

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

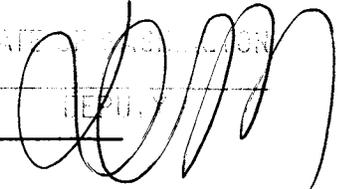
No. 38832-4-II

FILED
COURT OF APPEALS
DIVISION II

JUN 15 PM 2:07

STATE OF WASHINGTON

BY



LEDAURA LLC, a Washington limited liability company,

Respondent,

vs.

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,

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

BRIEF OF RESPONDENT LEDAURA LLC

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Do the Lease Agreement, Addendum, Option to Buy Real Estate, and Commercial & Investment Real Estate Purchase & Sale Agreement constitute one agreement? Assignment of Error 1.

B. If the Lease Agreement, Addendum, Option to Buy Real Estate, and Commercial & Investment Real Estate Purchase & Sale Agreement do not constitute one agreement, is the Option unenforceable when it does not contain a legal description? Assignment of Error 1.

C. Is Ledaura, LLC entitled to attorney fees and costs on appeal?

II. STATEMENT OF THE CASE

On January 25, 2006, Leah Caruthers, as co-Trustee of the David Smith Revocable Living Trust, entered into a Lease Agreement, Addendum, Option to Buy Real Estate, and Commercial & Investment Real Estate Purchase & Sale Agreement (collectively referred to herein as the “Agreement”) with Randy Gould, Bret Drager, and Greg Johnson (collectively referred to herein as “Gould”). CP 4-5, 9-46, 111-140, 186-188. The property was subsequently transferred to Ledaura LLC. CP 6 (paragraph 2.8), 48 (line 17), 220-221. The Agreement relates to a large warehouse located at the corner of 6th Avenue and St. Helens in Tacoma,

Washington. CP 4, 10.

The Addendum to the Agreement dated January 25, 2006, was entitled, "ADDENDUM January 25, 2006 Lease, Option to Buy Real Estate and Purchase and Sale Agreement 601 St. Helens Avenue, Tacoma, WA." CP 26-27. The Addendum dated January 25, 2006, provides among other things:

Other Documents included herewith:

1. Exhibit A Legal Description
2. A copy of the David W. Smith Revocable Living Trust dated April 18, 2005.
3. A copy of the Durable Power of Attorney designating Laura A. Kuhl and Leah Caruthers as co-attorneys-in-fact.
4. Lease Agreement dated January 24, 2006
5. Purchase and Sale Agreement dated January 25, 2006

CP 26. The Option to Buy Real Estate provides, "OTHER AGREEMENTS. As follows: Purchase & Sale Agreement Dated January 25th, 2006[,] Addendum Dated January 25th 2006." CP 29, 254. The Commercial & Investment Real Estate Purchase & Sale Agreement states:

3. EXHIBITS AND ADDENDA. The following Exhibits and Addenda are made a part of this Agreement:

Option to Purchase 1-25-06
Lease Agreement 1-24-06
Purchase and Sale 1-25-06
Addendum 1-25-06

Revocable Trust 4-18-05
Power of Attorney 4-18-05.

CP 32. The inter-relationship of these documents as described above is graphically depicted in Appendix A attached hereto.

Gould took actual possession of the property on or about January 25, 2006, but never paid any rent, other than the first and last months' deposit. CP 6, 147-152 (particularly paragraphs 1.11, 1.16, 1.17, 1.31). Gould was served with a Notice to Pay Rent or Vacate and Notice Terminating Option on July 31, 2007. CP 41-44, 150 (paragraph 1.32), 152 (paragraph 2.2). An unlawful detainer action was then filed. CP 6, 105, 145-158. Following a trial in the unlawful detainer case, the court found that Gould was in breach of the lease, the lease was terminated, and a judgment was entered against them.¹ CP 145-158. After entry of judgment against them, Gould did not use the procedure set forth in RCW 59.12.190 to reinstate the lease. CP 6 (paragraph 2.14), 49 (paragraph 2.14), 224 (paragraph 9).

Ledaura, LLC then commenced this action for a declaratory judgment asking the court to determine whether a material breach of the

¹ Defendants appealed the unlawful detainer matter, but the trial court was affirmed by this Court on April 14, 2009, in Court of Appeals Cause No. 37379-3-II. A mandate was issued June 2, 2009, and is attached as Appendix B.

lease constitutes a breach of the option. CP 3-8. Summary judgment in Ledaura's favor was granted by letter ruling on December 10, 2008. CP 398. Following argument over issues on the wording of the order, the Court's letter ruling was reduced to a written order on January 16, 2009. CP 399-404. Mr. Gould, Mr. Drager, and Mr. Johnson have now filed an appeal from the grant of summary judgment in Ledaura LLC's favor. CP 405-410.

III. ARGUMENT

- A. A MATERIAL BREACH OF THE LEASE CONSTITUTES A MATERIAL BREACH OF THE OPTION BECAUSE THE LEASE, OPTION, ADDENDUM, AND PURCHASE & SALE AGREEMENT INCORPORATE ONE ANOTHER BY REFERENCE, AND BECAUSE GOULD PREVIOUSLY MAINTAINED THAT THE DOCUMENTS CONSTITUTE ONE AGREEMENT.

The primary legal issue in the present case was stated by the Washington Supreme Court in the case of *Rademacher v. Rademacher*, 27 Wn.2d 482, 178 P.2d 973 (1947):

...it is an established principle of law which needs no citation of authority that before appellants would be entitled to claim or exercise the right to purchase under the option, they must establish that the lease containing the option was in full force and effect at the time they attempted to exercise the option.

