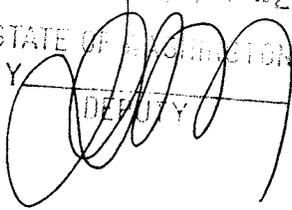


No. 37379-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
BY 
DEPUTY

RANDY GOULD and "JANE DOE" GOULD, husband and wife; BRET DRAGER
and "JANE DOE" DRAGER, husband and wife; and GREG JOHNSON and
"JANE DOE" JOHNSON, husband and wife; and DRAGER GOULD
ARCHITECTS, INC.,

Appellants,

v.

LEDAURA LLC, a Washington limited liability company,

Respondent,

APPELLANTS' REPLY BRIEF

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ORIGINAL

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The Appellants, Randy Gould, Bret Drager, Greg Johnson and Drager Gould Architects, Inc. provide this brief in reply to the Respondent's Brief. As provided in the Opening Brief, Randy Gould, Bret Drager and Greg Johnson are collectively referred to herein as the "Tenants". The David Smith Revocable Living Trust is referred to as the "Landlord" and the Respondent Ledaura LLC is referred to herein as "Ledaura".

ARGUMENT

1. **LEDAURA LACKS STANDING TO SUE AS THE LANDLORD BECAUSE THE TENANTS DID NOT CONSENT TO THE TRUST'S ASSIGNMENT OF THE LEASE.**

Pursuant to the terms of the Lease and the law, only the landlord may sue for unlawful detainer as it is the only party with an interest in the contract and therefore the only party with standing. See *Federal Financial Co. v. Gerard*, 90 Wn.App. 169, 177, 949 P.2d 412 (1998). Ledaura argues that "[t]he Tenants are simply trying to raise form over substance by arguing the LLC is not the proper party, even though there is no dispute the LLC is the owner of the property." Ledaura Brief at 17. But Ledaura confuses the difference between ownership of the property and having an interest in the Lease.

The Trial Court found that the Trust conveyed the property to Ledaura by quit claim deed. CP 65; Finding of fact 1.15; Exhibit 10. But there was no testimony, no evidence and no finding that the Lease itself was assigned by the Trust to Ledaura. A deed only conveys the Trust's title and interest in the property, not an interest in the Lease. *Muscatel v. Storey*, 56 Wn.2d 635, 639, 354 P.2d 931 (1960). In *Muscatel*, the Supreme Court stated as follows:

We must consider the question of the appellants' standing to maintain the action for the total amount of the judgment rendered. The record discloses that the trustee in liquidation for the Illinois Investment Company quitclaimed, to the Muscatel Brothers, the interest of the corporation in the hotel property on June 28, 1956. Such a deed conveys all the grantors' title and interest in the property and nothing more. Any right of action in favor of the corporation, arising out of the lease agreement, was a chose in action, which is personalty and therefore not conveyed by the quitclaim deed. *Ennis v. Ring*, 1956, 49 Wash.2d 284, 300 P.2d 773. No instrument assigning the chose in action was executed, consequently the appellants had no right to bring an action for any rent due . . .

Muscatel, 56 Wn.2d at 639.

Since any right of action arising out of a lease agreement is a chose in action and therefore not conveyed by a quitclaim deed, Ledaura failed to provide any evidence of an assignment, Ledaura had no right to bring an action for any rent due.

Even if the Lease was properly assigned, the Tenants never consented to the Lease assignment and therefore it would be void. Ledaura argues that the assignment of the Lease from the Trust to Ledaura was proper because (a) Greg Johnson was advised that the assignment would occur and did not object; (b) the assignment clause only related to Mr. Smith's ability to assign his right to Lease, sublease or assign his rights to his occupancy of the first floor; (c) Ledaura is only a change in identity from the Trust; and (d) the Tenants suffered no injury due to the assignment. None of these arguments are accurate.

A. Greg Johnson Objected to Any Assignment.

Ledaura's own witness, Ms. Caruthers, testified that her only conversation with Mr. Johnson regarding assigning the Lease occurred prior to the execution of the Lease. RP 11/20 29-30. Ms. Caruthers further testified that, because of this conversation, the Lease as subsequently executed specifically stated "This Lease shall NOT be assignable by Landlord without the consent of tenant." (Emphasis in the original) Exhibit 6; RP 11/20 p. 29-30. Consequently, the Trust could not reasonably have believed that Mr. Johnson consented to its subsequent assignment of the Lease

without any further notice to the Tenants. Moreover, the Trust's decision to execute the Lease with the requirement that it first obtain the Tenants' approval vitiated any perceived prior approval by Mr. Johnson.

