

74433-0

74433-0

NO. 74433-0

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

AMARJIT SANDHU and AMERICAN PIZZA & PASTA INC.,

Appellant,

v.

SEATTLE CHILDREN'S HOSPITAL,

Respondent.

BRIEF OF RESPONDENT

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RAP 18.1(a)25

I. INTRODUCTION

This case relates to the tenancy of appellant Pizza Mart located in the medical research facility of respondent Seattle Children's Hospital. Pizza Mart, which the Seattle Police describe as a "bar/night club," disturbed the quiet enjoyment of Children's facility and was consistently delinquent on its rent. Despite repeated written notices, Pizza Mart failed to cure these defaults. Towards the end of its difficult 10-year tenancy, Pizza Mart purported to exercise an Extension Option for an additional term. On Children's motion for summary judgment, the trial court properly concluded that Pizza Mart's admitted uncured defaults in payment of rent precluded Pizza Mart from exercising the Extension Option. Children's respectfully requests this Court to affirm the trial court's ruling on three independent grounds.

First, Children's repeatedly issued written notices giving Pizza Mart notice and opportunity to cure its monetary and non-monetary defaults. These Events of Default under the lease precluded Pizza Mart from exercising the Extension Option.

Second, as the trial court held, the lease provision that addresses the tenant's ability to exercise the Extension Option looks only to the tenant's own conduct and does not take into consideration whether the landlord gave the tenant written notice and opportunity to cure.

Third, because of its failure to pay late charges, the lease “deemed” Pizza Mart in “Monetary Default,” which separately precluded Pizza Mart from exercising the Extension Option.

In response, Pizza Mart improperly relies on inapplicable rules of construction and equity to try and rewrite the lease.

Finally, the trial court properly denied Pizza Mart’s summary judgment motion addressed at the same hearing.

II. STATEMENT OF THE CASE

A. The Parties’ Lease Agreement

Children’s is a non-profit based in Seattle. CP 135 ¶ 2. Children’s owns and operates a hospital and a number of clinics dedicated to the treatment of children, and facilities for scientific research, including the Ninth & Stewart Life Sciences Building in downtown Seattle. *Id.* The Life Sciences Building consists of over 200,000 square feet dedicated to laboratory research related to diseases and conditions that affect children, along with retail space located at street level. *Id.* Children’s, by assignment, is the landlord of the retail space, including the premises leased by the appellants operating under the name “Pizza Mart.” *Id.* ¶ 3. The ten-year term of the lease expired on December 31, 2015. CP 145 ¶ 2.1. The lease contained an Extension Option that Pizza Mart could exercise only if it was not in default or had not been in default twice

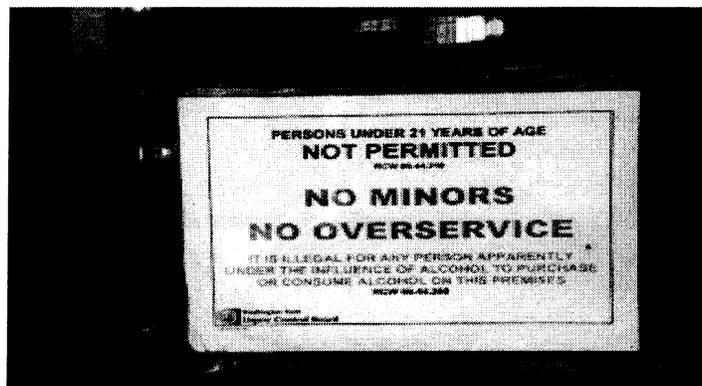
beyond the cure period during any twelve month period during the term.

CP 181 ¶ 51.2.

B. Pizza Mart's Operation of the Premises

The lease contemplated that tenant would use the premises in a manner compatible with operation of a scientific research facility, first by the original landlord, biopharmaceutical Corixa, and now by Children's. The lease restricts the use of the premises "solely" for a pizza restaurant (CP 146 ¶ 3.1), and "exclusively" for a "pizza restaurant which is indicative of Tenant's normal business, and for no other purpose." *Id.* ¶ 3.2. Exhibit E to the lease requires Pizza Mart to be responsible for enforcing appropriate behavior of its customers and Section 3.4 requires Pizza Mart to operate so as not to disturb the quiet enjoyment of any other tenant of the building complex. CP 197 Ex. E & CP 146 ¶ 3.4. Section 3.5 provides that Pizza Mart shall not allow consumption of alcoholic beverages, except in conjunction with the operation of the business as a pizza restaurant. CP 146 ¶ 3.5.

