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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 42365-1-II

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

KYB FARMS, INC.,

Appellant,

and YOUNG BONG KIM AND JIN HAE HAN,

Respondents on Cross-Appeal,

v.

JUNG JIN and HAE JIN, husband and wife,

Respondents/Cross-Appellants.

(1) REPLY BRIEF OF APPELLANT KYB FARMS, INC.; and (2) BRIEF OF RESPONDENTS YOUNG BONG KIM AND JIN HAE HAN ON CROSS-APPEAL

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ORIGINAL

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I. REPLY ARGUMENT IN SUPPORT OF KYB FARMS' APPEAL

A. The Jins' Brief of Respondents Confirms The Judgment Should Be Vacated And This Unlawful Detainer Proceeding Should Be Dismissed Because The Jins Failed To Give Proper Notice.

In KYB Farms' initial brief, it argued that the trial court lacked jurisdiction because the required statutory notice – the Notice to Pay Rent or Vacate the Premises – was defective. Exhibit 4. In the Brief of Respondents/Cross-Appellants Jung Jin and Hae Jin, the Jins not only do not contest KYB's arguments, the Jins concede the Notice was defective. The Jins do not dispute that failure to comply with the notice requirement "defeats the court's jurisdiction over the action." *Housing Authority of the City of Seattle v. Silva*, 94 Wn. App. 731, 734-35, 972 P.2d 952 (1999); App. Br. 10. The Jins further have not disputed that RCW 59.12.030 is to be strictly construed in favor of the tenant. *Id.* Because the defective Notice presents a jurisdictional defect, the judgment entered below should be vacated and the proceeding should be ordered dismissed.

1. The Notice is defective because KYB Farms was not in default when the Notice was issued.

In its opening brief, KYB Farms argued that, under RCW 59.12.030, proper notice <u>after</u> rent becomes due is a prerequisite to a cause of action for unlawful detainer. App. Br. 9. The Jins do not contest this. The trial court lacked jurisdiction because the Jins acknowledge that the

Notice at issue here was served before a default in the payment of rent had occurred. Resp. Br. 10.

The trial court specifically held that KYB Farms was current in its rent payments through August 2010. CP 14, Finding of Fact ("FOF") 16. Under the lease, rent was due on the first of each month. Exhibit 7, ¶ 3; CP 13, FOF 9. Thus, the Notice sent on August 27, 2010, claiming overdue rent in the amount of $17,172.00, was issued at a time when no rent was then due and owing. Exhibit 4; CP 14, FOF 13. The applicable statute is RCW 59.12.030(3), which provides in relevant part, "[t]he notice may be served at any time after the rent becomes due;..." Thus, it is undisputed that the Notice did not comply with RCW 59.12.030(3).

The Jins seek to excuse the defective Notice by claiming that, "[i]t was not until after the court had issued its oral ruling that anyone knew the lessee was not in default at the time of the notice." Resp. Br. 10. This assertion is factually untrue and legally inapposite. KYB Farms knew what rent was owing, having made 18 monthly payments in the amount of $1,200 without any objection by the Jins. CP13-14, FOF 11, 12. This is the full amount that the trial court found to be due under the lease. CP 14, FOF 16. Even if the Jins' facts were accurate, a jurisdictional defect is not waived merely because the definitive determination that KYB Farms was not in default at the time the Notice was issued, was not made until later

by the trial court. In short, the Jins' claimed mistaken belief that rent was due and owing at the time they issued their Notice does not cure the jurisdictional defect.

Since KYB Farms was, by the Jins' own admission, not in default at the time the Notice was served, and since the Jins do not contest that a trial court lacks jurisdiction to entertain a cause of action for unlawful detainer unless a landlord has served the tenant with proper notice after the rent becomes due, this Court should order that the judgment entered against KYB Farms be vacated and the proceeding dismissed.

The Jins argue, without citation to any support, that this Court nevertheless should overlook the defect in the Notice because the Notice "was sufficient to bring the matter before the court." Resp. Br. 10. The Jins offer no explanation as to why the Court should ignore the rule that a defective notice is a jurisdictional bar. *Housing Authority of the City of Seattle v. Silva*, 94 Wn. App. at 734-35.

