

Although Respondents Michael and Stacy Stang raise three arguments to defend the trial court's ruling, they do not address its fundamental flaw. First, the Stangs allege that appellants Michael and Betty Kennard agreed "that rent would not be due, at a minimum until the parties resolved their specific obligations to one another." (Response Brief at 13). Second, they claim the Kennards failed to prove the actual amount of rent due. (Response Brief at 17). And third, they allege "there was a breach of the implied warranty of habitability that delayed the duty to pay rent." (Response Brief at 14).

These arguments do not justify the trial court's denial of a writ of restitution. The testimony at trial, at worst, proves only that Mr. Kennard excused one month's rent – not that he agreed to postpone all payments. Next, the Kennards proved the amount of rent due under the written Lease. It was the Stangs' failure to prove the value of their offsets that thwarted judgment on the amount owing. Finally, the implied warranty of habitability, a new argument on appeal, "has not been extended to commercial leases in the usual situation." Olson v. Scholes, 17 Wn. App. 383, 392, 563 P.2d 1275 (1977).

To rule on a writ of restitution, the trial court had to calculate the rent due. Because the court failed to do so, the Kennards respectfully request the Court to vacate the trial court's rulings, award the Kennards fees on appeal, and remand for determination of the rent owing.

**I. The Kennards Did Not Agree To Defer Or Postpone Rent Payments**

Any binding agreement – oral or written – requires a meeting of the minds. Jones v. Best, 134 Wn.2d 232, 240, 950 P.2d 1 (1998) (“mutual assent is required and one party may not unilaterally modify a contract”). The trial court did not find that the Kennards expressly agreed to postpone rent payments. (Findings of Fact ¶ 8; CP 229) (“tenants reasonably believed Landlord would permit them to defer payment”). Instead, the court found only that the parties “intended their oral agreements...to modify their respective financial obligations.” (Findings of Fact ¶ 5; CP 228).

Recognizing the missing agreement to defer, the Stangs cite a snippet of Michael Kennard's trial testimony to prove “rent would not be due.” (Response Brief at 3).

Q. You said to Mr. and/or Mrs. Stang that you agree that you owed some money but that the previous month's rent should more than cover it?

A. That's correct.

(1/15/13 VRP 61). There are a number of problems with modifying the lease with this one line of testimony.

First, Mr. Kennard referred only to one month's rent -- \$4,630.42 -- to cover expenses that the Stangs contend exceeded \$25,000. It is not reasonable to infer that Mr. Kennard agreed to postpone *all* rent payments until the parties settled up. The only reasonable inference from this testimony is that Mr. Kennard considered offsetting tenant improvements against one month's rent, not to waive collecting rent altogether.

Second, in context, Mr. Kennard's testimony did not prove a mutual agreement to postpone all rent. The quoted question and answer came at the end of cross examination. The full set of questions and answers disproves the Stangs' asserted agreement.

Q. Mr. Kennard, you received a check in late September as well as in early October for rent; is that correct?

A. My attorney did.

Q. At some point you received a check from my clients; is that correct?

A. Correct.

- Q. You have also received money out of the court registry monthly; is that correct?
- A. That's correct.
- Q. You have accepted those payments as well, correct?
- A. Yes.
- Q. Regarding the \$2,300 that you admit that you owe Mr. and Mrs. Stang, you told them that you agreed that you owed them money but that the previous month's rent should cover it; is that correct?
- A. Do you want me to say what I did say to them?
- Q. I want you to answer the question yes or no.
- A. Can you ask the question again?
- Q. You said to Mr. and/or Mrs. Stang that you agree that you owed some money but that the previous month's rent should more than cover it?
- A. That's correct.
- Q. Mr. Kennard, just so I'm not misconstruing your testimony, you would like to see my clients stay in the building but they pay you some type of penalty or damage; is that correct?
- A. That's not correct.

(1/15/13 VRP 60-61).

Elsewhere at trial, Mr. Kennard stated unequivocally that he did not agree to postpone rent until the parties settled up. (1/15/13

VRP 28, 35, and 43) (Opening Brief at 13). The only oral agreement, which both parties acknowledge, was that the Kennards would reimburse the Stangs for specific improvements to the property. These were the “financial obligations” the parties agreed to modify. (Findings of Fact ¶ 5; CP 228).

Substantial evidence in the record does not support a finding that the parties agreed to defer rent until all improvements were finished. “Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” Edmonson v. Popchoj, 155 Wn. App. 376, 382-383, 228 P.3d 780 (2010). The evidence in this case proves the parties agreed to settle up later. It does not show that the parties agreed to *defer rent* until they settled up later. That was the Stangs’ hope, and given the circumstances, it was neither reasonable nor justified.

