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NO. 38109-5

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

JAMES STEWART

Appellant,

v.

TACOMA RESCUE MISSION

Respondent.

RESPONDENT'S REPLY BRIEF

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A. ASSIGNMENTS OF ERROR.

Assignments of Error:

1. Appellant's introduction should be stricken.

Issues Pertaining to Assignments of Error:

1. WHETHER PORTIONS OF APPELLANT'S BRIEF SHOULD BE STRICKEN WHERE APPELLANT WENT OUTSIDE THE AUTHORITY GIVEN BY THE RULES OF APPELLATE PROCEDURE (RAP 10.3); IN ADDING AN INTRODUCTION TO ITS BRIEF WHERE RAP DOES NOT ALLOW THE SAME; WHERE IN APPELLANT'S INTRODUCTION, FACTS ARE STATED NOT SUPPORTED BY THE RECORD; WHERE APPELLANT DID NOT ORDER A REPORT OF PROCEEDINGS AND IS THEREFORE BOUND BY THE FINDINGS OF FACT ENTERED BY THE COURT.
2. WHETHER THE EVICTION NOTICE GIVEN APPELLANT PURSUANT TO RCW 59.12.030(5) GAVE THE TRIAL COURT SUBJECT MATTER JURISDICTION.
3. WHETHER RESPONDENTS PROVED APPELLANT COMMITTED A NUISANCE WARRANTING APPELLANT'S EVICTION.
4. WHETHER ACCEPTANCE OF PAST DUE RENT BY RESPONDENT PRECLUDES A FUTURE EVICTION.
5. WHETHER APPELLANT'S REQUESTS FOR REASONABLE ACCOMMODATION TO DELAY MOVING PRECLUDES A CLAIM OF WAIVER DUE TO ACCEPTANCE OF RENT.

B. STATEMENT OF THE CASE.

Appellant is limited to the facts as determined by the Findings of Fact entered by the trial court. (CP 307-311) As no Report of Proceedings were ordered, the pertinent facts in this case follow. Appellant rented from Respondent an apartment on January 3, 2006. (CP 307) Appellant was homeless at the time he moved into the Jefferson Square Apartments operated by Respondent. (CP 308) (The Jefferson Square Apartments are hereinafter designated as JSA.) The reason Appellant was homeless was because he had been evicted by his prior landlord as a result of a nuisance notice served on him October 14, 2006. (CP 308) The 2006 eviction for nuisance was based upon Appellant exhibiting aggressive and hostile behavior and using threatening language against neighboring tenants. Said behavior caused female tenants discomfort as well as fearing for their personal safety. (CP 308) One said tenant said she was frightened so severely by Appellant that she had three grand mal seizures in one night. In addition, Appellant had numerous restraining orders against him by women with whom he had had a significant relationship or come in contact with who had feared for their safety as a result of his threatening behavior. (CP 308-309) Said behavior, together with the behavior while a resident of JSA, showed Appellant exercised a routine practice dealing with persons who offended him. This

routine practice was exhibited against neighboring tenants at the JSA and it led to the nuisance notice served on Appellant on October 9, 2007 by Respondent. (CP 309) The nuisance notice served on Appellant in this case included two threats against a neighboring tenant who suffered from severe physical disabilities. The threatening behavior and intimidation began almost immediately following Appellant's moving into JSA. (CP 309) In addition, Appellant bothering neighboring tenants with noise was exacerbated by his physically threatening language and appearance, which frightened neighboring tenants from complaining, especially female tenants. (CP 309)

Respondent, wishing to terminate Appellant's residency, issued several Twenty Day Notices to Terminate Tenancy in months preceding the nuisance notice. Appellant continued his threats and intimidation against a tenant with physical disabilities in July of 2007. Although Appellant had been issued a Twenty Day Notice to Terminate Tenancy on July 2nd to vacate the premises on July 31, 2007, a reasonable accommodation request was received by Respondent on July 31, 2007 and as a result Appellant was given an extra month to move. (CP 310) Respondent initiated an unlawful detainer action based on a Twenty Day Notice to Terminate Tenancy served on Appellant August 1, 2007. (CP 309-310) That cause of action was abandoned when it was brought to Respondent's attention Respondent was

required to base an unlawful detainer action on cause. As a result, the subsequent October 9, 2007 nuisance notice was prepared and served on Appellant. (CP 309-310)

Appellant's extreme loss of temper during trial showed the trial judge that such was the pattern of conduct used by the Appellant to threaten and intimidate other persons, most specifically, neighboring tenants. Following the issuance of the nuisance notice by Respondent, Appellant tendered both the September 2007 and October 2007 rent. Respondent accepted the September rent since Appellant had already lived on the premises for the entirety of that month, but declined to accept the October rent so as not to waive its nuisance notice. (CP 310-311)

The following facts stated by Appellant are not part of the record and are not to be considered as facts. Even exhibits admitted into evidence must not be considered if the testimony explaining how the exhibits related to this case have not been placed in the appellate record or are included in the findings.

