

No. 39281-0-II

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION TWO

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO
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KATALIN NYITRAI,

Appellant,

v.

STARLETA OLEA,

Respondent.

REPLY BRIEF OF RESPONDENT

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PM 10/9/09

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Court Rules

CR41(b)(3) 3

I. ASSIGNMENTS OF ERROR AND ISSUES

The court was correct in granting the Defendant's CR41(b)(3) Motion to Dismiss after Plaintiff rested; granting the Defendant attorney's fees and costs; and denying the Plaintiff's Motion for Reconsideration.

II. STATEMENT OF THE CASE

The Appellant is correct in that this is a "relatively straightforward commercial lease case." The court, at the close of the Plaintiff's case and having heard testimony from the Plaintiff and the Defendant who was called within the Plaintiff's case found the following.

1. The Plaintiff was the drafter of the initial lease to suite A at 1220 Ocean Beach Highway, Longview, WA (Ex. 1).
2. That Ex. 1 in Paragraph 2 "TERM" provides in the Plaintiff's handwriting and in a separate font:

The term of this Lease shall be for *Three years* commencing the 15 day of *November 2003* and shall terminate on the 30 Day of *November 2007*.

Ex. 1. The period from November 15, 2003 to November 30, 2007 is approximately four years and two weeks, and therefore this provision is internally inconsistent.

3. That the parties subsequently entered a second lease for suite B at the same location on July 20, 2004. Ex. 2. That in paragraph 2 of that lease with handwritten items and in a separate font:

The term of this Lease shall be for *Three years* commencing the 1st day of *September 2004* and shall terminate on the 30th day of *November 2007*.

Ex. 2. The period from September 1, 2004 to November 30, 2007 is approximately three years and three months, and therefore this provision is internally inconsistent.

4. There is no dispute in the testimony that neither the Plaintiff nor the Defendant at the signing of Ex. 1 or Ex. 2 was cognizant of the inconsistencies within the term provision. The Defendant intended the leases to be for 36 months and the Plaintiff subsequently adopted the position that the leases were for 48 months.
5. That the parties' testimony is in agreement and the Plaintiff's attorney stated on the record that the termination of both leases were supposed to end on the same date. VP 63/12-20
6. At the close of the Plaintiff's case, the court granted the Defendant's motion pursuant to CR41 (b)(3) and dismissed the case. The court found that both leases were internally inconsistent. VP 66/7-13. That the Plaintiff was the drafter of at least the first lease VP 67/4-8. The court ruled as a matter of law, the Defendant's interpretations (that the leases were for 36 months and not to 48 months, the Plaintiff's position) prevailed and that the Defendant's motion to dismiss was granted. VP/67 1-8.
7. The court entered Findings of Fact and Conclusions of law (CP 34).
8. The court entered a Final Judgment (CP 34/132-134) (CP 35/135-136).

9. The court denied the Plaintiff's Motion for Reconsideration (CP 39/156.)

III. ARGUMENT

A. Standard of Review

On a motion made by the Respondent pursuant to CR 41 (b)(3), the trial court dismissed the Plaintiff's case and ultimately entered a judgment against the Appellant for the Respondent's attorney's fees and costs incurred in defending the suit. CR 41(b)(3) states,

“(3) Defendant's motion after plaintiff rests After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.”

On appeal from the granting of a motion to dismiss at the close of the Plaintiff's evidence, the standard of review is as follows:

“If the court viewed the evidence most favorably to the Plaintiff, we are limited to a determination of whether there is any evidence or reasonable inference therefrom to establish a prima facie case as a matter of law; if, however, the court in deciding

the motion weighted the evidence and entered Findings of Fact, we will accept the Findings if they are supported by substantial evidence. *N.Fiorito Co. vs. State*, 69 Wn. 2d 616,419 P.2d 586 (1996); *Richards vs. Kuppinger*, 46 Wn. 2d 62, 278 P.2d 395 (1955). If Findings of Fact are entered, as they were in this case, we look to see if they support the conclusions of law in the judgment.”...we note as a matter of law, however, that the entry of Findings and Conclusions strongly indicates a weighing of the evidence, *Seattle-First Nat’l Bank vs. Hawk*, 17 Wn. App. 251, 562 P. 2d 260 (1977), because if the court accept the Plaintiff’s evidence in its most favorable light and draws a legal conclusion that there is no prima facia case, then no Findings or Conclusions are necessary or required. *N. Fiorito Co. Vs. State, Supra*,”

Nelson Construction Co. V. Port of Bremerton, 20 Wn. App. 321,326-27, 582 P.2d 511 (1978). See also *In Re Henry Schermer vs. Department of Social and Health Services*, 161 Wn. 2d 927, 169 P.3d 452 (2007); *Commonwealth Real Estate Services vs. Padilla*, 149 Wn. App. 751, 205 P.3d 937 (2009).

