NO. 44925-1-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

FIRGROVE COMMONS 3, LLC,
Appellant,

v.

VIKING BANK,
Respondent,

APPELLANT'S REPLY BRIEF
AND
CERTIFICATE OF MAILING

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STANDARD OF REVIEW IS NOT CONTESTED

Viking Bank does not contest the position of Firgrove Commons 3, LLC (hereinafter Firgrove) stated in its opening brief that the issue before this Court, the interpretation of an unambiguous, fully integrated contract, is a question of law subject to de novo review by this Court. *Paradiso v. Drake*, 135 Wn. App, 329, 143 P.3d 859 (2006), *Stranberg v. Lasc*, 115 Wn. App 396, 63 P.3d 809 (2003). This Court should review the decision of the trial court interpreting the lease de novo.

Viking bank asserts that Firgrove has the burden of proof in this case. Since this is a pure case of contract interpretation to be reviewed de novo by the Court, the burden of proof on factual issues is irrelevant.

FIRGROVE COMMONS 3 LLC'S INTERPRETATION OF PARAGRAPH 3.5 OF THE LEASE IS NOT CONTESTED

Viking Bank's response to the opening brief of Firgrove does not address the only issue in this case, the correct interpretation of Paragraph 3.5 of the Lease Agreement signed by the parties. Viking Bank does not even attempt to provide an interpretation of the language of Paragraph 3.5 of the Lease that supports an argument that the Lease does not require the bank to pay the management fee. Three straightforward Lease provisions from Paragraph 3.5 unambiguously require the tenant to pay the management fee as follows:

> All Base Annual Rent payable hereunder shall be paid as "triple Net" rent without deduction or offset.
>
> It is the intent of the parties, except as otherwise provided in this lease, that the Base Annual Rent provided to the Landlord shall be absolutely net to Landlord…
>
> Tenant shall pay all costs, charges, insurance premiums, taxes, utilities, expenses and prorated share of maintenance for common area CAM expenses and assessments of very kind and nature incurred for, against or in connection with the Ground Leased Premises and Property.

Viking Bank's failure to explain why that provision does it mean exactly what it says, that the tenant must pay any expense incurred by the landlord in connection with the Ground Leased Premises and Property, is dispositive of this case. The management fee was incurred in connection with the Ground Leased Premises and Property and is owed by Viking Bank.

Instead of presenting an alternate interpretation of Paragraph 3.5 of the Lease, Viking Bank cites, as the basis for its interpretation of the Lease, a portion of recital B on page 5 of the Lease. It argues that the recital demonstrates an intent that no management fee be paid because it recites that the tenant is leasing the premises for "construction, management, and operation of a banking facility". Viking Bank's argument that this Court should determine the intent of the parties to the Lease at issue from a portion of one sentence of the recitals in the Lease rather than look to the operative portion of the Lease is meritless. A court may look

to contract recitals to interpret the meaning of a contract only when the operative portion of the agreement is ambiguous. *Brackett v. Schafer,* 41 Wn.2d 828, 834, 252 P.2d 294 (1953). Recitals supply only background for the paragraphs which set forth the bargain that the parties struck in the operative provisions of a contract and preliminary recitals are only available to interpret the meaning of the contracts only when and if their meaning is unclear. *Rains v Wallaby,* 13 Wn.App. 712, P.2d 833 (1975). In the instant case both parties argued, and the trial court found, that the Lease at issue is not ambiguous. Paragraph 3.5 of the operative portion of the Lease is not ambiguous. The Lease recital relied on by Viking Bank may not be used to interpret the Lease. Viking Bank's primary argument that recital B of the Lease should be interpreted to demonstrate an intent that management fees not be paid is contrary to established Washington law and should be rejected by this Court.

In its only attempt to explain why Paragraph 3.5 of the Lease should not be interpreted to require the bank to pay the management fees, Viking Bank argues, at page 32 of its brief, that the management fee was not incurred "in connection with the Ground Leased Premises and Property" as required by the Lease for it to be payable by the bank under Paragraph 3.5. They argue that since the bank is required to maintain the Ground Leased

Premises, and the landlord does not manage that property, that they are not required to pay a management fee. One portion of Paragraph 3.5 being that requires the bank to pay the management fees states:

> … Tenant shall pay all costs, charges, insurance premiums, taxes, utilities, expenses, and prorated share of maintenance for common area cam expenses and assessments of every kind and nature incurred for, against, or in connection with the Ground Leased Premises and Property.