C. ARGUMENT.

1. APPELLANT'S BRIEF, VIOLATING THE RULES OF APPELLATE PROCEDURE, SHOULD BE STRICKEN WHERE: 1. AN INTRODUCTION IS INCLUDED AND IS OUTSIDE THE FORMAT OF RAP 10.3; 2. THE

INTRODUCTION AND OTHER PORTIONS OF THE BRIEF CITE FACTS AND LAW NOT SUPPORTED BY THE RECORD OR CITATION TO AUTHORITY; AND 3. WHERE APPELLANT DID NOT ORDER REPORT OF PROCEEDINGS AND IS THEREFORE BOUND BY THE FINDINGS OF FACT ENTERED BY THE COURT.

Appellant's introduction has no citation to the record. The following statements are facts not in the record: 1. The tenant, James Stewart, is a homeless veteran with mental disabilities; 2. months before the notice was issued, Stewart verbally threatened other tenants of the JSA at locations away from the apartment building (although threats did occur the timing aspect is deceptive); and 3. the entire balance of the introduction should be stricken for lack of citation to the record and to legal authority. In addition, the statement of the case states facts that are not in the record. In the last two lines of Page 5 of Appellant's brief plus the remainder of the entire paragraph stated in the first ten lines of Page 6, Appellant cites several references that there was no evidence of specific items. Those matters cannot be stated without a Record of Proceedings which Appellant did not order. On Page 7, Appellant cites to CP 309-310 facts that are just not in the Court's findings and are not stated in the findings.

2. THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION AS A RESULT OF HAVING GIVEN APPELLANT A NOTICE PURSUANT TO RCW 59.12.030 (5).

Appellants claim Respondent Tacoma Rescue Mission (hereinafter TRM) failed to give Appellant appropriate notices under state and federal law. The applicable federal regulation is 24 C.F.R. § 882.511 (c). In addition to the federal rules regarding evictions for breach of contract, the above regulation allows the owner to terminate a tenancy for: (2) violation of applicable federal, state or local law. The Housing Assistant Payment contract (HAP) paragraph 1.(c) states: “Any eviction (dispossession of individual from the dwelling unit) must be carried out through judicial process under state and local law.” State law allows a landlord to evict a tenant based on a tenant behaving in a manner that constitutes a nuisance (RCW 59.12.030(5)). RCW 59.12.030(5) requires a tenant be given a three day notice to vacate the premises following the service upon him of the notice. There is no federal regulation requiring an eviction notice for a tenant creating a nuisance.

Appellant raises a defense that the law requires a specific date to be given for the Appellant’s tenancy to be terminated and the Appellant to have moved. Neither RCW 59.12.030 nor case law supports this contention. Paragraph 9 of the parties’ lease states the following: “(f) The landlord must serve written notice of termination of tenancy to the resident which states the date the tenancy shall terminate. Such date must be in accordance with the

following: “When the termination is based on serious or repeated violation of the terms and conditions of the lease or on violation of applicable Federal, State or local law, the date of termination must be in accordance with state and local law.” RCW 59.12.030(5) is the state law that applies to the provisions of the lease. Said statute states the required time frame to be three (3) days from the date of service of the notice or four (4) days if the notice must be served by posting and mailing. RCW 59.12.030(5) and RCW 59.12.040. In fact, all notices required under RCW 59.12.030 (other than a 20 day notice to terminate tenancy without cause) require a number of days as opposed to a specified date to be included in eviction notices: 3 days to pay rent or vacate, RCW 59.12.030(3); 10 days for breach of contract, RCW 59.12.030(4); and 3 days for occupying premises without permission, RCW 59.12.030(6).

Appellant also states that the allegations in the nuisance notice were not sufficiently specific enough to give reason for termination. The courts in the state of Washington have given definition to the term nuisance as “interfering with the peaceful use and enjoyment of another’s property or person.” *Hostetler v. Ward*, 41 Wn. App. 343, 704 P.2d 1193 (1985). RCW 7.48.120 defines nuisance as follows:

“Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.”