Ledaura makes no effort to address the fact that communicating the intent to assign the Lease to only one of the Tenants is insufficient to gain approval from all of the Tenants, or how Mr. Johnson's failure to object could be construed as an approval where the Lease provides that any such approval shall be in writing. Exhibit 6 page 12 paragraph 31.c. Moreover, as late as May 22, 2007, two months after the purported assignment, the Tenants were still being advised that the Trust was the landlord. Exhibit 41. For all of those reasons, this Court should conclude that Ledaura is not the landlord and thus lacks standing to sue and on that basis reverse the Trial Court's decision and reinstate the Tenants' Leasehold interest.

B. The Assignment Clause Was Not Modified By The Addendum.

Ledaura argues that the parties intended the non assignability clause in the Lease to only apply to Mr. Smith's use of the bottom floor. There is no evidence to support this proposition.

The Addendum provision cited by Ledaura provides in pertinent part as follows:

David W. Smith shall have the exclusive right to occupy the bottom floor of the building rent free, except for expenses, for a period of up to (8) years or until his demise, but shall not have the right to lease, sublease or assign his rights to the subject property.

Exhibit 9.

That provision in no way changes or has any bearing whatsoever on the Lease provision that "This Lease is NOT assignable by [the David W. Smith Revocable Trust] without the consent of Tenant." Exhibit 6 page 10 of the Lease Agreement, paragraph 27.

There is no conflict between these two provisions: The Lease forbids the Trust from assigning the Lease without the Tenants' consent, and the Addendum further forbids David Smith from assigning his right to use the bottom floor rent free. As in *Berg v. Hudesman*, cited by Ledaura, parol evidence cannot be used to "add to, modify, or contradict the terms of a written contract, in the absence of fraud, accident, or mistake." *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (quoting *Pollick*, 20 Wn.2d at 348-49). The plain language of the agreements does not support

Ledaura's argument and must be rejected.

C. Assignment of The Property From The Trust To The LLC Is More Than A Change In The Form Of Ownership.

Ledaura argues that there really was no assignment, but instead simply a change in the form of ownership. Ledaura Brief at 17. Semantics aside, the evidence at trial was that the members of Ledaura are Leah Caruthers, Laura Kuhl and David Smith. CP 163 Finding of Fact 1.2. There was no finding nor testimony as to who the beneficiaries of the Trust were. Consequently, there is no evidence to support the argument that this assignment was simply a change in ownership.

D. The Tenants Are Not Obligated To Prove They Suffered Damage As A Result Of The Assignment.

Ledaura appears to assert that the Tenants' consent to the assignment is not required unless they can prove that the assignment resulted in damages to them. Ledaura's Brief at 17. The parties specifically negotiated a clause whereby the Trust must obtain the Tenants' consent prior to any transfer. The Tenants' explained the purpose of this provision as follows:

I believe it was because we didn't want to have the lease passed on to other entities when we had a written lease with one specific entity and just to keep it where we had written it

as opposed to it being transferred and passed on to other entities.

RP 11/20/07 p. 86.

The Tenants were not required to prove they suffered damage¹ due to the assignment, particularly since the Tenants were deprived of the right to consider the impact of this assignment, how the ownership interests have changed from the Trust to the LLC and how an assignment affects their rights under the Lease, Addendum and Option Agreements. The Tenants do not know what Ledaura's ability is to perform under those agreements, if Ledaura is as solvent financially as the Trust was or how they will enforce the various agreements if Ledaura only accepts responsibility for the Lease and none of the other agreements. Any or all of these issues would have been a reasonable basis for the Tenants to refuse consent.

Since the Tenants were not allowed to even consider the assignment issue, Ledaura must prove that it would have been unreasonable for the Tenants to refuse consent. See *Ernst Home Center, Inc. v. Sato*, 80 Wn.App. 473, 482-3, 910 P.2d 486 (1996)

¹ The fact that the Tenants did not identify any "damages" associated with the assignment has no bearing on whether or not they had an obligation to consent to the assignment or that the Tenants would have been acting unreasonably in not approving the assignment.