Rademacher, 27 Wn.2d at 499; See also 53 A.L.R.3d 435 (attached as

Appendix C to Appellants' Brief). Further, nonpayment of rent, coupled with a declaration of forfeiture, is sufficient to terminate a lease-option agreement. *See Kaufman Bros. Constr., Inc. v. Olney*, 29 Wn. App. 296, 628 P.2d 838 (1981); *Esmieu v. Hsieh*, 20 Wn. App. 455, 580 P.2d 1105, *aff'd* 92 Wn.2d 530, 598 P.2d 1369 (1979).

Mr. Gould, Mr. Drager and Mr. Johnson have argued that the Lease, Addendum, Option, and Commercial & Investment Real Estate Purchase & Sale Agreement are all separate agreements and therefore the *Rademacher*, *Kaufman Brothers Construction*, and *Esmieu* cases are distinguishable.

Gould's argument that the Lease, Option, Addendum and Purchase & Sale Agreement are separate agreements is contrary to the evidence, and contrary to their position at trial in the unlawful detainer case because these documents all incorporate each other by reference. A document is deemed to incorporate another by reference under the following circumstances:

The note or memorandum may consist of several writings, though the writing containing the requisite terms is unsigned, if it appears from the examination of all the writings that the writing which is signed by the party to be charged was signed with the intention that referred to the unsigned writing, and that the writings are so connected by internal reference in the signed memorandum to the

unsigned one, that they may be said constitute one paper relating to the contract.

Grant v. Auvil, 39 Wn.2d 722, 724-25, 238 P.2d 393 (1951).

The situation described in *Grant* is very similar to the one in the present case, although in the present case all the documents are signed. In the present case the Lease, Addendum, Option, and Purchase and Sale Agreement are completely intertwined. The Addendum to the Agreement dated January 25, 2006, is entitled, “ADDENDUM January 25, 2006 Lease, Option to Buy Real Estate and Purchase and Sale Agreement 601 St. Helens Avenue, Tacoma, WA.” CP 26-27. The Addendum dated January 25, 2006, provides:

Other Documents included herewith:

1. Exhibit A Legal Description
2. A copy of the David W. Smith Revocable Living Trust dated April 18, 2005.
3. A copy of the Durable Power of Attorney designating Laura A. Kuhl and Leah Caruthers as co-attorneys-in-fact.
4. Lease Agreement dated January 24, 2006
5. Purchase and Sale Agreement dated January 25, 2006

CP 26. Paragraph 9 of the Addendum also addresses what was to be done with the option payment called for in the Option. CP 26. That paragraph states, “Earnest/Option monies (\$35,000) provided pursuant to Agreement

shall be either [sic] paid into escrow...” CP 26. Clearly the Addendum applies to both the Lease and the Option and incorporates both by reference. Paragraph 11 of the Addendum addresses the payment of commission in the event Gould exercised the option. CP 26. The Option to Buy Real Estate states, “OTHER AGREEMENTS. As follows: Purchase & Sale Agreement Dated January 25th, 2006[,] Addendum Dated January 25th 2006.” CP 29. Each of these agreements are incorporated by reference into the Option. Finally, the Commercial & Investment Real Estate Purchase & Sale Agreement states,

3. EXHIBITS AND ADDENDA. The following Exhibits and Addenda are made a part of this Agreement:

Option to Purchase 1-25-06
Lease Agreement 1-24-06
Purchase and Sale 1-25-06
Addendum 1-25-06
Revocable Trust 4-18-05
Power of Attorney 4-18-05.

CP 32. Therefore, the Purchase & Sale Agreement incorporates the Option and the Lease by reference. Gould’s arguments about subjective intent notwithstanding, the only conclusion that can be drawn from the objective evidence contained in the Lease, Option, Addendum, and Purchase and Sale Agreement, is that these documents all constitute a single agreement.

The fact that all of these documents are completely intertwined, and should be treated as one agreement, is also supported by Gould's position at the unlawful detainer trial. Gould's position at the unlawful detainer trial should judicially estop them from arguing to the contrary at this time. The doctrine of judicial estoppel prevents,

“...a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc.*, 160 Wash.2d 535, 538, 160 P.3d 13 (2007) (citing *Bartley-Williams v. Kendall*, 134 Wash.App. 95, 98, 138 P.3d 1103 (2006)). The doctrine serves three purposes: (1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party that would be contrary to sworn testimony the party gave in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and waste of time.

Skinner v. Holgate, 141 Wn. App. 840, 847, 173 P.3d 300 (2007). At the unlawful detainer trial Gould took the position that all these documents constitute a single agreement, which is contrary to their present position.

At the unlawful detainer trial, the following exchange regarding exhibits took place:

MR. KIGER: Next, Exhibit 6.
That's the second lease that we talked about, and I would like to ask that that be admitted.
And for the record -- and I know this is probably something Mr. Roberts and I talked about -- there's a couple other exhibits that we believe are part of it, including that second addendum.

MR. ROBERTS: Right. That was my

only issue is there was a number of documents that kind of fall in sequential order. This is some of them, but not all of them. And so I don't have a problem stipulating to the documents as authenticated, but I think that the complete document actually consists of more than what's here identified as Exhibit No. 6.

THE COURT: So is that an objection to the admission of Exhibit No. 6?

MR. ROBERTS: No.

MR. KIGER: For the record, could I just -- I believe my understanding is that Exhibit 6, 7, and 9 are part of the same. Is that a fair statement?

MR. ROBERTS: I think that's probably right. But just to clarify, I wasn't objecting.