Both the statutory and case definitions of nuisance define a pattern of conduct described in the “nuisance notice” given to Appellant. The facts show that Appellant’s behavior was threatening, intimidating, and generally interfering with the peaceful use and enjoyment of his neighbor’s property. The Findings of Fact show that Appellant’s behavior created fear in his neighbors for their personal safety. The only facts before the Court of Appeals are those found in the Findings of Fact determined by the Court. (CP 306-311) The trial court specifically found that said behavior is a pattern established by the Appellant long before he became a resident at the JSA, immediately before becoming a resident at the JSA, during the time he was a resident at the JSA, and indeed, during trial. (Again see CP 306-311)

The notice in this case specifically describes a behavior and pattern of conduct that resulted in the Appellant’s being a nuisance to his neighbors. Said notice complies with the requirements of 24 C.F.R. 882.5 (c), paragraph 1.11 of the HAP contract (CP 233) and paragraph 9(a)(3) of the parties’ lease. (CP 265) Appellant relies on the *Housing Authority of King County v.*

Saylor, 19 Wash. App. 871, 578 P.2d 76 (1978). *Saylor* relied heavily on the fact that the Housing Authority of King County as a government agency derived its existence from statute. *Saylor* said at page 873: “The government as landlord is still the government... unlike private landlords, it is subject to the requirements of due process of law...” The applicable C.F.R. in *Saylor* was 24 C.F.R. § 866.53 (c) and applied to federally subsidized public housing agencies. Nothing in *Saylor* indicates that the King County Housing Authority could evict pursuant to notices given under Washington State law without going through the requirements of the federal regulations under 24 C.F.R. § 866.53 (c). The *Saylor* notice stated only: “You are in violation of your lease in Section 6j: The Tenant shall not commit or maintain a nuisance on or about the premises.” Unlike *Saylor*, the TRM described the behavior that was a nuisance, giving examples of the same. Unlike *Saylor*, TRM is a private entity, and unlike *Saylor*, TRM is operating under 24 C.F.R. § 882.511 which gives full authority to this particular program to rely on violations of state law.

Appellant cites *Saylor* and *Housing Authority of the City of Everett v. Terry*, 114 Wn.2d 558, 789 P.2d 745 (1990) to support its position that the notice requirements to terminate a tenancy must comply with both federal and state law. Said flies in the face of the exact language found in 24 C.F.R. §

882.511. 24 C.F.R. § 882.511 does not require a federal notice where there is a violation of state or local law. *Terry* does not require both a federal and state eviction notice. Instead, *Terry* requires a state notice even in instances where a federal notice was given. Appellant goes on to cite *Terry* to say that a landlord can only evict a tenant for breach of contract. *Terry* just does not say what Appellant claims. *Terry* is a case in which the Everett Housing Authority sought to evict Terry under a breach of contract theory and gave the breach of contract notice required by the federal regulations. Said notice did not comply with the state statute, and the Supreme Court in *Terry* held that for any eviction in the state of Washington, notice under RCW 59.12.030 was required. Theoretically, the Everett Housing Authority could have given Terry either a three day nuisance notice or a ten day breach of contract notice under RCW 59.12.030 but instead did neither. In the case at hand the only requirement is to give a notice pursuant to state law. TRM complied with said requirements.

3. APPELLANT'S CLAIM TRM DID NOT PROVE A NUISANCE IS NOT SUPPORTED BY THE RECORD.

TRM provided a number of witnesses who testified to the conduct of the Appellant during trial. The Court's findings reflect the facts testified to by all the witnesses including Appellant. In his claim, Appellant states that nuisance allegations apply only to commercial tenancies and that his behavior

amounted only to ordinary lease violations rather than nuisance. There is no cite to the Clerk's Papers and there is no Report of Proceedings to support those allegations. RCW 59.12.030(5) has no language restricting evictions based on that statute to commercial evictions. In addition, Appellant's contention flies in the face of common sense. Even the cases Appellant has cited that involve nuisance notices all involve residential tenancies.