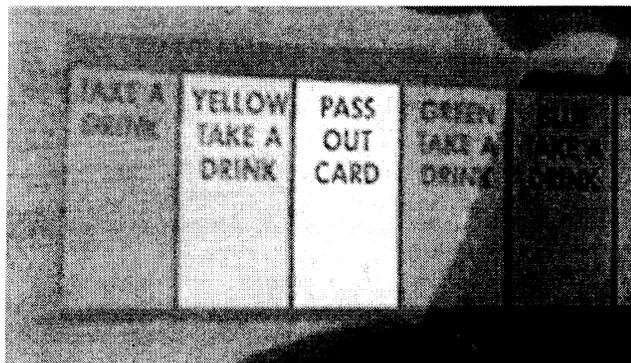
Unlike a typical pizza restaurant, Pizza Mart only allows persons over 21 to enter the premises:



CP 136 ¶ 4; CP 208. This allows Pizza Mart to operate a dedicated bar promoting “body shots”:



CP 136 ¶ 5; CP 210, and conduct other drinking games in which participants select color cards to “take a drink” or “pass out”:



CP 136 ¶ 6; CP 212.

The Seattle Police issued a report that specified the Location Type of the premises as a “Bar/Night Club.” CP 136 ¶ 11; CP 269. Another police report described heavy drinking by patrons “trying to get drunk” and a bloody knife fight between intoxicated customers. CP 136 ¶ 11; CP 230-232.

Pizza Mart’s inebriated customers regularly urinated and vomited in the interior hallway. CP 137-138 at ¶ 12. Its customers also disrupted the tenancy of other occupants by lighting firecrackers, punching holes in the walls, gouging hallways and restrooms, and tampering with the breaker box causing a loss of power to other tenants. *Id.*; CP 273.

Defendant and his staff have engaged in additional misconduct. A Pizza Mart employee used the dumpster for personal trash. CP 273. Video records also established that Mr. Sandhu and his staff were “coat-tailing” two cars out of the parking garage using a single swipe of the parking access card. *Id.*; *see also* CP 334 Sandhu decl. ¶ 16 (“seems like a petty ‘offense’”).

Children’s provided Pizza Mart with videotapes, photographs, and otherwise advised Pizza Mart of the damage and disruption to the building caused by its operations. CP 301 ¶ 3; CP 307 (videotapes); CP 137-138 ¶ 12; CP 271-285 (notices).

In response, tenant observed that “the business would no longer be financially viable” unless it competed on the same terms as other “bars that are in the neighborhood.” CP 138 ¶ 13; CP 287. Pizza Mart’s counsel stated that Pizza Mart’s high-volume alcohol sales were necessary to keep the business afloat:

My client and his General Manager have taken a hard look at the revenue stream of the business, and in particular the *hours during which the revenue comes into the business*. Unfortunately, between the hours of 11 p.m. and 2 a.m., when the sale and consumption of alcohol is terminated in accordance with State law, *a large percentage of the total revenue stream comes in and a very large part of the profit margin from the overall revenues comes in during that same timeframe.*

CP 287 page 1 ¶ 2 (emphasis added).

C. Pizza Mart’s History of Payment Delinquencies

Despite revenue from the sale of alcohol, throughout much of the lease term, Pizza Mart failed to pay timely the full amount of rent due in accordance with the lease. CP 147 ¶ 4.1 & CP 292. The lease specified (i) payment of rent on or before the first day of the month, (ii) the amount to be paid each month, and (iii) and late charges. CP 147 ¶¶ 4.1-4.2.