THE COURT: Exhibit 6 is admitted.

CP 106-107 (U.D. Trial Transcript (11/19/07) 105:11 - 106:11); 159-191

(U.D. Trial Exhibits 6, 7 and 9).

On cross examination by Gould's counsel, Ms. Caruthers testified as follows:

BY MR. ROBERTS:

Q Ms. Caruthers, I'm handing you what's been marked as Exhibit No. 6. This is the second lease agreement; is that correct?

A Yes.

Q Now, attached to that was an addendum; is that correct?

A Yes. I don't see it here.

Q I'm handing you what's been marked as Exhibit No. 9.

A Okay.

Q Is that the addendum that was attached to it?

A Yes.

Q So this Exhibit No. 9 is part of the lease agreement, correct?

A Yes.

CP 107 (U.D. Trial Transcript (11/19/07) 126:6-20).

On the second day of the unlawful detainer trial, Mr. Drager produced a fully executed copy of the Agreement which became Trial Exhibit 45 in the unlawful detainer case. CP 106 (paragraph 2); and CP 10-39. Following is an excerpt from that trial testimony:

Q In a second here I'm going to show you an exhibit that's being marked Exhibit No. 45. I'll hand that to you. I'm assuming that was located during lunch break. Is that fair to say?

A Yes.

Q What is that?

A Agreements, several pages.

Q And that's signed by Ms. Caruthers and yourself and Mr. Gould and Mr. Johnson?

A Yes.

MR. KIGER: Actually, I guess we're both offering it at this point in time. It's probably a stipulated exhibit, Your Honor.

MR. ROBERTS: I agree.

THE COURT: Exhibit No. 45 is admitted.

CP 107-108 (U.D. Trial Transcript (11/20/07) 63:12 – 64:2). This Trial Exhibit 45 from the unlawful detainer case consists of the Lease, Option, Addendum, and Purchase and Sale Agreement. CP 10-39. Similarly, Mr. Gould testified:

Q Now, today we had Exhibit No. 45, the lease agreement and related documents, that are all signed by you. After this was signed by you and your partners, what did you do with that document?

A After we signed this document on the 24th, I made copies of it and I believe I sent one to Greg and then later gave one to Leah when she requested it.

Q Do you remember when it was that Aleta requested it?

A I believe it was somewhere in the first part of 2006, probably March or April, because I remember that she came to pick it up when we were in the building already.

Q Had she been asking for it prior to that time?

A I believe she asked once prior to that.

Q Were you trying to withhold it from her in some way?

A No, I simply forgot to make a copy and give it to her. I assumed that she had gotten a copy from the other agent.

CP 108 (U.D. Trial Transcript (11/20/07) 139:18 – 140:10). Finally, in closing argument, counsel for Gould made the following argument:

MR. ROBERTS: Your Honor, there's few facts really that are in dispute. We all agree that Exhibit 45 is the lease agreement, and from that agreement we determine what the relationship is amongst the parties....

CP 108 (U.D. Trial Transcript (11/20/07) 175:20 – 24). Gould's position in the present case, that these documents are in no way related to each other, is not only contrary to the plain language in the documents, but is contrary to Gould's testimony and argument in the unlawful detainer case.

Gould further argues that the agreements are separate because there

was separate consideration, because the duration of the lease and option appear to be different, and because the assignability provisions in the lease and option allegedly differ. Appellants' Brief, pps. 11-14. None of these factors change the fact that each of the documents incorporates the others by reference.

Gould cites *Harting v. Barton*, 101 Wn. App. 954, 965, 6 P.3d 91 (2000) for the proposition that a lease-option agreement is severable if separate consideration is paid for the option. But the *Harting* court did not reach that issue. The court in *Harting* already held that breach of the lease constitutes a breach of the option. *Id.* In discussing whether there was separate consideration for the option, the *Harting* court found that there was none. Therefore, because there was no separate consideration in that case, the *Harting* court never reached or addressed the issue of what would have happened *if* there was separate consideration.

With regard to the duration of the lease and the option, the apparent inconsistency is one of Gould's own creation. It is true that the option was to expire January 25, 2014. CP 28. But for all practical purposes, so was the lease. The lease was for an initial term of three years to expire January 25, 2009. CP 10. But it was renewable for another five year term through January 25, 2014, the exact same date the option was to

expire. CP 26. The intent of the parties is further demonstrated by the fact that David Smith (one of the members of Ledaura LLC) retained the exclusive right to occupy a portion of the building during the entire eight years of the lease. CP 26 (paragraph 4). So why was the lease term divided as it was? First, Ledaura (and its predecessors) was originally asking at least \$1.4 million for the building. CP 221-222, 385. But Appellants were only willing to pay \$1,060,000. *Id.* In order to make up the price difference it was determined that the landlord would need to receive rent of approximately \$4,500 per month for eight years. *Id.*; *See also* CP 229 (the first lease agreement signed by the parties on December 2, 2005). Also, Mr. Johnson suggested to Ms. Caruthers that by making the initial lease term three years, she could avoid having to pay her real estate agent a commission on the lease. CP 221-223, 249-250, 384-385. Mr. Johnson testified he, Mr. Gould and Mr. Drager wanted eight one year terms. CP 303 (line 12.5-13.5). So no matter what way the lease is examined, its terms added up to the same length as the option. If the commission was avoided, Mr. Johnson would then profit by taking a 50% share of the avoided commission. CP 26 (paragraph 11), 222-223, 302-303, 385. For these reasons, the argument that the terms of the lease and option are different, is not entirely true, and does not support Gould's

position that it should have any impact on whether the lease and option were separate documents.