The Jins also seek to excuse the defective Notice by arguing that the trial court found that KYB Farms was delinquent in its rent payments as of the time the trial concluded. Resp. Br. 10. The trial court found that KYB Farms owed no rent at the time the Notice was served on August 27, 2010; that KYB Farms subsequently tendered payment of rent for September 2010, which tender was rejected by the Jins; and that KYB

Farms thereafter ceased paying rent beginning in September 2010, after the Notice was served. CP 13-14, FOF 12-14, 16. In other words, only after the Jins stopped accepting KYB Farms' monthly $1,200 payments did KYB Farms stop making rent payments; it is only those post-Notice rent payments that were found by the Court to be owing to the Jins. *Id.*

The Jins appear to seek some equitable relief from the jurisdictional bar. There is no basis for such relief in law or on the facts. Indeed, not only was the Notice sent at a time when no rent was owing, but it sought payment of rent amounts totaling $17,172 that the trial court found were never owing under the parties' agreement. Exhibit 4; FOF 13, 16. Thus, none of the rent claimed to be delinquent under the Notice was found to be due and owing by the trial court. CP 14, FOF 16. The Jins should not be rewarded for their failed effort to demand excess rent in the amount of $17,172.

2. The Jins' brief confirms that the Notice was defective because it was not directed to the tenant, KYB Farms.

In its initial brief, KYB Farms argued that the Notice was also defective because it was directed to Young Bong Kim and Jin Hae Han ("Kim/Han") individually, not to the tenant, KYB Farms, a Washington corporation. Exhibit 4; CP 12, FOF 2. The Jins argue, without reference to any authority, that this Court should overlook any "defect in the notice"

because "the issues were joined, and the contractual relationship of the parties was fully litigated." Resp. Br. 10. Kim/Han were not the tenants. Indeed, the Jins acknowledge in their brief, "Yong Bong Kim and Jin Hae Han are persons separate and distinct from KYB Farms, Inc." *Id.,* at 4. The fact that KYB Farms engaged the substance of the complaint at trial does not negate the jurisdictional defect presented by the Notice which, on its face, is not directed to the corporate tenant, KYB Farms. Exhibit 4.

II. KIM/HAN'S RESPONSE TO JINS' CROSS-APPEAL

A. The Court Should Affirm The Award Of Attorney Fees To Young Bong Kim And Jin Hae Han As Prevailing Parties.

In their cross-appeal, the Jins argue that the trial court erred in awarding attorney fees to defendants Kim/Han. The trial court correctly awarded them their reasonable attorney fees as prevailing parties.

In the prayer for relief in their Complaint, the Jins sought "double damages against <u>all</u> Defendants for failure to pay rent" as well as an award of attorney fees against all defendants. CP 4 (underlining added). While the trial court concluded that the Jins were entitled to entry of judgment against KYB Farms for unpaid rent, the Jins concede that Kim/Han "were not parties to the lease" and Kim/Han were not held to be liable for unpaid rent. Resp. Br. 1; CP 15, Conclusion 6; Exhibit 7; CP 13, FOF 9. Accordingly, Kim/Han were correctly held to be prevailing parties by the trial court.

The lease provides for an award of reasonable attorney fees and costs to the prevailing party in an action to enforce the lease. Ex. 7 at p. 6, ¶ 20; CP 13, FOF 9; CP 15, Conclusion 7. Since the Jins unsuccessfully sought to hold Kim/Han personally liable for money damages for breach of the lease, and since that contract contains a provision for the award of attorney fees to the prevailing party, the trial court correctly awarded Kim/Han their reasonable attorney fees.