Pizza Mart does not contest that over a four and one-half year period (2007 to mid-2011), Pizza Mart paid its rent late, underpaid the

amount due, and failed to pay late charges. CP 292, CP 319 at 11:21-24, CP 332, Appeal at 7. At various points, Pizza Mart sought rent reductions in exchange for changing the nature of its operations. When these discussions proved unsuccessful, in both March 2010 (CP 216) and again in November 2010 (CP 218), Children's made written demand for payment of full rent in accordance with the lease.

- In **January** 2010, Pizza Mart's rent (including common area charges) was \$4,046.71 per month. CP 147 ¶ 4.1; CP 216. In January, Pizza Mart paid rent more than three weeks **late** (January 25), and paid only \$2,903, an **underpayment** of over \$1,100. *Id.* CP 292.
- For **February** 2010, Pizza Mart paid **late** (March 25) and again **underpaid** the rent due by over \$1,100. CP 292. The same day, March 25, 2010, Children's notified Pizza Mart of the defaults and instructed Pizza Mart to pay the full and correct rent "[e]ffective immediately starting April 1." CP 216.
- On **April 1**, the deadline specified in the notice, Pizza Mart did not pay Children's **any** rent, including the outstanding March and April 2010 rent. CP 292.
- In further disregard of the default notice, Pizza Mart paid its March 2010 rent almost two-months **late** (April 23) and its April 2010

rent almost one-month *late* (May 25). CP 292. In both cases it *underpaid* the amount of rent due specified in the lease and notice, only \$2,903 instead of \$4,046.71. *Id.*

Pizza Mart continued to underpay rent pay (only \$2,903) through September 2010. CP 292. In October and November 2010, it unilaterally reduced its rent payments even further to \$2,000 per month. *Id.*

- November 2010 rent was not received until **November 24, 2010**. *Id.* Although the amount of rent due in November was \$4,046.71, Pizza Mart paid only \$2,000. *Id.*
- On **November 26, 2010**, Children's issued a second default notice which restated the March 25, 2010 notice to pay full rent, and specified that failure to pay the "correct rent amount of \$4,046.71 immediately" will "put you in default." CP 218-219.
- Pizza Mart failed to cure the default. It *failed to pay* the outstanding rent due in November 2010 within 3 days, and for December 2010 it paid *late* (December 20), and again *underpaid* the rent specified in the lease and the notice: it paid \$2,006, instead of \$4,046.71. CP 292.

Pizza Mart acknowledges it failed to cure these Monetary Defaults within 3-days (or even during calendar year 2010), or applicable late charges. Appeal at 7 (Pizza Mart was "behind on rent for over a year").

D. Procedural History

Children's sought to regain possession of the premises so it could be used in a manner consistent with a building dedicated to scientific research. On February 24, 2015, Children's filed a lawsuit seeking a declaration that Pizza Mart's defaults authorized Children's to terminate the lease prior to the expiration of its term. CP 1-5.

On February 17, 2015, Pizza Mart purported to exercise its option to renew. CP 221-222. On August 14, 2015, Pizza Mart filed a counterclaim for declaratory judgment that it is "eligible to exercise the option to extend the Lease." CP 15 ¶ 27.

Pizza Mart filed a motion for summary judgment to dismiss Children's action for a declaratory judgment to terminate the lease before the end of the December 31, 2015 term. CP 24-30.

Children's concurrently filed a cross-motion for summary judgment to establish that the Extension Option could not be exercised because Pizza Mart had at least two monetary or non-monetary defaults during the term, and/or (ii) was currently in default. CP 127-133.

Both parties' motions were scheduled for hearing on November 20, 2015. As the term of the lease was set to expire at the end of December, 2015, during the hearing, the trial court focused on Children's cross-motion addressing the lease extension. RP 4:9-14. Although Pizza Mart

contends the trial court was “confused,” the transcript demonstrates that the trial court was well versed on the issues and based its order on careful analysis of the relevant lease terms. *See, e.g.* RP 10:15- 11:25 (trial court’s analysis of the interplay between Section 22.1 and Section 51.2). The trial court granted Children’s cross-motion for summary judgment and denied Pizza Mart’s motion for summary judgment. CP 577-578. Pizza Mart’s motion for reconsideration was denied. CP 579-580. The trial court entered the parties’ stipulated judgment on December 31, 2015. CP 581-583.