Similarly the significance of the assignability provisions of the lease and option should not be used to contradict the plain language of the Agreement or Gould's position in the unlawful detainer trial. Apparently Gould raises this issue because of a comment at 49 Am. Jur. 2d Landlord and Tenant § 296 that a lease and option may be separable where,

...the optionee has an unrestricted right to transfer and assign all its rights under the option without the consent of the optioner if the lease cannot be assigned or sublet without written consent of the lessor.

49 Am. Jur. 2d Landlord and Tenant § 296 (Appendix D to Appellant's Brief). First, it should be noted that this is a *minority* view. *Id.* The majority view is that, "an option contained in a lease is inseparable from and an integral part of the whole contract." *Id.* Second, the present case does not present the factual situation described because: (1) under the present lease, the lessees have the *exclusive* right to assign their rights under the lease ["lessee" is defined as Gould and/or "nominee" or "assigns" CP 10, 26; and "tenant shall have *exclusive* rights to lease and sublease the middle and upper floors..." CP 26, paragraph 6, emphasis added], and (2) the option was assignable [CP 28, paragraph 4]. Gould's

argument about whether the landlord/optioner (Ledaura LLC) could assign the lease or option is not relevant to this analysis even if this Court chose to adopt the minority rule on when such agreements are divisible. 49 Am. Jur. 2d Landlord and Tenant § 296 (Appendix D to Appellant's Brief).

Next, Gould argues that Ledaura's interpretation that a breach of the lease constitutes a breach of the option would add language to the lease. However, such language was not required to be in the lease. *See Rademacher v. Rademacher*, 27 Wn.2d 482, 178 P.2d 973 (1947); *Harting v. Barton*, 101 Wn. App. 954, 6 P.3d 91 (2000); *Kaufman Bros. Constr., Inc. v. Olney*, 29 Wn. App. 296, 628 P.2d 838 (1981); *Esmieu v. Hsieh*, 20 Wn. App. 455, 580 P.2d 1105, *aff'd* 92 Wn.2d 530, 598 P.2d 1369 (1979); 53 A.L.R.3d 435. That is because the default rule in Washington is that a breach of the lease is a breach of the option. *Id.* Therefore, it is Gould who would have to affirmatively show specific language in the Agreement that this was not the agreement, not the other way around.

As a further extension of their argument that specific language had to be in the Agreement that a breach of the lease was a breach of the option, Gould submitted a settlement proposal from Ledaura to support their argument. Appellants' Brief, pps. 19-21; CP 86-90. Ledaura moved to strike these materials on the basis of ER 408 because it constituted

settlement materials. CP 195-197. This motion to strike was denied, and Ledaura has not assigned error to that ruling in this appeal. CP 395-397. Interestingly, Gould's argument on this issue actually demonstrates the policy behind ER 408. Karl Tegland has described that policy as follows:

The rule is based upon a belief that (1) the evidence has little probative value because an offer to settle may be motivated solely by a desire to buy peace, and (2) it is sound public policy to encourage the settlement of disputes by creating at least a limited privilege for settlement negotiations.

The rule is intended to facilitate settlement negotiations by eliminating the need for counsel to preface statements with phrases such as "hypothetically speaking," "for the sake of discussion only," and so forth.

5D Wash. Prac., Courtroom Handbook on Evidence, p. 263. In the present case the language offered in settlement was offered in order to buy peace and avoid the lawsuit that is now this appeal. CP 376. It does not show that the parties agreed to not be bound by the default rule in Washington that a breach of the lease constitutes a breach of the option.

Finally, Gould argues that the option should not be terminated for equitable reasons. Again, the facts in support of this argument actually demonstrate that the parties intended the lease and option to be one agreement. If the lease and option were not one agreement, then Gould would not have spent over \$100,000.00 on significant and expensive

improvements to the building. CP 74, 83. In any event, if Gould was genuinely concerned about protecting their investment in the property, they could have reinstated the lease pursuant to RCW 59.12.190. They did not do so. CP 6 (paragraph 2.14), 49 (paragraph 2.14), 224 (paragraph 9).

If Gould felt the result in the unlawful detainer case terminating their lease was inequitable, they should have taken steps to mitigate their damages by reinstating the lease pending the outcome of their appeal.

B. IF THE LEASE AND OPTION ARE SEPARATE DOCUMENTS, OR IF THE COURT WERE TO SEVER THEM, THE OPTION WOULD NOT BE ENFORCEABLE BECAUSE IT DOES NOT CONTAIN OR INCORPORATE BY REFERENCE A LEGAL DESCRIPTION.

If this Court determines that the Lease, Addendum, Option, and Purchase and Sale Agreement are separate agreements, then the trial court's decision should be affirmed because the Option and Purchase and Sale Agreement did not contain a legal description. RCW 6.04.010, the statute of frauds, and Washington common law require that a contract for the conveyance of real estate must comply with the statute of frauds, which includes providing an adequate legal description of the property. RCW 6.04.010 provides, in part, that, "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." In *Martin v. Siegel*, 35

Wn.2d 223, 212 P.2d 107, 23 ALR 2d at 1 (1949), the court held that,

In the interest of continuity and clarity of the law of this state with respect to legal descriptions, we hereby hold that every contract or agreement involving a sale or a conveyance of platted real property must contain, in addition to other requirements of the statute of frauds, description of such property by the correct lot number(s), block number, addition, city, county, and state.