(relating to the landlord's right to withhold consent to assignment of a commercial lease). Since no such proof was presented at trial, this Court must conclude that the Lease was assigned in violation of its express terms and as such the assignment is void.

2. THE TENANTS WERE NOT PROPERLY SERVED AND THUS THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THEM.

The parties entered into a Lease Agreement in which Randy Gould, Bret Drager and Greg Johnson are the tenants and the David Smith Revocable Trust is the Landlord. Exhibit 6. On July 30, 2007, Ledaura served a notice to the Tenants to "pay rent or vacate". Exhibit 11. The Affidavit of Service specifies the notice was only served on Randy Gould.² CP 28.

Pursuant to RCW 59.12.030, as a prerequisite to any suit, a landlord is obligated to provide to all of the tenants a notice to "pay rent or vacate". Failure to properly serve the notice pursuant to RCW 59.12.030 deprives the court of subject jurisdiction. *Christensen v. Ellsworth*, 162 Wn.2d 365, 173 P.3d 228 (2007). Ledaura failed to serve Mr. Johnson and Drager Gould Architects,

² The Affidavit of Service is attached as Appendix A.

Inc. and thus the Trial Court lacked subject matter jurisdiction over them.

A. The Trial Court Made No Finding Of Service On Greg Johnson or Drager Gould Architects, Inc.

The Trial Court made no finding that either Greg Johnson or Drager Gould Architects, Inc. (DGA) were served. Ledaura bears the burden of proving that all of the Tenants were served with the notice. “The absence of a finding in favor of the party with the burden of proof as to a disputed issue³ is the equivalent of a finding against that party on that issue. *In re Marriage of Olivares*, 69 Wn.App. 324, 334, 848 P.2d 1281 (1993) *review denied*, 122 Wn.2d 1009, 863 P.2d 72 (1993); *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001).

This Court must conclude that the Trial Court’s failure to find that Greg Johnson and DGA were properly served with the notice means they were not served. Consequently, the order and judgment against Greg Johnson and DGA must be reversed and the Lease must be reinstated as to them.

³ The Tenants disputed Ledaura’s service of the notice by alleging as affirmative defenses “failure to perform a condition precedent”, “improper service of the pre-eviction notice” and “failure to state a claim upon which relief may be granted”. CP 34

B. Service On Mr. Gould Does Not Constitute Service On Mr. Johnson or Drager Gould Architects, Inc.

A notice to pay or vacate must be served in accordance with RCW 59.12.040. RCW 59.12.030(3). The statute allows service to be accomplished through the following means:

either (1) by delivering a copy personally to the person entitled thereto; or (2) if he be absent from the premises unlawfully held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his place of residence; or (3) if the person to be notified be a tenant, or an unlawful holder of premises, and his place of residence is not known, or if a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated.

RCW 59.12.040.

The Affidavit of Service for the notice only specifies that Randy Gould was served, not Bret Drager, not Greg Johnson and not DGA. There is no dispute that Ledaura did not mail a copy of the notice to the premises, to any of the Tenants' last known addresses or post the notice on the building. Consequently, Ledaura must prove that Mr. Johnson and DGA were personally served.

i. Service on Greg Johnson.

Based on the Affidavit of Service, Mr. Johnson was not personally served with the Notice to Pay Rent Or Vacate. Ledaura argues that Mr. Johnson, Mr. Drager and Mr. Gould were partners and as such service on Mr. Gould and Mr. Drager was service on Mr. Johnson. Ledaura Brief at 12-13.

Ledaura has the burden of proving that the Tenants constituted a partnership. As provided above, “the absence of a finding in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against that party on that issue. *In re Marriage of Olivares*, 69 Wn.App. at 334. Moreover, the Trial Court’s refusal to find that there was a partnership makes clear that Ledaura did not carry its burden of proof.

Even if the Trial Court had not rejected Ledaura’s proposed finding that there was a partnership, the Tenants do not meet the statutory definition of a partnership as they “are not carrying on as co-owners of a business for profit formed under RCW 25.05.055.” RCW 25.05.005(6). Moreover, the facts Ledaura relies upon expressly do not establish a partnership. RCW 25.05.005 states in pertinent part as follows:

(a) Joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property;

(b) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived;

RCW 25.05.055 (3).