III. ARGUMENT

This Court should affirm the trial court’s grant of summary judgment on three separate and independent grounds. (A) Pizza Mart’s failure to cure the monetary and non-monetary defaults of the lease specified in Children’s written notices precluded Pizza Mart from exercising the Extension Option. (B) As tenants with a pattern of defaults during the lease term are undesirable, the lease provides that for tenant to exercise the Extension Option, tenant must avoid two uncured defaults during any twelve month period. The trial court correctly determined that with respect to renewal there is no consideration given to whether landlord provided tenant with written notice of the defaults. (C) Even if *arguendo* Children’s default notices were defective and even if the Extension Option

required Children's to provide Pizza Mart with written notice of the defaults, Pizza Mart still could not exercise the Extension Option because Pizza Mart's failure to pay late charges are "deemed" an "Event of Default" under the lease.

A. The Trial Court Properly Granted Children's Motion to Preclude the Exercise of the Extension Option

Pizza Mart concedes that during the lease term it consistently failed to pay the rent and late charges specified in the lease. Appeal at 7 citing CP 292 (Pizza Mart was "behind on the rent for over a year"); Sandhu decl. ¶ 11 (CP 332) ("For some time I had been paying less than the full amount of the base rent"); CP 463 (Pizza Mart's own reference to accumulation of unpaid "\$24,860.36 for the back rent"). Throughout its tenancy, Pizza Mart customers repeatedly damaged property and disrupted the quiet enjoyment of the property, including at least seven incidents in which customers urinated or vomited in the interior hallway, four incidents in which tenants punched holes in the wall and otherwise damaged the interior hallway, and multiple incidents in which customer were involved in fights, tampered with breaker boxes causing loss of power and ignited firecrackers. Appeal 6-7 (collecting correspondence); CP 137 ¶ 12 & CP 271-285.

Section 51.2 of the lease provides that Pizza Mart “may not exercise its Extension Option if at the time of exercise it is then in default beyond any applicable cure period or if it has ever been in default beyond any applicable cure period more than two (2) times in any (12) month period.” CP 181. The trial court properly determined that Pizza Mart’s multiple defaults extending months or longer beyond any applicable cure period precluded it from exercising the Extension Option.

1. Children’s Properly Notified Pizza Mart of Its 2010 Rent Defaults

In addition to its non-monetary defaults, Pizza Mart failed to cure at least two Events of Default, each a Monetary Default, for which it received written notice in 2010. On March 25, 2010, Children’s notified Pizza Mart that it was underpaying the rent due under the lease, and instructed Pizza Mart to pay the full and correct rent “[e]ffective immediately April 1.” CP 216. Pizza Mart made no payments on April 1 (i.e., the specified five days after the default notice) and in fact did not pay the past due March 2010 rent until April 23, and did not pay the April 2010 rent, also due on April 1, until May 25. CP 292. In further disregard of the default notice, in each case Pizza Mart underpaid the amount due. *Id.* On November 26, 2010 Children’s issued a second default notice, which specified the failure to pay the “correct rent amount of \$4,046.71

immediately” will “put you in default.” CP 218. Pizza Mart again failed to cure by paying the outstanding rent due within three days. CP 292.

Pizza Mart argues that these written notices were substantively defective because they are “devoid of any demand for payment of a specific amount claimed to be past due” and “devoid of any stated cure period.” Appeal 28. Pizza Mart seeks to inject new terms into the lease, which does not impose either requirement. CP 168 ¶ 22.1(a). Regardless, Children’s notices did in fact satisfy Pizza Mart’s more exacting requirements. The March 25, 2010 notice states that Pizza Mart has been underpaying rent for “each of the last three years,” specified the correct rent of \$4,046.71, and provided a five-day deadline for payment. CP 216. The November 26, 2010 notice identified non-monetary and monetary “incidents” of “default,” referenced Pizza Mart’s “rental underpayment,” and required payment of the “correct rent amount of \$4,046.71 immediately.” CP 218-219.