The appellant in its brief states,

“the trial court in this case made it clear that it was NOT weighing the evidence, but that it was instead treating the motion as akin to summary judgment, and ruling as a matter of law.”

This statement significantly mischaracterizes what the trial court said. From this position, the appellant goes on to argue since this was a summary judgment the Findings of Fact and Conclusions of law, CP 34/page 132-134 should be disregarded by the

Appellate Court. However, what the court actually said is as follows, the court:

“This motion to dismiss is, I think, just like a summary judgment motion, and ought to be treated the same way.

“Are there facts that are in dispute? These facts are not in dispute. These are the facts that, to my understanding, are not in dispute: two separate leases, signed at two separate times, for two separate suites in the same building, apparently adjacent. The leases are internally inconsistent. They’re internally inconsistent.

Both parties agree that the leases are intended to end at the same time. Both parties agree that that’s true, which is a little different than my reading.

The second lease, on its face, can be considered an independent agreement; but the parties are stipulated (sic) that it’s not, and so I’m not going to treat it as independent, I’m going to treat them as part of the same agreement.

And, then, the question is: were the leases are inconsistent, internally inconsistent, is there a rule of law that goes without...without weighing the credibility of any .. any witness? My understanding of the rule of law is without weighing credibility, if there are inconsistencies in a written agreement, they’re construed against the drafter, and in this case, that’s the Plaintiff. She drew them up. They’re inconsistent, and she is the drafter, and that gives the option to interpret to the Defendant, as a matter of law.

So, I’m granting the motion to dismiss.” VRP 66-67 4-9.

B. Review

The appellant argues that the cited provision indicates that the judge did not weigh the evidence. Clearly just the opposite is correct. From the cited provision above as well as the Findings of Facts and Conclusions of law, CP34/ 132-134, the court clearly weighed the evidence presented and found based on the uncontroverted evidence there was a basis for granting the Respondent's motion to dismiss.

The Findings of Fact and Conclusions of law entered on March 23, 2009 and approved for entry by the Appellants's counsel set forth the court's five separate Findings of Fact and the resulting four conclusions of law. As set forth in the *Seattle-First Nat'l Bank vs. Hawk*, Supra the entry of Findings of Facts and Conclusions "strongly indicates a weighing of evidence" by the trial court. The Appellants's entire argument on this point rests on the statement made by the trial judge that he was not weighing the "credibility" of the witnesses in making his ruling.

The Appellant's next argument is that the court wrongly adopted the respondent's interpretation of the contract versus that being espoused by the Appellant who the court found to be the drafter of that document. In its argument, the Appellant cites *Forest Marketing vs. DNR* 125 Wn. App. 126, 104 P.3rd 40 (2005). In the present case, the trial court did not find the lease to be ambiguous. Rather, it found the lease to be "internally inconsistent". It found that the term of the lease, as set forth in the handwritten provision for "three years" to be inconsistent with the period covered from commencement date through termination date. The court heard testimony from the Appellant that she received monthly payments until November 2006 (36 months). VP 39/3-12 The court heard testimony from the Respondent that it was her clear understanding and intention that the lease was to run for 36 months. VP 60/2-VP 61-1 Lastly, the court heard testimony from the Appellant that she did not even become aware of the inconsistency in the

document until years after its execution VP 41-9/42-10. In *Forest Marketing*, the court lays out the basic rule in these situations, it stated,

“(i)f the contract is ambiguous the doubt created by the ambiguity is resolved against the one who prepared the contract” *Felton vs. Menan Starch, Co.* 66 Wn. 2d 792,797, 405 P.2d 585 (1965) citing *Sunset Oil Company vs. Vertner* ,Wn. 2d 268, 208 P.2d 906 (1949)”

While setting forth the general rule, the *Forest Marketing Enterprises* court sets forth the fact that the court has discretion in adopting that general rule and will not do so if the outcome would be absurd,

“We construe contracts to reflect the parties’ intent, and give the contract language its ordinary meaning. See *Corbray vs. Stevenson* 98 Wn. 2d. 41,415, 456 P.2d 473 (1982)...We avoid interpreting statutes and contracts in ways that lead to absurd results *Mortell vs. State* 118 Wn. App. 846,849 78 P. 3d. 197 (2003)....”