Martin v. Siegel, 35 Wn.2d at 229. A legal description sufficient to comply with the statute of frauds in a contract for the conveyance of land must be sufficiently definite to locate the land without resort to oral testimony to determine the exact legal description of the land upon which the minds of the parties met, the one to sell and the other to buy. *Bingham v. Sherfey*, 38 Wn.2d 886, 234 P.2d 489 (1951).

The only legal description attached to any of the documents referred to above was Exhibit A to the Lease. The title at the top of the document containing the legal description reads, "LEASE AGREEMENT...EXHIBIT A." CP 274, 340. No other document in the entire package contains a legal description of any sort. This is further evidenced by an examination of the document produced by Gould on the second day of the unlawful detainer trial as Exhibit 45, and the option agreement that was recorded by Gould, which also does not contain a legal description. CP 160-184, 252-255.

It is Ledaura' position that all of the documents constitute a single agreement between the parties, and that the position advanced by Gould in this proceeding is a strained attempt to recast the evidence in a new light so as to avoid the forfeiture of the option, which naturally results from their material breach of the Agreement. Obviously if the Lease, Addendum, Option, and Purchase and Sale Agreement constitute a single agreement, then there is no statute of frauds problem since the Lease contained the legal description. But Gould should not be permitted to have it both ways; they should not be able to argue on the one hand that the Lease, Addendum, Option, and Purchase and Sale Agreement are separate agreements, and on the other hand that the Option and/or Purchase and Sale Agreement satisfy the statute of frauds. *Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007). They should not be able to pick and choose which parts of the agreement apply to them, and which do not, depending on what results in a favorable outcome to them. *Id.* Therefore, in the event that the Court agrees with Gould that the parties entered into several separate agreements, then the trial court should be affirmed.

Appellants' argument that they believed the legal description was attached to the Option, or that it could have been attached later by one of

the real estate agents is not supported by the facts or the law. First, by the time the Agreement was entered into, both parties had terminated their real estate agents. CP 222, 390-391. Therefore, there was no agent who could have inserted the legal description over the parties' signatures as is argued by Gould. Second, under Washington law, even where the agreement permits insertion of a legal description at a later date, the legal description must in fact be inserted in order to comply with the statute of frauds.

Home Realty Lynnwood, Inc. v. Walsh, 146 Wn. App. 231, 189 P.3d 253 (2008); *Geonerco, Inc. v. Grand Ridge Properties IV LLC*, 146 Wn. App. 459, 191 P.3d 76 (2008). If the legal description is not inserted, then the agreement is not enforceable. *Id.* In the present case it is not disputed that the only legal description was the one attached to the Lease. So if the Lease is not part of the Option, then the Option contained no legal description. For these reasons the trial court's decision should be affirmed.

C. LEDAURA, LLC SHOULD BE AWARDED IT'S FEES AND COSTS ON APPEAL, AND GOULD'S REQUEST FOR FEES AND COSTS SHOULD BE DENIED.

Ledaura respectfully requests an award of fees and costs on appeal.

RAP 18.1 provides for an award of costs and fees on appeal if otherwise permitted by applicable law. RAP 18.1(a). In the present case attorney

fees and court costs are to be awarded the prevailing party on appeal pursuant to Section 25 of the lease, paragraph 21 of the purchase and sale agreement. CP 19, 37. Ledaura requests permission to file an affidavit of fees and costs pursuant to RAP 18.1(d) following the decision on this appeal.

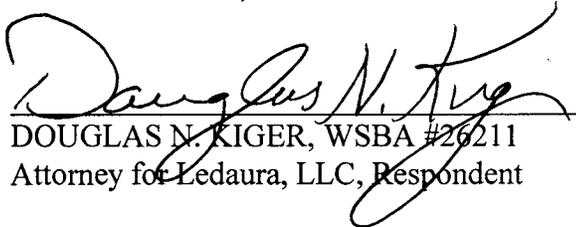
Further, if the Court agrees with Gould that the agreements at issue herein are each severable, then Gould's request for fees and costs should be denied because the option does not contain an attorney fee or cost provision.

IV. CONCLUSION

For the reasons set forth above, Ledaura, LLC respectfully requests the trial court decision be affirmed, and that Ledaura, LLC be awarded fees and costs on appeal against Appellants.

RESPECTFULLY SUBMITTED this 12 day of June, 2009.

BLADO KIGER, P.S.


DOUGLAS N. KIGER, WSBA #26211
Attorney for Ledaura, LLC, Respondent

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the ___ day of June, 2009, she placed with ABC Legal Messengers, Inc. an original Brief of Respondent Ledaura, LLC and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

Attorneys for Appellants, Randy Gould, Bret Drager, and Greg Johnson:

Mark R. Roberts
DAVIS ROBERTS & JOHNS, PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335

DATED this ____ day of June, 2009, at Tacoma, Washington.

BLADO KIGER, P.S.