Appellant also cites RCW 59.18.130(5) as stating that a residential tenant shall not permit a nuisance and as a result must use the notice provision in RCW 59.18.180. However, RCW 59.18.130 and RCW 59.18.180 give a landlord additional rights by filing an unlawful detainer complaint without giving a nuisance notice. There is nothing in said statute that abrogates RCW 59.12.030(5). If the legislature had intended to abrogate or supplant RCW 59.12.030 in its notice provisions, it certainly would have done so specifically, not by the inferences Appellant is suggesting. A landlord's duty under RCW 59.18.180 to give a tenant an opportunity to repair or clean premises does not apply to the facts of this case. Appellant claims he has the right to change his behavior to come into compliance with his lease pursuant to RCW 59.18.180 within thirty days of written notice by the Respondent. There are two statutory provisions that show Appellant is wrong in this claim. The first is RCW 59.18.170 which reads as follows:

“If at any time during the tenancy the tenant fails to carry out the duties required by RCW 59.18.130 or 59.18.140, the landlord may, **in addition to pursuit of remedies otherwise provided by law**, give written notice to the tenant of said failure, which notice shall specify the nature of the failure.”

Respondent chose to use another remedy provided by law, that is by delivering Appellant a nuisance notice pursuant to Respondent’s right to do so under RCW 59.12.030(5).

Second, although RCW 59.18.180 deals with notice provisions for a tenant’s violation of RCW 59.18.130, it does so in connection with non-compliance with the lease that:

“can be remedied by repair, replacement of a damaged item, or cleaning, the tenant shall comply within thirty days after written notice by the landlord specifying the non-compliance...”

RCW 59.18.170 is clear in its authorization given to Respondents and all landlords to use the provisions under RCW 59.12.030 and in the case at hand, specifically subsection 5, to evict the tenant. Appellant has been behaving in a manner that has been threatening and intimidating to his neighboring tenants. The provisions of RCW 59.18.180 clearly do not apply to the requirement of a thirty day notice if the conditions of the premises are not an issue. The conditions of Appellant’s apartment were not such that they required repair, replacement of a damaged item, or cleaning. It is rather

disingenuous to claim that Appellant's personality or behavior can be either repaired, replaced or cleaned. Respondent chose to proceed under RCW 59.12.030(5) as really the only alternative since RCW 59.18.180 cannot be interpreted to apply to the facts of this case.

Appellant also cites one instance in the Findings of Fact (CP 311) where one of the instances of Appellant's threatening behavior occurred away from the site as not being the place of nuisance that allows an eviction. As can be seen from the findings, the threat away from the site against a neighboring tenant was only one of many instances that led to the findings that the neighbors of Appellant were intimidated and afraid for their safety. Furthermore, the location threats were made at locations providing services to indigent individuals such as tenants at JSA. (CP 11) Said position in Appellant's brief does not support his claim that TRM did not prove his conduct over a period of time and was not threatening, intimidating or creating fear to the neighboring tenants, and since there are no records of proceedings, there is nothing to indicate that the Court's findings, including a threat away from the premises, was part and parcel of the entire type of conduct complained of by Appellant's neighbors.

4. ACCEPTANCE OF PAST DUE RENT FOLLOWING THE ISSUANCE OF A NUISANCE NOTICE DOES NOT PRECLUDE AN EVICTION BASED UPON SAID NOTICE.

Respondents gave Appellant a nuisance notice October 9, 2007. (CP 309-310) Appellant tendered the rent for the months of September and October of 2007 on October 10, 2007. Respondent accepted the rent for the month of September but declined the rent for the month of October. (CP 309-310) Appellant claims acceptance of the September rent waives Respondent's right to bring an eviction action against Appellant based upon the October 9, 2007 eviction notice. The cases cited by Appellant do not support his claim that Respondent waived the right to evict based upon the nuisance notice. The case of *Wilson v. Daniels*, 31 Wn.2d 633, 198 P2.d 496 (1948) involved the issuance of a three day notice to pay rent or vacate at the same time a ten day notice for breach of contract was being prepared. The three day notice to pay rent or vacate was served on December 3, 1946 requiring the tenant to pay the rent on or before December 6th or vacate. Rent for the month of December was accepted on December 6, 1946. The ten day notice for breach of contract was served on December 7, 1946. The Court determined that an unlawful detainer action did not apply until a ten day period to make the repairs had expired. The fact the rent was accepted through the month of December meant that the breaches were waived for the future time rent was accepted. As a result, the unlawful detainer could not be started until after December 31st, the time for which rent had been paid