The only proof Ledaura offers to support a partnership is one passage from Mr. Drager's testimony where he states: "Well, if I can state that in not exact numbers, currently we have a loan that allows us to draw on up to \$200,000 for Randy's and mine one half of the partnership . . ." ⁴ RP 11/20/07 p. 157-158. The use of the term "partnership" in that one passage is not sufficient proof that a partnership actually existed. It only demonstrates the amount each person contributed to the leasehold improvements. Simply making that monetary contribution is not enough to satisfy the statutory requirement there be an intent to carry on a business. RCW 25.05.005(6). It further ignores the statutory exclusion that only having joint interest in property is not sufficient to demonstrate a

⁴ The Landlord argues "The tenants should not be allowed to have it both ways; to argue they are partners when it suits them, but not partners when it may cause an adverse result." Ledaura's Brief at 14. The Landlord fails to provide any citation to the record where the Tenants have done so.

partnership. RCW 25.05.055(3). To hold that Tenants are considered a partnership because they contribute to the expense of improvements would be to hold that all of the tenants in a building are partners because they jointly contribute to the costs of common area maintenance, taxes and insurance.

Even if this Court concludes there is a partnership, service of the notice on one partner is not service on all. Ledaura relies upon the statutory provision that states "Each partner is an agent of the partnership for the purpose of its business." RCW 25.05.100. However, the fact that one partner is served does not constitute service on all partners. In *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn.App. 480, 485-6, 674 P.2d 1271 (1984) the Court concluded that "while notice to one partner is notice to all, that does not mean that service on one partner is such service on all partners that an in personam judgment can be taken against partners not personally served." Like *Mid-City Materials*, service of the notice is necessary to confer subject matter jurisdiction and service on one partner is not service on all for that purpose.

The unlawful detainer statute, which defines the only authorized methods for service, does not provide that personal

service on one tenant constitutes personal service on all. RCW 59.12.040. Ledaura could have obtained proper service if the notice had been both posted on the property and mailed. *Id.* Failing to do that, Ledaura cannot rely on the Uniform Partnership Act to excuse its noncompliance with the unlawful detainer statute.

As a result of Ledaura's failure to properly serve the notice on Mr. Johnson, the Trial Court lacked subject matter jurisdiction over him and thus the decision and judgment as to Mr. Johnson must be reversed and Mr. Johnson's leasehold interest must be restored.

ii. Service on the Corporation.

Ledaura argues that DGA was personally served with the notice to pay rent or vacate because Mr. Gould and Mr. Drager were served with the notice, arguing they are "officer[s], agent[s], or person[s] having charge of the business of such corporation." Ledaura Brief at 13; RCW 59.12.040. Once again, the Trial Court made no such finding and "the absence of a finding in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against that party on that issue." *In re Marriage of Olivares*, 69 Wn.App. at 334.

Even if this Court concludes that the Trial Court implicitly found Mr. Gould or Mr. Drager to be agents of DGA, there is no evidence in the record to support a finding that DGA was ever served with Ledaura's notice. Ledaura's failure to include DGA on the notice makes the notice fatally defective. Exhibit 11; *Metcalfe v. Heslop*, 161 Wash. 106, 107, 296 P. 151 (1931). In fact, nowhere on the notice does it reference DGA and neither does the Affidavit of Service. Appendix A. CP 28. Consequently, even if Mr. Gould or Mr. Drager qualified as an "officer, agent, or person having charge of" DGA, the notice would not advise either them or DGA, nor would any of them reasonably believe, that it was directed to the corporation.

As a result of Ledaura's failure to properly serve the notice on DGA, the Trial Court lacked subject matter jurisdiction over DGA and thus the decision as to DGA must be reversed and DGA's leasehold interest must be restored.

3. THE LEASE COULD NOT COMMENCE UNTIL THE LANDLORD PROVIDED THE BUILDING IN "FREE OF DEBRIS AND BROOM SWEEP CLEAN" CONDITION.

Assuming Ledaura served the notice properly, assigned the Lease properly and obtained the Tenants' consent to the assignment, the Trial Court must be reversed as the Lease did not

commence until September 2007 after which time the Tenants were entitled to free rent for the following 2 through 11 months. Thus, the Tenants were not in unlawful detainer.