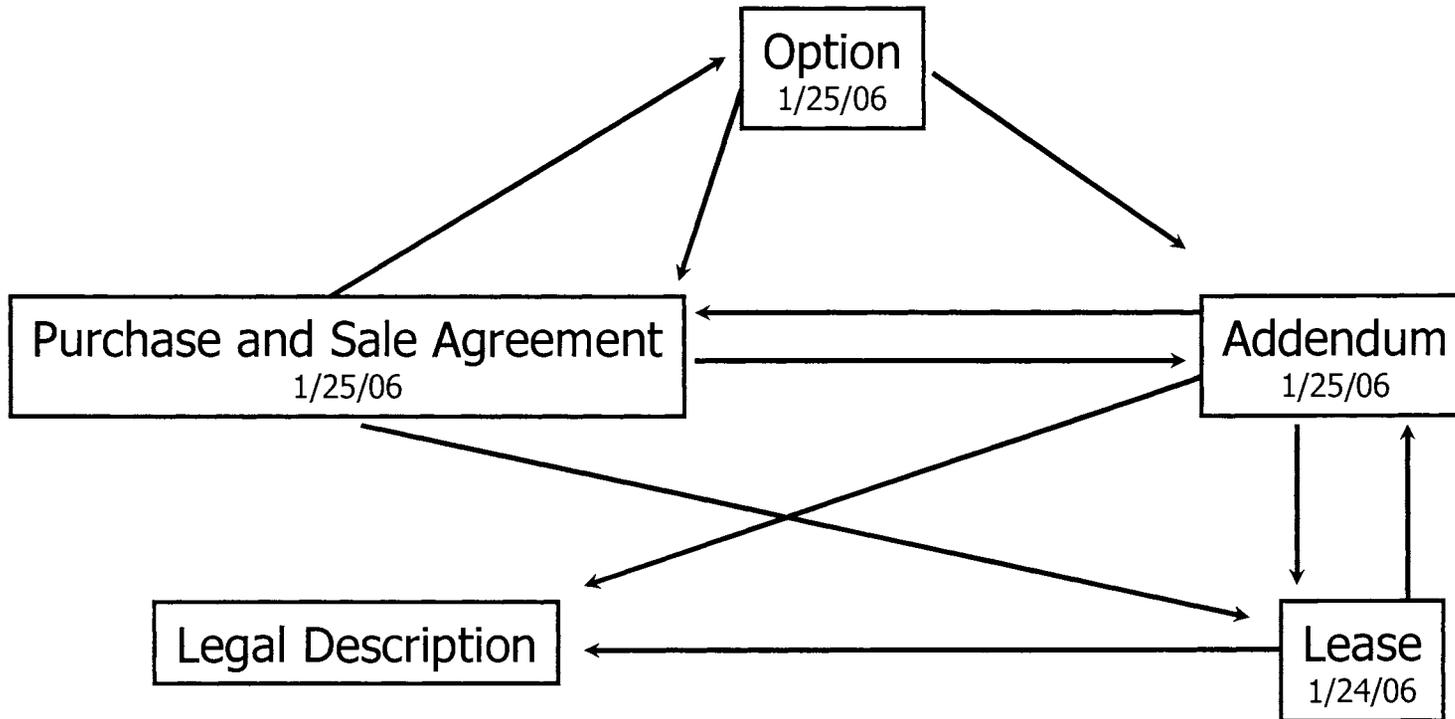
Heather Medina

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
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Appendix A

BLADO KIGER, P.S.
ATTORNEYS AT LAW
Bank of America Building, 2nd Floor
3408 South 23rd Street
Tacoma, WA 98405-1609
Tel (253) 272-2997 Fax (253) 627-6252

Ledaura v. Gould



Appendix B

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IN COUNTY CLERK'S OFFICE
FILED
A.M. JUN 09 2009 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

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

LEDAURA LLC, a Washington limited liability company,

Respondent,

v.

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.

No. 37379-3-II

MANDATE

Pierce County Cause No.
07-2-10979-5

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

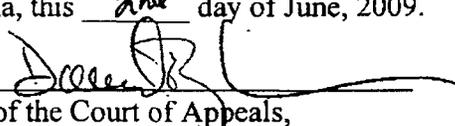
This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on April 14, 2009 became the decision terminating review of this court of the above entitled case on May 15, 2009. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

Page 2
Mandate 37379-3-II

Judgment, Respondent, Ledaura LLC is awarded \$7,773 attorney fees and \$14.71 in costs
Judgment Debtor, Appellants, Randy Gould, Bret Gould, Greg Johnson, Drager Gould
Architects, Inc., \$7,787.71



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 2nd day of June, 2009.


Clerk of the Court of Appeals,
State of Washington, Div. II

Mark Ronald Roberts
Davis Roberts & Johns PLLC
7525 Pioneer Way Ste 202
Gig Harbor, WA, 98335-1166

Douglas N Kiger
Blado Kiger PS
3408 S 23rd St
Tacoma, WA, 98405-1609

Hon. Linda CJ Lee
Pierce Co Superior Court Judge
930 Tacoma Ave South
Tacoma, WA 98402

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LEDAURA LLC, a Washington limited
liability company,

Respondent,

v.

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.

No. 37379-3-II

UNPUBLISHED OPINION

HOUGHTON, J. — In this unlawful detainer action, commercial tenants Bret Drager, Randy Gould, Greg Johnson (tenants), and Drager Gould Architects, Inc. (DGA) appeal the trial court's judgment in favor of landlord Ledaura, LLC. We affirm.

FACTS

On January 24, 2006, Leah Caruthers, in her capacity as co-trustee of the revocable living trust of David W. Smith (the trust), entered into a commercial lease agreement with the tenants.¹ The parties completed a pre-printed commercial lease form by filling in blanks and annotating

¹ Caruthers is Smith's daughter, and she created the living trust to provide for him and his future income after he suffered a stroke in 2004, that rendered him unable to speak and impaired his movement.

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other portions by hand.² The lease contained a provision that “[t]his Lease shall not be assignable by Landlord without the consent of Tenant” with the word “not” written by hand between “shall” and “be.” Clerk’s Papers (CP) at 16. Section 3a of the lease contains a provision that “[i]f Tenant occupies the Premises before the Commencement Date [defined elsewhere in the lease], then the Commencement Date shall be the date of occupancy.” CP at 7. The tenants agreed to pay the first and last months’ rent, followed by rent of \$4,500 per month, beginning 12 months after the commencement date.