The trial court erred by implying a new contract term, requiring the Kennards to postpone collecting rent until the Stangs’ business opened. The costs for the improvements were independent from the rent due, not conditioned on it. If the Kennards agreed to offset some rent with the costs of improvement, they did not agree to postpone rent indefinitely.

## **II. The Court Erred By Not Calculating The Rent Due**

Even though the Court found that the parties had agreed to offset improvements against rent, the Stangs still had the burden of proving their counterclaims. This is the important difference between offsetting rent and deferring it. No reasonable dispute exists over the amount of rent due under the lease -- \$4,630.42 per month. The controversy is over the cost of improvements that allegedly offset the rent. The trial court erred by not requiring the Stangs to prove the value of their claimed offsets.

The Kennards made a prima facie case of rent due – four months from May through August, 2012. As proven at trial, monthly rent was \$4,630.42. (1/15/13 VRP 32). The Stangs do not contend that they made rent payments for these four months. (1/15/13 VRP 143).

Instead, they argue that Mr. Kennard could not provide the final total during trial. (Response Brief at 17) (“at trial, Kennard was unable to testify as to exactly how much he believed was owed to him”). Given the multiple factors involved in calculating the final judgment – rent, late fees, and interest – it is no surprise that Mr. Kennard did not have the exact amount handy. His trial counsel did, however, asking for \$16,594 in closing. (1/16/13 VRP 188)

("which is the amount that Mr. Kennard stated in his declaration when we filed the case").

The Stangs seek to shift the burden of proof for their counterclaims. They, not the Kennards, had to show that their offsets were greater than the amount of rent owing. Missing from the Stangs' response brief is any proof of the value of their counterclaims. Nor do the Stangs discuss the trial court's finding that "the invoices that the defendant gave to the plaintiffs are not sufficient, in my view, to determine the amounts actually owing." (1/15/13 VRP 204).

On August 27, 2012, the Kennards declared that the Stangs had defaulted on the Lease. The trial court erred by not calculating the value of the Stangs' counterclaims and determining the rent due. Because their evidence was insufficient at trial, the Stangs failed to satisfy their burden of proving their counterclaims.

### **III. The Implied Warranty of Habitability Is A New Argument on Appeal and Inapplicable Here**

Finally, the Stangs offer a new argument on appeal to defend the trial court's ruling.

[T]here was a breach of the implied warranty of habitability that delayed the duty to pay rent. Although the trial court did not make specific findings regarding the implied warranty of habitability, it was

not error for the court to hear and consider this evidence.

(Response Brief at 15). The Stangs assert that RAP 2.5(a) allows them to present the new argument “if the record has been sufficiently developed to fairly consider the ground.” (Response Brief at 15).

There are two flaws with this argument. First, RAP 2.5(a) gives this court discretion to review a new argument, but does not mandate it. Plein v. Lackey, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003) (“The parties must have had a full and fair opportunity to develop facts relevant to the decision”). Here, the record is not sufficiently developed. The Stangs argued below that the property was inadequate for commercial, not residential, use. There is no evidence in the record that the Stangs wanted the property for human habitation.

Second, the implied warranty of habitability applies only to residential leases, not commercial property.

The lessees assert that the lessors impliedly warranted that the premises were habitable, citing Foisy v. Wyman, 83 Wn.2d 22, 515 P.2d 160 (1973). In the Foisy case the court was concerned with a residential lease where the defects in the premises were items which made a rented house unfit for human habitation... As discussed in J. Page, Law of Premises Liability ss 9.30-9.36 (1976), the implied

warranty of habitability has generally been imposed in residential leases. It has not been extended to commercial leases in the usual situation. Stoebuck, The Law Between Landlord and Tenant in Washington, 49 Wash.L.Rev. 291, 344 (1974).

Olson v. Scholes, 17 Wn. App. 383, 392, 563 P.2d 1275 (1977).

Here, the Stangs leased the commercial property "as is", knowing that it required substantial renovation. Washington law does not imply a warranty of habitability for this commercial lease.

### **CONCLUSION**

Appellants Michael and Betty Kennard proved at trial that Respondents Michael and Stacy Stang agreed to pay monthly rent of \$4,630.42. No dispute exists that the Stangs failed to pay rent from May to August, 2013. Because the trial court erred by accepting the Stangs' counterclaims as a defense, and then failed to calculate the rent due, this case must return for retrial on the amount of unpaid rent.

The Kennards respectfully request the Court to vacate the trial court's findings and conclusions on unlawful detainer, attorneys' fees award, and judgment, and to remand for rehearing.

DATED this 21<sup>st</sup> day of January 2014.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Appellants' Reply Brief to:

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DATED this 21<sup>st</sup> day of January, 2014.

  
Heidi Main