The Lease commencement date was a central issue in the case because it establishes the date from which the free rent period begins. CP 165; Finding of Fact 1.19. The Trial Court found that even though the Tenants “took actual possession of the Property on or about January 25, 2006”, the Lease did not commence until June 2006. CP 166-7; Finding of Fact No. 1.11. Based on the evidence at trial, the Court determined that the parties intended for the Lease to commence when the premises were “free of debris and broom swept clean”. CP 166; Findings of Fact 1.25 and 1.26.

Ledaura disputes this conclusion, arguing that the Trial Court adopted its argument that the Lease commenced upon “possession” and the Trial Court determined that the Tenants “possessed” the building in June 2006. Ledaura’s Brief at 20. Since the Trial Court specifically found that the Tenants took possession of the building in January 2006 and that the Lease did not commence until June 2006, the Court expressly rejected Ledaura’s argument.

A. Ledaura Admitted That The Actual Commencement Date Was Not Earlier Than November 2006 And Thus Within The Free Rent Period.

Once the Trial Court established that commencement occurs when the premises are “broom swept clean”, the question is when was it broom swept clean? Ledaura argues that “the tenants make a mountain out of a mole hill with regard to the items remaining at the property between June 2006 and September 2007.” Ledaura Brief at 22. Ledaura then attempts to argue that the meaning of the condition, “broom swept clean and free of debris” really does not mean what it says. Ledaura’s Brief at 22-27. But Ms. Caruthers expressed her intent and understanding of that condition when she testified that the earliest this condition was met was less than one year before the November 2007 trial (and thus within the free rent period). Ms. Caruthers testified as follows:

Q But just to be clear, in your opinion, you had not met the terms of this Paragraph No. 2 until sometime in November of 2006, correct?

A When I was there with our attorney -- I'm not sure about the timeline.

MR. ROBERTS: Your Honor –

THE WITNESS: You'll have to put it in front of me for me to be clear of the dates. I'm sorry.

Q (By Mr. Roberts) To help you, you testified that you met with some attorneys last year. When was that?

A It would have been almost a year ago because it was very cold.

Q So almost a year ago at that meeting, that's when you considered the building to be free of debris and broom-swept clean, correct?

MR. KIGER: Objection; misstates the testimony.
THE COURT: Overruled.

THE WITNESS: That was our mutual understanding with all of us talking about it right then and there.

RP 11/19 p. 129.

There being a clear statement by Ledaura that it believed the condition for commencement of the Lease was fulfilled less than a year before trial, Ledaura seeks to excuse its Lease obligation by arguing that the Tenants' demolition work excused the Landlord from performing its obligation. Ledaura Brief at 21-24.

B. Ledaura Was Not Excused From Its Obligations.

There is no dispute that the Tenants conducted demolition work in the building. But for the reasons provided in the Appellants' Opening Brief, this did not materially interfere with the Landlord's ability to provide the building "free of debris and broom swept clean" as required in the Addendum. Exhibit 8.

Despite having complete access to the building, the Landlord took no action and instead waited more than a year, until September 2007, to remove the remaining debris. RP 11/19 p. 116-118, 142-143; RP 11/20 p. 14-15. On August 23, 2006, the Tenants proposed that they would remove all of the remaining debris if the Landlord would remove the remaining hazardous substances. Exhibit 34. See also RP 11/20 pages 90-91, 122. But the Landlord rejected this proposal. Exhibit 35.

On October 11, 2006, the Tenants advised the Landlord that there were still light fixtures, miscellaneous furniture, metal parts and table tops in the building. Exhibit 39. In response, the Landlord stated "You don't need to move anything". *Id.*

Clearly the Tenants were not interfering with the Landlord, but on the contrary trying to assist the Landlord in fulfilling the condition even offering to remove the remaining debris themselves. Consequently, Ledaura cannot now complain that the Tenants are "making mountains out of molehills" when they repeatedly advised the Landlord of its obligation to remove the debris, even offering to remove it themselves, and the Landlord refused to do so.