The parties executed a lease addendum the following day providing Smith live in the basement rent free; the tenants pay no additional rent for the first year; and a three-year lease term commencing on “the date the building shall be free of debris and broom swept clean, approximately (60) days from date of agreement.” CP at 22. The parties added the provision defining the commencement date because debris covered the inside of the property at the time of the lease’s execution.

After the tenants entered into the lease with the trust, they told Caruthers that they and their corporate entity, DGA, would like to occupy a portion of the property formerly used as an apartment while they renovated the remainder of the property. Caruthers agreed and the tenants later obtained a key from Smith. In February, soon after the tenants signed the lease, they began remodeling a 760 square foot portion of the property for use as their office. The tenants moved into the office in April 2006, after three months of remodeling. On February 16, 2006, the trust transferred its interest in the property to the newly formed Ledaura LLC. The entire property, including the ground floor, comprises about 20,000 square feet.

² The parties had already entered into a previous lease on December 2, 2005, that they extinguished before entering into the lease at issue in this case.

No. 37379-3-II

In March 2006, Caruthers hired Robert Munroe³ to clear debris out of the property. During his employment with Caruthers, the tenants hired Munroe to perform demolition work on the same space. Instead of finishing the debris clearing, Munroe began demolishing the property and, in the process, removed asbestos. When the tenants learned of this and other problems, they terminated him.⁴ He later vandalized the property by damaging electrical systems and moving debris around the building. After the vandalism, the parties attempted to clear the debris out of the property and draft a new lease addendum, but they ultimately they did not reach an agreement.

On July 30, 2007, Ledaura served Gould a copy of the notice to pay rent or vacate. Ledaura addressed the notice to Gould, Drager, and Johnson. On August 10, Ledaura filed a complaint for an unlawful detainer action against the tenants, alleging failure to pay rent. The tenants included a counterclaim in their answer, and the trial court dismissed it without prejudice.

At trial, the court focused on the lease's commencement date. Ledaura argued that the lease commenced in February 2006, when the remodeling began that led to the tenant's occupancy beginning in April 2006. Ledaura relies on the portion of the lease providing that early occupancy triggers the beginning of the commencement date. The tenants argued that the lease commenced in September 2007, when the building contained a 55-gallon drum, some desks, an air canister, and some paint cans. The tenants rely on the lease provision that the

³ Munroe is also spelled "Monroe" throughout the record.

⁴ Caruthers testified that Munroe hired street people, slept in the property on an old mattress, removed asbestos without a permit, and caused the Department of Labor and Industries to shut the site down.

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commencement date would begin when the building was free of debris and swept clean "approximately (60) days from the date of agreement." CP at 166.

The trial court found that Johnson did not object to the transfer from the trust to Ledaura and that because the lease commenced in June 2006, the tenants owed rent beginning in June 2007. The trial court also found that the tenants had not paid any rent other than the initial first and last months' installments and that Ledaura served a five-day notice on Gould and Drager to pay rent or vacate on July 30, 2007. As five days had passed by the time of trial, the trial court awarded Ledaura the following damages for June 2007 to February 2008: (1) a \$56,093.22 principal judgment, (2) \$943.08 in prejudgment interest, (3) \$19,605.00 in attorney fees, and (4) \$987.83 in costs. The award totaled \$77,629.13.

The trial court ordered a forfeiture of the lease and the return of the property to Ledaura within 20 days. The trial court ruled that with the exception of DGA, the tenants were jointly and severally liable on all the judgments. The tenants appeal.

ANALYSIS

The tenants raise various arguments as to why the trial court erred in entering judgment against them. They argue that the trial court lacked subject matter jurisdiction due to faulty service of process, that they did not consent to the lease assignment, and that the building was not free of debris and swept clean by June 2006. They also assert that a leaking roof should have decreased the amount of rent due and that the trial court should not have awarded attorney fees to Ledaura.

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SUBJECT MATTER JURISDICTION

The tenants first contend that the trial court lacks subject matter jurisdiction over both Johnson and DGA because Ledaure did not serve notice on either. The tenants assert that Ledaure cannot avoid this lack of jurisdiction by showing that Johnson and DGA shared debts and were co-tenants, as RCW 59.12.030 and .040 require strict compliance. Ledaure countered at argument that the tenants waived their jurisdiction defenses and that, had they raised them at trial, Ledaure could have shown compliance with RCW 59.12.040.

In an unlawful detainer action, failure to strictly comply with the notice requirements of RCW 59.12.030 deprives the trial court of subject matter jurisdiction. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007). RCW 59.12.030 and .040 describe the commencement of an unlawful detainer action and list the appropriate methods of service of notice. Under RCW 59.12.040,

[a]ny notice provided for in this chapter shall be served 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.

Although a party cannot waive a lack of subject matter jurisdiction, it may waive a lack of personal jurisdiction either expressly or impliedly by consenting to the trial court's jurisdiction. *Skagit Surveyors & Eng'rs LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998); *In re Marriage of Steele*, 90 Wn. App. 992, 997-98, 957 P.2d 247 (1998). Here, the tenants included a counterclaim in their answer, seeking affirmative relief and submitting themselves to the trial court's jurisdiction. *Grange Ins. Ass'n v. State*, 110 Wn.2d

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752, 765, 757 P.2d 933 (1988); *Kuhlman Equip. Co. v. Tammermatic, Inc.*, 29 Wn. App. 419, 425, 628 P.2d 851 (1981). The tenants therefore waived any lack of personal jurisdiction.

