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I. ASSIGNMENT OF ERROR

1. The court erred in making that part of Conclusion of Law 16 which awarded defendants Yong Bong Kim and Jin Hae Han reasonable attorneys fees.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was there any statutory or contractual provision which gave the court authority to award reasonable attorneys fees in an unlawful detainer action to occupants of the land who were not parties to the lease?

III. COUNTER STATEMENT OF THE CASE

A. Facts

Lessors leased two parcels of farm land, which included a single family residential building, to KYB Farms, Inc. Finding of Fact 9, CP 13:9-15. Yong Bong Kim, the sole shareholder and officer of KYB Farms, Inc. and his wife, Jin Hae Han, resided on the demised premises. Finding of Fact 15, CP 14: 10-11. Although there were three different written lease agreements admitted into court, the court found that the “Farming Land Lease Agreement” dated August 25, 2008, was not “indicative of any agreement between the parties and may have been only for the purpose of helping defendant Kim obtain a Visa.” Finding of Fact 8, CP 13: 7-8.

The other two leases, including the final one in March, 2009, (Exhibit 7) executed in conjunction with defendant corporation's purchase of a farming business from another party, were virtually identical and both called for rental payments of \$2,000.00 per month. Finding of Fact 9, CP 13:9-14.

Notwithstanding the written terms of that March, 2009 lease, the corporate tenant only paid the lessors \$1,200.00 per month as rent. Finding of Fact 11, CP 13: 18-19.

On August 27, 2010, Lessor served tenants with a Three Day Notice to pay rent or vacate. Finding of Fact 13, CP 14: 5-6.

KYB Farms, Inc., tendered one \$1,200 payment in response to the notice, which was rejected. No other rent payments were ever tendered. Finding of Fact 14, CP 14:7-9.

Lessor then filed a complaint for unlawful detainer on March 22, 2011, naming both KYB Farms, Inc., a corporation, the lessee, as defendant, and also naming Yong Bong Kim and Jin Hae Han, husband and wife, as defendants.

B. Summary of Proceedings

After a non-jury trial, the court entered its Finding of Facts and Conclusion of Law on June 24, 2011 (Finding of Fact CP 11-16), and its judgment (CP 9-10).

The court found that the defendant KYB Farms, Inc., was delinquent in the payment of rent in the amount of \$12,000.00, plus late charges of \$600.00 (Finding of Fact 16, CP 14: 12-16), and awarded judgment to Lessors, against KYB Farms, Inc.

Pursuant to section 20 of the lease providing for payment of reasonable attorney's fees in the event of litigation, the court awarded Lessors \$11,300.00 for attorney fees plus costs of \$266.80 against KYB Farms, Inc. Conclusion of Law 7, CP 15: 11-15.

The court also concluded that Lessors were entitled to a Writ of Restitution restoring the premises to them, including the residential dwelling, which was then still occupied by defendants Yong Bong Kim and Jin Hae Han. Conclusion of Law 5, CP 14: 5-8; and Finding of Fact 15, CP 14:10-11.

Because the court did not award a monetary judgment for the unpaid rent against defendants Yong Bong Kim and Jin Hae Han personally, the court concluded that those two defendants were entitled to recover their own reasonable attorney's fees in the amount of \$16,195.00. Conclusion of Law 7, CP 15: 15-16.

IV. ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERROR

Generally. As mentioned in an earlier chapter, attorney fees are usually taxable only in the nominal amounts specified in RCWA 4.84.080, often termed statutory attorney fees. The

court has no general authority to award a higher amount. The Washington courts have adhered to the so-called American rule, requiring each side to bear its own attorney fees.

In certain situations, however, the prevailing party may be entitled to recover a higher amount. The legislature has, in recent years, enacted a number of statutes allowing reasonable fees to be awarded to the prevailing party under specified circumstances. In addition, reasonable fees may be available pursuant to a contractual provision, or on an equitable theory.”

Vol. 14A Washington Practice, Second Edition, Civil Procedure section

37.1

A. There was no contractual provision entitling Yong Bong Kim and Jin Hae Han to reasonable attorneys fees.

The lease in the case at bar was between the lessors and KYB Farms, Inc., a Washington corporation. One of the two farming lots subject to the lease contained a single family residential building. Defendants Yong Bong Kim, the sole shareholder and officer of KYB Farms, Inc., and Jin Hae Han, husband-and-wife, resided in that residential building.