Pizza Mart also contends Children’s notices were procedurally defective because of uncertainty as to the “manner” of delivery. Appeal 29-31. However, as Pizza Mart acknowledges, Children’s practice for delivery of notices to Pizza Mart was to “send an e-mail copy then we always send a FedEx copy” Appeal 29. By failing to offer any evidence to rebut the showing that Children’s was acting consistent with

standard practices, the evidence before the trial court presented no genuine dispute of fact. *Mahon v. Credit Bureau of Placer Cty. Inc.*, 171 F.3d 1197 (1999) (granting summary judgment because standard business practice established notice was sent by first class mail). Proper delivery of the notice is further corroborated by the extensive and multiple declarations of Mr. Sandhu, CP 40-41, CP 329-338, 514-515, that describe these events in exquisite detail without contesting that he received proper notice. *Colford v. Kiso*, 51 Wn.2d 640, 642, 320 P.2d 1077 (1958) (lack of denial established evidence of party's notice) (citing *Wiard v. Market Operating Corp.* 178 Wash. 265, 271, 34 P.2d 875 (1934) ("We know of no more convincing proof of a fact than evidence of its admission, when the person to whom the admission is attributed, having the opportunity, fails to deny it.")).

2. Pizza Mart's Multiple Uncured "defaults" in Payment of 2010 Rent and Operation of the Premises Precluded Its Exercise of the Option

The core of Pizza Mart's appeal is the contention that the trial court erred because it refused to equate specific references in the lease to an uncured "default" with an "Event of Default." *See, e.g.* RP 10:15-11:25. A review of the lease establishes that the trial court correctly distinguished between an uncured default that does not require written notice, and an Event of Default involving a Monetary Default that does

require written notice. Accordingly, even if Children's failed to provide Pizza Mart with written notice (which is not the case), the trial court properly ruled that by its "defaults," Pizza Mart lost the ability to exercise the Extension Option.

Section 22.1(a) of the lease specifies that the failure of the tenant to "pay when due any sum required to be paid hereunder" is a "default." CP 168 ¶ 22.1(a). However, landlord may only "take action based on such default," if there is a "Monetary Default," which occurs when tenant fails to cure the default within three days after written notice. *Id.*

Section 51.2 of the lease, which does not mention notice, provides that the tenant may not exercise its Extension Option if tenant "has ever been in default beyond any applicable cure period more than two (2) times in any twelve (12) month period." CP 181 ¶ 51.2.

Similarly, Section 22.6 provides that tenant must post additional security when it engages in a pattern of "defaults" by failing to pay rent or other amounts when due more than two times during any calendar year during the term. Under the lease, upon the "occurrence of the third or any subsequent default in the payment of monies during said calendar year," tenant is subject to making payment in advance of the amounts due for the two month period following any cure. CP 171 ¶ 22.6. Again, no notice requirement is mentioned.

As these provisions illustrate, the lease consistently distinguishes between protections afforded to the landlord when tenant displays a pattern of uncured “defaults,” including the obligation of tenant to increase its security by paying rent in advance (Section 22.6) and for the non-creditworthy tenant to relinquish its option to extend the lease beyond the term (Section 51.2), with the protections afforded the tenant under Section 22.1. Thus, the lease defines a series of “Events of Default,” Section 22.1(a)-(f), the first of which, a “Monetary Default,” requires the landlord to give notice of the default on payment of rent and wait three days before it can “take action,” such as commencing an unlawful detainer action to regain possession of the premises.

Pizza Mart identifies as error, the trial court’s unwillingness at the hearing or the subsequent motion for reconsideration to rewrite Section 51.2 of the lease to replace “default beyond any applicable cure period” with “Event of Default,” i.e. a default beyond any applicable cure period *after written notice*. Pizza Mart’s interpretation adds a written notice requirement that is inconsistent with the lease and the text of the applicable provision.

3. Unpaid Late Charges “Deemed” a “Monetary Default”

Even *arguendo* if (a) there was a defect in Children’s notices, and (b) the Extension Option required Children’s to establish “Events of Default,” rather than requiring that Pizza Mart avoid multiple uncured “defaults,” the trial court still ruled correctly because Pizza Mart’s unpaid late charges were “deemed” an Event of Default under Section 22.2(a).