On appeal, the tenants cite *Christensen* to support their argument that because Ledaura did not strictly comply with RCW 59.12.040 by serving process on each tenant individually, the trial court lacked subject matter jurisdiction. See 162 Wn.2d at 372. But the record adequately supports the parties' agreement that Ledaura properly served notice on Gould. By properly serving Gould, Ledaura satisfied the strict subject matter jurisdiction requirements of *Christensen* and complied with RCW 59.12.040.⁵ See 162 Wn.2d at 372. The trial court therefore did not lack subject matter jurisdiction in this case and the tenants' argument fails.

CONSENT TO LEASE ASSIGNMENT

The tenants next contend that the trust did not have authority to assign its interest in the property without the tenants' consent. As a result, they assert that Ledaura is not the proper party to enforce the lease.

The tenants rely on two portions of the lease to support their position. First, they cite the portion that reads, "[t]his Lease shall not be assignable by Landlord without the consent of the Tenant." CP at 16. Next, they rely on the portion of the lease that reads "the covenants and agreements of this Lease shall not be altered, modified or added to except in writing signed by Landlord and Tenant." CP at 18.

We review whether substantial evidence supports the trial court's findings and whether they, in turn, support its conclusions of law. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Here, the trial court found that "[w]ithout objection, all of the interest of

⁵ As Ledaura satisfied the service requirements of RCW 59.12.040, we need not analyze other provisions of the statute.

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[the trust] in the Property was transferred to Ledaura LLC on February 16, 2006, by quitclaim deed' and found that the tenants consented to the transfer. CP at 164-65.

Gould testified that the assignment of the lease did not impact his occupancy or harm him in any way. Caruthers testified that she and Johnson discussed the formation of the LLC and the transfer of the property and he did not object. Substantial evidence supports the trial court's consent finding. The tenants' argument fails.

LEASE COMMENCEMENT DATE

The tenants next contend that the lease commenced on September 2007 because the property was not free of debris and swept clean until that time, thus tolling their obligation to pay rent. They argue that the trial court reached the wrong conclusion because it ignored certain pieces of evidence and gave too much weight to others. We disagree.

In a letter dated August 23, 2006, the tenants told Caruthers:

As set forth in the lease addendum, the commencement date begins as soon as the building is "free of debris and broom swept clean." Obviously, we all had hoped that those conditions would be quickly met. Unfortunately, as noted above, the leased premises are still not free of debris. On the other hand, we acknowledge that we have been able to make limited use of the rented areas even though not all of the debris has been removed. Therefore, we think it is reasonable and fair to designate the commencement date as July 1, 2006.

Ex. 34. When the tenants hired Munroe to do the demolition work, he had nearly completed the removal of the debris from the property and would have completed that work had the tenants not interfered. Furthermore, the tenants exercised control over the property when they began the demolition and invested approximately \$200,000 to make the property conform to their needs. Substantial evidence therefore supports the trial court's finding and the tenants' argument fails.

Ruse, 138 Wn.2d at 5.

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IMPLIED WARRANTY OF HABITABILITY

The tenants next contend that they should not have to pay the entire amount of the rent owed under the lease. They make this claim asserting that Ledaura violated its responsibility to repair roof leaks in violation of the implied warranty of habitability.

In Washington, the implied warranty of habitability does not generally extend to commercial leases. *Olson v. Scholes*, 17 Wn. App. 383, 392, 563 P.2d 1275 (1977). In *Olson*, Division One rejected a claim of breach of an implied warranty of habitability in a commercial lease because the lessee accepted the premises in "as is" condition and operated a business there for two years before bringing the claim. 17 Wn. App. at 392-93. The facts are similar to those here, where the tenants acquired the property in "as is" condition in a commercial setting. We agree with Division One and also decline to extend the implied warranty of habitability to commercial leases.

The trial court entered no findings of fact with respect to the leaking roof. As a result, in support of their claim regarding the roof, the tenants assigned error to the trial court's finding of fact establishing the amount owed for past rent due and conclusions of law related to the \$77,629.13 judgment. But as we discussed above, substantial evidence supports the trial court's decision that the commencement date was June 2006. The findings therefore also support the damages for past due rent.⁶ *Ruse*, 138 Wn.2d at 5. The tenants' argument fails.

⁶ Furthermore, the record shows that Caruthers or Smith's attorney paid to fix the roof three times: once before the parties executed the lease, once in March 2006, and again after that hiring a different roofer.

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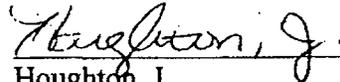
ATTORNEY FEES

Both parties request attorney fees on appeal under RAP 18.1, citing a lease provision allowing the prevailing party in any litigation to recover attorney fees. Awarding attorney fees under a contract is a matter of discretion with the trial court that we will not disturb absent a clear showing of an abuse of that discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987); *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986). The trial court abuses its discretion when it bases its decision on manifestly unreasonable grounds. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996).

Here, Ledaura prevailed below and presented a detailed accounting of its fees. The trial court did not abuse its discretion in granting them. Because Ledaura substantially prevails on appeal, it is entitled to reasonable attorney fees under section 25 of the lease and RAP 18.1.

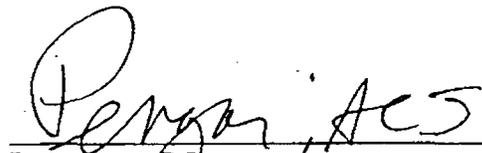
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


Houghton, J.

We concur:


Quinn-Brintnall, J.


Penoyar, A.C.J.