The Jins argue that, since Kim/Han "are persons separate and distinct from KYB Farms, Inc.[,...] they cannot claim the benefit of a contractual provision to which they were not a party." Resp. Br. 4-5. That is not the law. The decision in *Herzog Aluminum, Inc. v. General American Window Corporation*, 39 Wn. App. 188, 692 P.2d 867 (1984), is dispositive of this issue. There, the court addressed whether a defendant who successfully defends a breach of contract "by proving the absence of an enforceable contract" is entitled to an award of fees under the attorney fee provision in the contract and pursuant to RCW 4.84.330, which makes such provisions bilateral. *Id.* at 189. The court held in *Herzog Aluminum* the defendant was entitled to such an award. *Id. Accord Meenach v. Triple "E" Meats, Inc.,* 39 Wn. App. 635, 640-41, 694 P.2d 1125 (1985)(rejecting claim that "respondents cannot recover attorney fees

because respondents at trial argued there was no contract and consequently no breach").

Revised Code of Washington 4.84.330 provides in relevant part:

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

The court in *Herzog* held that, "the broad language '[i]n any action on a contract' found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract." *Herzog Aluminum,* 39 Wn. App. at 197. Here, the Jins sought to impose personal liability against Kim/Han for rent allegedly due under the lease. CP 4, ¶ 3.[1]

The Jins also argue that RCW 4.84.330 "does not apply" here because judgment has not been entered in favor of Kim/Han. Resp. Br. 8-9. The money judgment entered by the trial court was only against KYB Farms. CP 9. As in *Herzog Aluminum*, Kim/Han successfully rebuffed a claim for damages and attorney fees against them.

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[1] The Jins' brief states, without record citation, that they "did not seek any monetary judgment at trial against defendants Yong Bong Kim and Jin Hae Han," without mentioning their demand for double damages in their Complaint. Resp. Br. 8; CP 4, ¶ 3.

Finally, the Jins contend that they prevailed against Kim/Han because the Jins were granted a writ of restitution to the premises against all defendants. Resp. Br. 8. However, not only were Kim/Han not parties to the lease, but at no time did they ever claim to be tenants. Their only involvement was that they were physically present through the tenancy of their corporation, KYB Farms, the sole tenant under the lease.

B. Kim/Han And KYB Farms Are Entitled To An Award Of Attorney Fees And Costs On Appeal Pursuant To RAP 18.1.

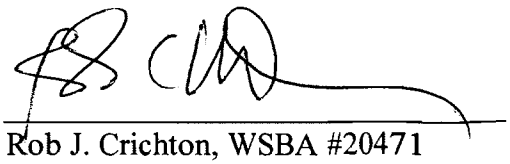
For the reasons set forth above, and in KYB Farms' opening brief, Kim/Han and KYB Farms should be awarded their reasonable attorney fees and costs on appeal pursuant to RAP 18.1(a), as prevailing parties in this action.

III. CONCLUSION

For the reasons set forth above and in KYB Farms' opening brief, this Court should (1) reverse the trial court as to the entry of judgment against KYB Farms and direct that the trial vacate the judgment; (2) direct that the trial court award KYB Farms its reasonable attorney fees and costs as a prevailing party; (3) award KYB Farms attorney fees and costs on appeal pursuant to RAP 18.1; (4) affirm the trial court's award of attorney fees and costs in favor of Young Bong Kim and Jin Hae Han; and (5) award Kim/Han attorney fees and costs on appeal pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 15th day of December, 2011.

KELLER ROHRBACK L.L.P.



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CERTIFICATE OF SERVICE

I, Florine Fujita, declare under penalty of perjury under the laws of the State of Washington:

I am employed by the law firm of Keller Rohrback L.L.P., a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On December 15, 2011, I caused a true and correct copy of the following document to be served on counsel listed below in the manner indicated:

(1) REPLY BRIEF OF APPELLANT KYB FARMS, INC.; and (2) BRIEF OF RESPONDENTS YOUNG BONG KIM AND JIN HAE HAN ON CROSS-APPEAL

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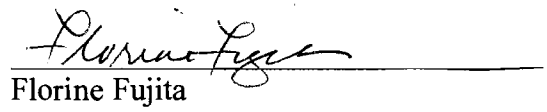
DATED this 15th day of December, 2011.



Florine Fujita