By operation of the lease, Pizza Mart’s unpaid late charges constituted at least two Monetary Defaults of the lease thereby precluding exercise of the Extension Option. During 2010, Pizza Mart failed to pay rent and additional rent when due “on or before the first day of each calendar month.” CP 147 ¶ 4.1; CP 292. The lease provides that in the event “any Monthly or Additional Rent” is “not paid within five (5) days after its due date, Tenant shall pay to Landlord a late charge (the ‘Late Charge’) as Additional Rent, in an amount of five percent (5%) of the amount of such late payment. *Id.* ¶ 4.2. Pizza Mart did not pay these mandatory Late Charges within the specified five-day grace period. CP 292. The lease “deems” the tenant’s failure to make payment of the Late Charges a “Monetary Default.” CP 147 ¶ 4.2. The unpaid Late Charges provide an independent ground to affirm the trial court’s ruling on the Extension Option.

4. Pizza Mart Misapplies the Rules of Construction

As discussed above in Section A.2 of this brief, Pizza Mart contends that the references in Section 51.2 of the lease to a “default” that was not timely “cured,” should be interpreted as an “Event of Default,” that is, as a default not timely cured *after written notice*. Pizza Mart heavily relies on rules of construction to justify its proposed judicial rewrite of the parties’ lease. In so doing, Pizza Mart disregards the most fundamental rule of construction. “It is a longstanding rule that courts cannot, and ought not, make a contract for the parties which they did not make for themselves or impose upon one party an obligation which was not assumed.” *Seattle-First Nat. Bank v. Earl*, 17 Wn. App. 830, 835, 565 P.2d 1215 (1989) (collecting cases). Pizza Mart also tries to rely on the rule that ambiguities in a lease should be construed against the drafter, *see, e.g. Allied Stores Corp v. North West Bank*, 2 Wn. App. 778, 784, 469 P.2d 993 (1970) (“particularly when, as here, the lease was drafted by the lessor”); *Carlstrom v. Hanline*, 98 Wn. App. 780, 785, 990 P.2d 986 (2000) (same), but in this case there is no evidence in the record as to the drafting history other than the fact that Children’s was not involved because it assumed the lease by assignment. CP 136 ¶ 3.

5. The Equitable Grace Period Factors Are Irrelevant to this Case

Pizza Mart's declaratory counterclaim, which is the subject of the trial court's order with respect to the Extension Option, alleges that tenants "have operated the business of 'A Pizza Mart' in accordance with the express provisions of the Lease." CP 14-15 ¶ 26. Thus, Pizza Mart's counterclaim is an action on the lease agreement. *BKWSPOKANE, LLC v. FDIC*, 2013 WL 312389, *6 (E.D. Wash. Jan. 25, 2013) (dismissing equitable claims because they presuppose the lack of a written contract which is inconsistent with the allegations that the property is governed by the lease). Pizza Mart's assertions of general equitable considerations do not apply to the facts and circumstances of this case. At most, equity can provide a brief grace period to correct minor procedural irregularities that do not prejudice the landlord. It does not cure an ongoing failure to pay rent or operate the premises in accordance with the lease.

First, the equitable considerations referenced by Pizza Mart address "special circumstances," not applicable here, when a lessee "*fails* or *delays* in *giving notice* to exercise an option to extend in accordance with the written terms of its lease." *Recreational Equipment Inc. v. World Wrapps Northwest, Inc.*, 165 Wn. App. 553, 555, 266 P.3d 924 (2011) (emphasis added). In *World Wrapps*, for example, the purported delay in

the exercise of the extension occurred because landlord's attorney "incorrectly stated [the] expiration date of the lease." *Id.* at 556. *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84, 867 P.2d 683 (1994), also cited by Pizza Mart, similarly considered whether to grant equitable relief for late exercise of option. *See also Wharf Rest. Inc. v. Port of Seattle*, 24 Wn. App. 601, 611, 605 P.2d 334 (1979) (establishing factors for granting an equitable grace period to exercise option). The timing of the notice to extend is not at issue in this case, and furnishing Pizza Mart with a grace period would not resolve the present dispute.