Viking Bank's argument that the management was not incurred in connection with the ground leased premises is wrong because although the Lease does not require the landlord to manage the maintenance of the Viking Bank site, the bank does not have access to the leased premises from a public street. A significant portion of the management fee was incurred to manage the maintenance of the driveways in and out of Viking Bank's leased premises. Viking bank does not dispute that the property manager performed all of the following functions related solely to maintain those driveways:

> It sent an employee of the management company to the property more often than 1 time per week to inspect the driveways and common areas to make sure there were no obstructions blocking the driveways, no garbage in the area and no need for towing of abandoned vehicles from the premises, etc. That employee picked up garbage and debris in the common areas and reported maintenance issues he could not resolve on-site to the property manager to have 3rd parties hired by the property manager to maintain the common area. (RP 76-79).

> It regularly inspected the stormwater system that serves all of the property in the four parcel Firgrove center and provided necessary maintenance. (RP 77-78).
>
> It had employees replace burned out lights in the entrances to the center if the work could be done by the employee during routine inspections or where lights were at such a height that a lift was required to replace a burned out light, it arranged to have proper equipment rented, to replace the light. (RP 79-80).
>
> It annually negotiated and entered into a contract with a snow removal company so that the common area driveways could immediately cleared in the event of a snow event. (RP 83-84).
>
> In the event of a snow event it sent an employee to the site to determine if snow clearing or deicing of the common areas as necessary. (RP 84-85).
>
> When common area maintenance needed to be done it hired the third parties to do the common area maintenance, and supervised the work to see that it was done. (RP 89-90, 83-84).
>
> When bills were generated from third parties or maintenance of the common areas, snow removal from the common areas or maintenance of the stormwater system, the property manager bills each of the 3 existing tenants and the owner of the unimproved lots within the development the percentage share each is to pay and receive the payment and pays the expenses to the provider of the service. (RP 90).

All of those management functions were performed to keep the driveways to the Viking Bank premises clean, lighted at night and cleared of stormwater or snow so that the Viking Bank property could be accessed. It is impossible to argue the keeping the driveways open to the Viking bank property was not done "in connection with the ground leased premises" which is the test

under the Lease to require the bank to pay the expenses. Further, all of the other management functions that were undisputedly performed for the bank by the property manager were performed exclusively for the Viking Bank property or "Ground Leased Premises", including the following:

> It sent a bill for the rent to Viking Bank every month. (RP 80-81) (Paragraph 23 of Trial Court Decision).
>
> It received and posted the rent payment from Viking Bank to the rent ledger and disbursed sums to the owner. (RP 80-81) (Paragraph 23 of Trial Court Decision).
>
> It billed Viking Bank for the property taxes two times per year. (RP 81-82) (Paragraph 23 of Trial Court Decision).
>
> It received payment from Viking Bank for property taxes two times per year and paid the County the property taxes on the parcel. (RP 82) (Paragraph 23 of Trial Court Decision).
>
> It received the bills from Pierce County for sewer charges to the leased property and, billed those sewer charges to Viking Bank monthly. (RP 82) (Paragraph 23 of Trial Court Decision).
>
> It received payment from Viking Bank for the sewer charges, posted the payment and paid Pierce County for the sewer bills every month. (RP 82) (Paragraph 23 of Trial Court Decision).
>
> It provided garbage service to the Viking Bank premises and paid the bill for garbage service to the garbage provider. (RP 82)

Since those services were provided by the property manager exclusively for the benefit of ground leased premises of Viking

Bank and no other property, they were "in connection with the Ground Leased Premises" and support the obligation of the bank to pay the management fee.

The Lease also requires Viking Bank to its share of pay costs incurred by the landlord related to the entire Firgrove Center of which its property is one parcel. Under Paragraph 3.5 of the Lease the tenant, Viking bank, is required to pay its share of designated expenses for the "Property" which is defined by the Lease as the entire shopping Center of which the Viking Bank parcel is only one of four parcels. The Lease expressly provides that Viking Bank is to pay its share of the expenses in connection with the Ground Leased Premises and Property.

Even if the management expenses were not incurred for or in connection with the Viking Bank premises, or the "Ground Leased Premises", they were incurred in connection with the Property and they are payable by Viking Bank.