expired. The case of *Signal Oil Company v. Stebick*, 40 Wn.2d 599, 245 P.2d 217 (1952) clarifies this position more fully. That case states at 40 Wn.2d at 603, "As soon as they (landlord) accepted rent **in advance** from the assignees, with full knowledge of all the facts, the right to declare a forfeiture was waived as fully and completely as by the written consent provided for in the lease itself." In said case, the ten day breach of contract notice was given on October 21, 1950. Said notice required the tenant to come into compliance with the lease within ten days of the notice. The tenant failed to come into compliance pursuant to the notice. Landlord accepted the rent for the months of November and December 1950 and January 1951. The landlord then filed suit for unlawful detainer based upon the October 21st notice on January 8, 1951 and served the summons and complaint on the 12th of January 1951. It was only the acceptance of rent following the period of time given in the notice that created the waiver. In *Signal v. Stebick*, it was only the acceptance of rent for the months following the notice (November through January) that created the waiver. In the case at hand, the Appellant tendered the rent for the month of October following the nuisance notice being served on October 9, 2007. Respondent refused acceptance of the October rent so as not to waive the October 9th claim of nuisance. (CP 309-310) Respondent's acceptance of **past due rent** does not waive the eviction

process. Several cases have dealt with the issue of acceptance of partial rent following the initiation of the eviction process through the service of an eviction notice including *Housing Resources Group v. Price*, 92 Wn. App. 394, 958 P.2d 327 (1998) and *Hwang v. McMahill*, 103 Wn. App. 945, 15 P.3d 172 (2000). In *Hwang*, the landlord served the tenant with a notice to pay rent or vacate, requiring the tenant to pay rent in the amount of \$385.00 and utilities in the amount of \$540.00. Said sums were to be paid by April 11, 1999 or vacate the premises. Tenant paid \$200.00 after April 11th, which was accepted by the landlord. The Court of Appeals held that acceptance of the amount was not a waiver of the eviction process pursuant to the previously given eviction notice. In *Housing Resources Group v. Price* (also involving subsidized housing) the tenant's portion of the rent was \$127.00. The rent was increased to \$139.00 and the tenant refused to pay the same. The landlord accepted the \$127.00 while continuing to demand the balance. The Court of Appeals held that acceptance of partial rent did not waive the eviction process as long as the accepted rent was applied to the oldest portion of the debt first. Likewise in the case at hand, Respondent accepted only part of the rent that was due and owing and applied it to the oldest portion of the rent due, therefore there was not a waiver of the eviction process.

5. ACCEPTANCE OF RENT DURING THE ENTIRE PROCESS OF DEALING WITH APPELLANT'S DISTURBANCES CAME AS A RESULT OF APPELLANT'S REQUESTS AND WERE THEREFORE NOT A WAIVER.

Respondent's problems with Appellant accelerated during January of 2007. As a result, Respondent gave Appellant a termination notice on April 9, 2007. From that point on, Appellant made continuous requests for accommodations and indicated he wanted to move and would do so voluntarily. (CP 310) As a result, Respondent held off on the eviction process. It was not until September 2007 that it became evident Appellant was not going to abide by the previous promises and an unlawful detainer summons and complaint were served on him based upon the twenty day notice to terminate tenancy served on August 1, 2007. (CP 310) Only when it was determined that the HAP contract and lease precluded the no-cause eviction were the facts put into a form that led to the preparation of the October 9, 2007 nuisance notice. As a result there was no waiver of any eviction rights prior to the October 9th eviction notice being given to the Appellant.

D. CONCLUSION.

Respondent requests the Court of Appeals uphold the trial court's

rulings regarding the adequacy of the notice and asks that the judgment of the trial court be affirmed.

Respectfully submitted,

DATED:
April 9, 2009

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JAMES STEWART,

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TACOMA RESCUE MISSION,

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DECLARATION OF
SERVICE

Everett Holum states:

I, Everett Holum, attorney for Respondent in the above-entitled cause of action, over 18, competent to testify on the matters stated herein and do so based on personal knowledge.

On April 10, 2009, I filed an original and one true and correct copy of

DECLARATION OF SERVICE - 1

Respondent's Reply Brief and Declaration of Service at *The Court of Appeals of the State of Washington, 949 Market Street, Suite 500, Tacoma, Washington 98402*. In addition, I served one true and correct copy of Respondent's Reply Brief and Declaration of Service to *Mr. Stephen Parsons at 715 Tacoma Avenue South, Tacoma, Washington 98402*.

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

DATED at Tacoma, Washington, on April 10, 2009.



Everett Holum