When the unlawful detainer proceeding was commenced, the primary defendant was the lessee, KYB Farms, Inc., but Yong Bong Kim and Jin Hae Han, as residents on the property, were necessary parties defendant. They were represented by the same counsel who represented KYB Farms, Inc. CP 5-8.

Yong Bong Kim and Jin Hae Han are persons separate and distinct from KYB farms, Inc. Unless they were to agree that they were not legally

separate and distinct, they cannot claim the benefit of a contractual provision to which they were not a party. If they want to claim the benefit of that contractual provision, then they would have to also assume the liability for the unpaid rent due under the lease, in which case they would not be prevailing parties in any sense of the word

B. There are no statutory provisions entitling Yong Bong Kim and Jin Hae Han to reasonable attorneys fees.

The unlawful detainer statute governing commercial leases (RCW 59.12) does not provide for reasonable attorneys fees to litigants in unlawful detainer proceedings. The closest it comes is RCW 59.12.170, which provides that in an unlawful detainer proceeding: “The jury, or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and, if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer, or unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due.” That provision is sometimes thought of as a substitute for the lack of reasonable attorneys fees

provision in the statute. In fact, the lessors, in their complaint for unlawful detainer, asked that the unpaid rent found to be due be doubled. CP 4:10.

RCW 4.84.330, pleaded by all defendants in their common answer, does not apply to Yong Bong Kim and Jin Hae Han. RCW 4.84.330, which is entitled “**Actions on contract or lease which provides that attorneys' fees and costs incurred to enforce provisions be awarded to one of parties — Prevailing party entitled to attorneys' fees — Waiver prohibited**” states:

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.

Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

This provision, sometimes referred to as the doctrine of mutuality, only applies to parties to the contract or lease. Basically, it means that if the lease or contract says one party is entitled to attorneys fees, the other will be so entitled if they prevail. It does not provide that persons who are

not parties to the lease or contract have any rights under that lease or contract.

RCW 4.84.070 also does not apply. That statute, which is entitled "costs to defendants defending separately" provides:

In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such defendants as recover judgments in their favor, or either of them.

In the case at bar, Yong bong Kim and Jin Hae Han filed a common answer with KYB Farms, Inc., and all were represented by the same counsel (CP 5-7), so RCW 4.84.070 obviously does not apply.

C. The Residential Landlord- Tenant Act (RCW 59.18) does not apply.

The lease in the case at bar was a lease of farm land between the lessors and KYB Farms, Inc., a Washington corporation. Exh. 7. One of the two farming lots subject to the lease contained a single family residential building. Defendants Yong bong Kim, the sole shareholder and officer of KYB Farms, Inc., and Jin Hae Han, husband-and-wife, resided in that residential building.

When the unlawful detainer proceeding was commenced, the primary defendant was the lessee, KYB Farms, Inc., but Yong Bong Kim and Jin Hae Han, as residents occupying the house on the property, were

necessary parties defendant. They were represented by the same counsel who represented KYB Farms, Inc. CP 5-8.

The residential landlord tenant act (RCW 59.18), which does provide for reasonable attorneys fees, has no application in this case. RCW 59.18.040, which lists those living arrangements which are specifically exempted from the provisions of RCW 59.18, specifically lists: " (5) Rental agreements for the use of any single-family residence which are incidental to leases or rentals entered into in connection with a lease of land to be used primarily for agricultural purposes."

D. Yong Bong Kim and Jin Hae Han were not "prevailing parties."

Lessors did not seek any monetary judgment at trial against defendants Yong Bong Kim and Jin Hae Han. Because lessors did not seek any monetary judgment against said defendants, no monetary judgment was entered against them. They were, however, subject to the writ of restitution ordered against all the defendants, directing return of the leased premises to lessors. Conclusion of Law 5, CP15:5-8.

Even though RCW 4.84.330 does not apply to defendants Yong Bong Kim and Jin Hae Han, as noted above, said statute, in its final paragraph, contains a useful definition of "prevailing party." That last paragraph states: "As used in this section 'prevailing party' means the

party in whose favor final judgment is rendered." Even though no monetary judgment was entered against Yong Bong Kim and Jin Hae Han in favor of lessors, the lessors were granted a writ of restitution against all defendants restoring the premises, and are clearly the "prevailing parties."