4. THE TENANTS ARE EXCUSED FROM PAYING RENT ON THE ENTIRE LEASEHOLD.

As discussed in its Opening Brief, the Landlord breached its warranties of habitability and quiet enjoyment by failing to remove the remaining debris and failing to repair the roof thereby excusing the Tenants from paying rent. Opening Brief at 33-38. Ledaura argues that these warranties are inapplicable or if applicable, the Tenants must still pay rent.

A. Warranties Of Habitability And Quiet Enjoyment Are Applicable to This Lease.

The Lease provides in pertinent part as follows:

30. Quiet Enjoyment. So long as Tenant pays the Rent⁵ and performs all of its obligations in this Lease, Tenant's possession of the Premises will not be disturbed by Landlord . . .

Exhibits 6 and 45, Section 30.

In *Foisy v. Wyman*, 83 Wn.2d 22, 515 P.2d 160 (1973), which has been cited by both parties, the Court held "that in all contracts for the renting of premises, oral or written, there is an implied warranty of habitability and breach of this warranty constitutes a defense in an unlawful detainer action." *Foisy*, 83

⁵ It is important to note that the Tenants were not obligated to pay rent for months 2 through 11. Consequently, even if the Lease commenced in June 2006, the Tenants were in compliance with this provision while the Landlord was in breach.

Wn.2d at 28. Presumably, this includes the warranty of quiet enjoyment also.

In *Olson v. Scholes*, 17 Wn.App. 383, 563 P.2d 1275 (1977) the Court declined to extend that rule to a commercial lease where it involved “commercial facilities used for dogs and cats and not for human living quarters.” *Id.* at 392. However, the Court also recognized in its opinion the case of *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268, 33 A.L.R.3d 1341 (1969), where “following a scholarly discussion of the history of the implied warranty of habitability, the court imposed such a warranty in a lease of office space for commercial purposes, but nonetheless for human occupancy.” *Id.* In Washington, it appears the warranties do apply when there is human occupancy.

The Tenants occupied the building as an office and intended to utilize the remainder of the building for human occupancy. The Tenants have thus met that requirement and should be entitled to assert this affirmative defense, particularly since the Tenants were limited to the use of only 760 square feet of the building.

B. The Landlord Violated Its Warranties By Failing to Remove the Debris And Repair The Roof.

With regard to the roof, Ledaura states “the Tenant’s

argument that the roof was never fixed is misleading.” Ledaura Brief at 31. Then Ledaura contradicts itself by admitting that it was responsible for the roof but did not have the money to fix it. Id.; RP 11/19 pages 139-141. In its brief, Ledaura further contradicts its own admission at trial that the Tenants continued to complain about the roof leak and that in November 2006 the roof still continued to leak. RP 11/20 page 37-38. The leaking roof clearly prevented the Tenants from making improvements to the building. RP 11/20 123-124; 127-131; 140-141; Exhibit 46. The leaking roof prevented the Tenants from occupying all but 760 square feet of the building. Consequently, the only area that the Tenants “possessed” was that small area, constituting 6% of the lease space. RP 11/20 p. 96-97. Even in that 760 square feet of space, there were leaks damaging the Tenants’ equipment and improvements. RP 11/20 p. 130-131. Based on the stated rental rate in the Lease of \$4,500 per month, the Tenants’ rent for the pro-rata portion of the building it could occupy is at best \$285.00 per month. Even if the Court’s conclusion that the Tenants owed rent is not completely reversed, the amount of the rent owed should be reduced to \$285.00 per month for the months for which rent was indeed due.

5. LEDAURA WAS NOT THE PREVAILING PARTY.

Ledaura argues it was the prevailing party because it was successful in dismissing the Tenants' claim for breach of the warranty of habitability and the Trial Court concluded the Tenants were in unlawful detainer. Ledaura Brief at 34. However, Ledaura requested rent and double damages for 22 months totaling almost \$320,000 and was only allowed rent and double damages for 6 of those 22 months totaling approximately \$57,000. Ledaura's Brief at 35; RP 11/19 pages 123-124; Plaintiff's Exhibit 22. CP 167 Finding of Fact No. 134. The Tenants actually prevailed on 16 of the 22 months for which Ledaura was making a claim and thereby reduced the claim by 82%. The Tenants further prevailed on the interpretation of the Lease commencement date when the Trial Court determined the Lease commencement was when the building was "broom swept clean", not upon possession. RP 11/19 pages 123-124; Plaintiff's Exhibit 22; CP 167 Finding of Fact 1.29. The Tenants also prevailed on the issue of receiving offsets regarding payment of the property taxes, payment of insurance. CP 168-9; Findings of Fact 1.41 1.42.