Second, courts grant a grace period to cure minor defaults when the "delay is short" and "the failure to give notice was purely inadvertent." *Wharf Rest.*, 24 Wn. App. at 612 (granting grace period to cure six week delay in exercising option); *but see Heckman Motors*, 73 Wn. App. at 88 ("Heckman Motors' delay in exercising the option was not short. It was more than six weeks"). Unlike a short and inadvertent delay in the exercise of an option, Pizza Mart's defaults involve the knowing failure to pay rent for almost 18 months after written notice, and ongoing disruption to the building's other tenants because it relied on drinking games to boost its own revenues rather than respect the rights of the landlord and its fellow tenants that share the interior hallway. *Lenci v. Owner*, 30 Wn. App. 800, 803, 638 P.2d 598 (1982) (Tenant "*consistently paid his rent*

late, and failed to make timely insurance and tax payments as required by the lease. We agree with the trial court, the *equities* are on the side of the *landlord*.”) (emphasis added) (cited by Pizza Mart CP 323).

Third, Pizza Mart also contends that its tenant improvements in 2005 (ten years ago) and 2009 (six years ago) are a relevant consideration, Appeal 36-39, because equitable forfeiture of tenant improvements is one of the *Wharf Restaurant* equitable factors used to evaluate a tenant’s right to a grace period. But this presupposes that a trial court should extend the *Wharf Restaurant* factors beyond the “special circumstances” of the delay or failure to exercise timely notice of the extension. *World Wrapps*, 165 Wn. App. at 555. Further, the trial court properly declined to consider Pizza Mart’s purported “losses” in the absence of evidence whether they had been amortized/depreciated during the ten-year lease term. *Heckman Motors*, 73 Wn. App. at 88 (improvements had “basically amortized out” during the initial 5-year term of the lease). Regardless, even if Pizza Mart had established applicable and undepreciated sums, and equity somehow applies, Pizza Mart’s own authority provides only for monetary compensation based on the benefit to the landlord, rather than reinstating the option contrary to the terms of the parties’ express agreement. *Hansen Inc. v. Pacific Int’l Corp.*, 76 Wn.2d 220, 230, 233, 455 P.2d 946 (1969)

(trial court correctly granted seller option to purchase buyer's equity rather than reinstate buyer's real estate contract).

B. The Trial Court Properly Denied Tenant's Motion To Establish Tenant's Compliance With The Lease During The Term

Children's complaint alleged that during the term, which expired soon after the hearing, Pizza Mart's operations violated various provisions of the lease related to its use of the premises and its failure to prevent a nuisance affecting the other tenants' quiet enjoyment. CP 1-7. Pizza Mart filed a motion to establish that as a matter of law, its operations complied with the terms of the lease. CP 24-30. The trial court, finding issues of material fact, denied Pizza Mart's cross-motion. CP 561-562. Pizza Mart includes this element of the trial court's order in its appeal. Appeal 39-42.

Children's complaint alleged that Pizza Mart's operations violated Sections 3.1, 3.2, 3.3 and Exhibit E, and 3.4 of the lease. CP 2-3 (Compl. ¶¶ 9a-e). Although Pizza Mart's motion purported to seek "dismissal of the Complaint," Assignment of Error #2; Appeal 39, it limited its discussion to just Section 3.5 of the lease. *See* Appeal 5-6 & 40. For purposes of summary judgment, the stated allegations in Children's complaint control over Pizza Mart's incomplete characterization. The trial court properly denied the motion to dismiss Children's complaint.

First, Pizza Mart’s attempt to analyze Section 3.5 in isolation from the other operative provisions of the lease violates the cardinal rule of contract construction that the provisions of a contract must be construed together and each provision must be given effect. *Salvo v. Thatcher*, 128 Wn. App. 579, 587, 116 P.3d 1019 (2005). The various provisions of Article 3 (“Use, Nuisance or Hazard”) establish the terms and conditions for the tenant’s use of the premises. These provisions individually and collectively prohibit the “consumption” of alcoholic beverages, “except in conjunction with the operation of its business as a pizza restaurant.” CP 48 ¶ 3.5. Pizza Mart’s acknowledged use of the premises to promote “body shots”¹ involved the consumption of alcoholic beverages in conjunction with another person’s body, not pizza. CP 136 ¶ 5, CP 210. Other activities in which patrons select color coded cards to “take a drink” or “pass out” constitute alcohol consumption in conjunction with a card game, not pizza. CP 136 ¶ 6, CP 212. Even standing alone, Pizza Mart’s operation of the premises does not conform to the requirements of Section 3.5.