Lessors respectfully submit that the trial court had no authority to award reasonable attorney's fees to Yong Bong Kim and Jin Hae Han because: (1), they were not parties to the lease, and therefore had no contractual provision for attorney's fees; (2) there was no statutory provision which provided for an award of reasonable attorneys fees to a litigant in the case, and (3) they did not prevail.

V. ARGUMENT IN OPPOSITION TO APPEAL OF KYB FARMS, INC.

A. The notice to pay rent or vacate was not defective at the time given.

At the time the notice to pay rent or vacate was given, the written lease executed by the parties called for monthly payments of \$2000. Finding of Fact 11, CP 13:18 – 20. The lessee had only paid \$1200 per month. At the conclusion of the trial, after hearing all of the conflicting oral testimony, nearly all of which came in through a Korean language interpreter, the court concluded, without really making a specific finding, that the proper amount of rent was \$1200 per month. Finding of Fact 16, CP 14: 12-14. Had that been known at the time the notice to pay rent or

vacate had been served, then clearly it would have been an invalid notice. However, at that time, there was at least a prima facie case to believe that the rent was the \$2000 amount specified in the written lease. It 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.

The notice to pay rent or vacate was sufficient to bring the matter before the court. After full trial on the merits, the court concluded that the lessee was then seriously delinquent in rent, and ordered that a writ of restitution should issue. Conclusions of Law 5 and 6, CP 15:5-10.

B. The notice was served upon Yong Bong Kim who was the sole shareholder, officer, director and registered agent of the corporate tenant at the principal place of business of the tenant.

The court specifically found that "On August 27, 2010, plaintiffs served defendants with a three-day notice to pay rent or vacate (Exhibit 4). Finding of Fact 13, CP 14:5-6.

Even if there was a defect in the notice, or the service of the notice, the issues were joined, and the contractual relationship of the parties was fully litigated.

VI. ATTORNEY'S FEES ON APPEAL

The "Commercial Premise Lease Agreement" dated March 2, 2009 (Exhibit 7) provided, in section 20: "If it becomes necessary for one

party to commence an action against the other party for failure to abide by any of the terms of this Lease Agreement, the prevailing party in such action shall be entitled to recover all costs, including reasonable attorneys' fees, associated with the action."

RAP 18.1(a) requires a party requesting reasonable attorneys fees to set forth the request in the brief "if applicable law grants to a party the right to recover reasonable attorneys fees or expenses on review...."

In this case, the right to recover reasonable attorneys' fees belongs to the prevailing party, pursuant to the contractual provision set forth above.

VII CONCLUSION

The court erred in awarding reasonable attorneys fees to defendants Yong Bong Kim and Jin Hae Han because they had no contractual right to recover those, nor any statutory right to do so.

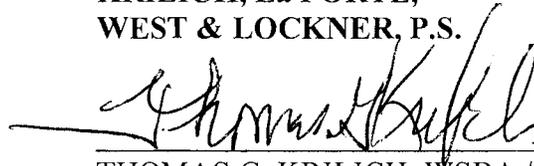
The court did not err in entering his conclusions of law and judgment in favor of lessors, including the termination of the lease, the awarding of a judgment for unpaid rent and the granting of a writ of restitution. The notice to pay rent or vacate was based upon the written lease of the parties, and the courts later determination that the rent was an amount different than that specified in the lease does not invalidate the

court's ability to hear and resolve the contractual issues between the lessor and the lessee.

The Court of Appeals should affirm the judgment against KYB Farms, Inc., but reverse the monetary judgment for attorney's fees in favor of Yong Bong Kim and Jin Hae Han, and should award the lessors reasonable attorneys fees on appeal.

Respectfully submitted this 16th day of November, 2011.

**KRILICH, La PORTE,
WEST & LOCKNER, P.S.**



THOMAS G. KRILICH, WSBA # 2973
Of Attorneys for Respondents/Cross
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DECLARATION OF SERVICE

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STATE OF WASHINGTON

I hereby certify under penalty of perjury under the laws of ~~the state~~ BY _____
of Washington, that the following is true and correct:
DEPUTY

On November 10, 2011, I served a true and accurate copy of the
foregoing document via regular mail to:

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DATED: November 10, 2011, at Tacoma, Washington.

Kimberly E. Siemers
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