In determining the prevailing party, “the determination turns on the extent of the relief awarded the parties.” *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn.App. 760, 772, 115 P.3d 349 (2005). “When there are several conflicting claims at issue, a defendant is awarded attorney fees for those claims it successfully defends, and plaintiff is awarded attorney fees for those claims upon which it prevails, and the awards should be the offset.” *Id.* The *Crest Inc.* Court also recognized the distinction regarding prevailing on a major claim compared to prevailing on minor claims in ultimately determining the prevailing party. *Id.* The *Crest Inc.* Court did not total the claims to determine who prevailed on more claims. *Id.* Rather, it gave greater weight to the party who prevailed on the major claim. *Id.*

Here, the major claim was determining when the Lease commenced. In fact, most of the trial was spent solely on that issue. The Tenants prevailed on that issue, convincing the Trial Court to reject Ledaura’s position that the Lease commenced upon occupancy. Consequently, the Trial Court abused its discretion by not awarding to each party their attorneys fees and then offsetting those amounts. So in addition to the proportionality approach

provided in *Marassi v. Lau*, 71 Wash. App. 912, 916, 859 P.2d 605 (1993) and discussed in the Tenants' Opening Brief, the Tenants are also the prevailing party based under the *Crest, Inc.* decision. Alternatively, this Court should conclude that there was no prevailing party and neither party should have received its attorney's fees and costs.

CONCLUSION

The Tenants respectfully request that this Court reverse and remand this case back to the Trial Court with instructions to dismiss Ledaura's claims and to restore the Tenants' rights under the lease.

Alternatively, the Tenants request that the Court reverse and remand the claims relating to Mr. Johnson and Drager Gould Architects back to the Trial Court with instructions to restore those tenants' rights under the lease.

Respectfully submitted this 24th day November, 2008.

DAVIS ROBERTS & JOHNS, PLLC



MARK R. ROBERTS, WSBA #18811
Attorneys for Appellants Drager, Gould,
Johnson and Drager Gould Architects

APPENDIX A



07-2-10979-5 28050080 AFSR 08-14-07

FILED
IN COUNTY CLERK'S OFFICE
A.M. AUG 13 2007 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

DELIVERY TO:
RANDY GOULD,
BRET DRAGER,
GREG JOHNSON,

Plaintiff/Petitioner

vs.

Defendant/Respondent

Cause #: 07-2-10979-5

Declaration of Service of:

NOTICE TO PAY RENT OR VACATE AND NOTICE
TERMINATING OPTION

Hearing Date:

Declaration:

The undersigned hereby declares: That s(he) is now and at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, and is competent to be a witness therein.

On the date and time of Jul 30 2007 12:15PM at the address of 312 6TH AVE TACOMA, within the County of PIERCE, State of WASHINGTON, the declarant duly served the above described documents upon RANDY GOULD and BRET DRAGER GREG JOHNSON by then and there personally delivering 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with RANDY GOULD A NAMED PARTY (50'S, 230, 5'11, C/M).

No information was provided that indicates that the subjects served are members of the U.S. military.

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

Dated: July 31, 2007 at Tacoma, WA

by

K. Picard PCR 2061

Service Fee Total: \$ 48.35

ORIGINAL

**ORIGINAL
PROOF OF SERVICE**

ABC Legal Services, Inc.
206 521-9000
Tracking #: 4231823



Blado & Kiger
3408 So 23rd 2nd Floor
Tacoma, WA 98405
253 272-2997

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November 2008, I caused to be served the foregoing REPLY BRIEF OF APPELLANTS on the following individual in the manner indicated:

Douglas N. Kiger
BLADO KIGER, P.S.
3408 South 23rd Street
Tacoma, WA 98405-1609

(X) Via Hand Delivery (ABC Legal Messengers)

SIGNED this 24th day of November, 2008, at Gig Harbor Washington.


KRISTINE R. PYLE

FILED
COURT OF APPEALS
DIVISION II
08 NOV 24 PM 4:42
STATE OF WASHINGTON
BY DEPILEY