But Section 3.5 cannot be read as a stand-alone provision. Pizza Mart’s violation of the lease is further demonstrated by examination of

¹ “A body shot is a sexual way of doing shots of tequila. Your lime is held in your partner's mouth and the salt put on a body part (stomach, neck, breasts, etc). You lick the salt off of them, take your shot and then eat the lime out of their mouth.” <http://www.urbandictionary.com/define.php?term=body+shot>

related provisions of Article 3 that restrict the use of the premises “solely” for a pizza restaurant (¶ 3.1), and “exclusively” for a “pizza restaurant which is indicative of Tenant’s normal business, and for no other purpose.” CP 146 ¶ 3.2. A “normal” pizza restaurant does not exclude minors. CP 136 ¶ 4, CP 208. A “normal” pizza restaurant does not conduct drinking games, CP 136 ¶ 6; CP 210; CP 212, and is not identified in police reports as a “Bar/Night Club.” CP 269. And as Pizza Mart itself admits, in the evening hours “a large percentage of the total revenue stream”² comes not from pizza, but from the sale of alcohol. CP 287.

Third, Section 3.3 and Exhibit E of the lease (CP 146 ¶ 3.3; CP 197-198) require tenant to enforce appropriate behavior of its customers and Section 3.4 prohibits use or occupancy of the premises that is illegal, dangerous, a nuisance or disturbs the quiet enjoyment of other tenants in the building complex. CP 146 ¶ 3.4. Pizza Mart waives aside the trial court’s consideration of the extensive evidence documenting its customer’s misconduct as “irrelevant” and “anecdotal.” Appeal 40. After

² Mr. Sandhu submitted a declaration in opposition to Children’s motion for summary judgment which stated for the first time that a new point of sale system would show that 67% of sales comes from food and non-alcoholic beverages. CP 330 ¶ 6. Mr. Sandhu provides no data to substantiate this conclusory statement. Further, even if accurate, this average does not contradict Pizza Mart’s earlier analysis that most of its revenue in the late evening was from the sale of alcohol. CP 287 page 1 ¶ 2.

over-service of Pizza Mart customers, the police have been summoned to address a stabbing and damage to property. CP 224-267; CP 269.

Videotapes and photographs show intoxicated Pizza Mart customers urinating and vomiting in the building hallways, punching holes in the wall, and damaging the building. CP 301 ¶ 3; CP 307; CP 271-277.

These videotapes show that the customers engaging in this misconduct enter the interior hall from Pizza Mart's dedicated backdoor. CP 300 ¶ 2; CP 305. Pizza Mart's customers have also detonated fireworks and repeatedly interfered with the electrical system used by other tenants. CP 297; CP 278-280. Extensive evidence substantiates the trial court's ruling denying summary judgment as to whether Pizza Mart's operations were dangerous, a nuisance or disturbed the quiet enjoyment of other tenants.

C. Children's Is Entitled To Attorney's Fees

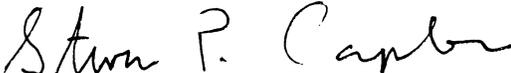
The Court may award attorney's fees on appeal if permitted by "applicable law." RAP 18.1(a). In this case, the lease provides for prevailing party attorney's fees.

IV. CONCLUSION

The Court should uphold the trial court's decision granting summary judgment in favor of Children's as to the Extension Option and denying summary judgment as to Pizza Mart as to dismissal of Children's complaint.

RESPECTFULLY SUBMITTED this 1st day of June, 2016.

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By 
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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused a copy of the foregoing to be served upon the following counsel of record via e-mail and U.S. Mail:

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