In the present case, the only argument at trial was whether the leases were for 3 years or 4 years. To make a determination on that issue would not and did not require the court to make a strained or forced “construction leading to absurd results” *Forest Market Enterprises*, Supra (quoting *Eurick v. Pemco Ins. Co.*, 108 Wn. 2d 338, 341 738 P.2d 251 (1987) (quoting *E-Z Loader Boat Trailers, Inc. vs. Travelers Indem., Co.*; 106 Wn. 2d 901,906 726 P.2d (1986)))

In the present case, the court was correct in applying the general rule that the contract which contained “internal inconsistencies” should be interpreted against the party responsible for those inconsistencies, the Appellant.

The Appellant’s next argument is found on page 12 of her brief. That argument can best

be summarized in her own words,

“It is obvious that the trial court in this case skipped right over the entire process of weighing the extrinsic evidence to determine the intent of the parties, and instead jumped to the “short-cut” of applying a canon of construction that is supposed to be a last resort.”

At the close of the Plaintiff’s case, the “extrinsic” evidence before the court besides Exhibits (1) and (2) (the two leases), was almost entirely the testimony of the Appellant and the Respondent. Again, the Appellant makes the mistake of interpreting the Judge’s statement that he was weighing the “credibility” of the parties to mean that he was not in fact weighing the evidence. The Appellant then goes on to ask this court to find that evidence did not support the trial court’s Findings of Fact and Conclusions of Law. The Appellant provides to the court the case of *King vs. Wright* 146 Wn. App. 662, 670-71, 191 P.3rd 946 (2008) to support her argument. In the portion of the cited text where emphasis was added by the Appellant, the following statement was made,

“...if extrinsic evidence does not resolve the ambiguity, the contract will be construed against the drafter.”

That in fact is the analysis that the trial court made. It found that the leases were internally “inconsistent” and none of the evidence presented before the Plaintiff rested her case could explain the inconsistencies. Therefore, using the rule of construction the Court adopted the Respondent’s interpretation of the contract since it found the Appellant was the drafter.

IV. ATTORNEYS FEES ON APPEAL

Respondent is asking the court for reimbursement of attorney’s fees in this appeal. The

basis of the underlying lawsuit is a commercial lease for Suite A 122 Ocean Beach Hwy, Longview, WA (Ex.1). The commercial lease contains an attorney's fees provision. The lease states,

“21. COST AND ATTORNEY’S FEES: If, by reason of any default or breach on the part of either party in the performance of any of the provisions of this Lease, a legal action is instituted, the losing party agrees to pay all reasonable costs and attorney’s fees in connection therewith.”

In the trial court, the court granted the Respondent her attorney’s fees and costs and entered a judgment against the petitioner. That judgment has been paid and respondent filed a Full Satisfaction of Judgment (CR46/p161-162). Respondent is now asking for attorney’s fees in this appeal. This court recently rendered a decision on this very issue. In *Thompson vs. Lennox* 151 Wn. App. 479 ; 212 P.3rd 597, (2009) the court stated,

“Fees may be awarded as the part of the cost of litigation when there is a contract, statute, or recognized ground in equity for awarding such fees. *W. West Coast Stationary Eng’rs Welfare Fund vs. City of Kennewick*, 39 Wn. App 466,477, 694 P.2 1101 (1985). “A contractual provision for award of attorney’s fees at trial supports an award of attorney’s fees on appeal under RAP 18.1.” *W. West Coast Stationary Eng’rs Welfare Fund*, Supra at 477.

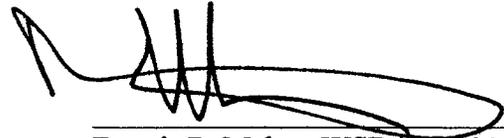
In the present case, in compliance with RAP 18.1(b), the Respondent makes this request.

V. CONCLUSION

The trial court committed no error in making its decisions and rendering a judgment in this

matter. The trial court's judgment should be affirmed and Ms. Olea, the Respondent in this matter, should recover her attorney's fees and costs in this appeal.

Dated: October 9, 2009

A handwritten signature in black ink, consisting of a series of loops and vertical strokes, positioned above a horizontal line.

Dennis P. Maher, WSBA #10916
Attorney for Respondent

CERTIFICATE OF SERVICE

I, Tiffany Stephens, legal assistant to Dennis P. Maher, Attorney at Law, hereby certify that on the date set forth below I caused a copy of the within **REPLY BRIEF OF RESPONDENT** to be delivered by US Mail, first class postage prepaid, to counsel of record for the Appellant at the following address:

SULLIVAN & THORESON
Michael T. Schein
Columbia Center
701 Fifth Avenue, Suite 4600
Seattle, WA 98104

Dated this 9 day of September, 2009



Tiffany Stephens

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