VIKING BANK DOES NOT DISPUTE THAT TRIAL COURT COMMITTED LEGAL ERROR IN ITS INTERPRETATION OF LEASE PARAGRAPH 3.5

Viking Bank does not contest either that the trial court incorrectly applied the law regarding contract interpretation as argued at page 20 and 21 of Firgrove's opening brief or that the rules of contract interpretation applied by the trial court constitute reversible error. The trial court's refusal to interpret Paragraph 3.5

of the Lease to require the tenant to pay management fees was based on the trial judge's erroneous application of the law regarding consistent lease provisions. The trial court, citing *Fardig v. Reynolds*, 55 Wn.2d 540, 348P 2d 661 (1960) and *Hollingsworth v. Robe Lumber*, 182 Wash. 74, 45 P2d 614 (1935) held that interpreting Paragraph 3.5 to require expenses to be paid by the tenant would render paragraph 3.2 that requires the tenant to pay property taxes, paragraph 3.3 that requires the tenant to pay utilities, and paragraph 3.4.3 requires the tenant to pay for trash services, to be superfluous because the language of 3.5 would already require the tenant to pay those expenses. Viking Bank does not dispute that the cases cited by the trial court in support of the court's reasoning that Paragraph 3.5 of the Lease does not require the bank to pay all expenses because such an interpretation makes other Lease paragraphs superfluous apply only where lease provisions are inconsistent. *Mayer V. Pierce County Medical*, 80 Wn.App 416, 909 P 2d 1323 (1995). The trial court should be reversed because the basis of its decision that Paragraph 3.5 of the Lease does not require Viking Bank to pay the management fee was legal error. Paragraph 3.5 of the Lease requires the tenant to pay the management fee in this court should so rule.

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VIKING BANK DOES NOT CONTEST THAT MANAGEMENT DUTIES PERFORMED WERE SUBSTANTIAL

Viking bank does not respond to or contest Firgrove's argument at page 22 of its opening brief that the court erred in paragraphs 6 and 16 of its decision when it found that there was no evidence presented at trial regarding the scope of duties of the property manager and that any management duties were negligible. The fourteen management functions performed by the property manager for the Viking Bank property are set forth in Firgrove's opening brief at page 22 and again in this brief at pages 4-7 and need not be repeated here. Since Viking Bank does not contest Firgrove's assignments of error and argument regarding paragraphs 6 and 16 of the trial court's decision, this Court should rule that there is substantial evidence of the management duties performed in the record, and reverse the trial court's finding that those duties were "negligible".

VIKING BANK DOES NOT CONTEST THAT A 5% MANAGEMENT FEE IS REASONABLE

Viking Bank presented no evidence at trial to dispute that 5% is a standard management fee charged by property managers for ground leases and it does not argue that 5% is not a reasonable management fee for the management services provided in connection with the Viking Bank property. In footnote 12 at page 29 of its responding brief Viking Bank suggests that the testimony

regarding reasonable management fees failed to establish that 5% is a reasonable fee being charged by a property manager in the property management industry. That argument completely ignores the actual testimony at trial. At trial the property manager testified:

> Q. Does Rush Properties have a standard fee for property management on ground leased premises?
> A. Yes.
> Q What is that fee?
> A 5 percent.
> Q Is that a standard in the industry?
> A Yes.
> Q How do you know that?
> A. Well, you know, first of all, we've had accepted by numbers of multi-– national corporations where they have ground leases across the country, you know, Burger King, Sonic, etc., big companies like that. That's one way because they always reference what they're paying in Chicago versus what they're paying in Tacoma or Washington; and secondly we belong to, you know, industry groups BOMA for one, and so, you know, everybody is trying to know what's going on, industry standard, but, you know, I think our -- it really is from being in business, you know. You know, being in business for as long as we have, you understand that the market rates are. (RP 75)

The trial testimony was very clear. The 5% management fee that is standard in the industry applies to property management of ground leased premises. Viking Bank's footnote argument to the contrary is wrong.

Since 5% was established as a reasonable fee, and that amount was actually paid by Firgrove to the property manager in this case for property management fees, there is no reason that the 5% fee should not be the amount ordered to be paid by Viking

Bank under Paragraph 3.5 of the Lease. Viking Bank does not contest the clear law cited at pages 26 through 28 of Firgrove's opening brief that where the amount of an expense to be paid under a written contract is not identified by the contract that the Court will determine a reasonable amount to be paid. The fact that the Court has to set a reasonable amount for expenses would be true under the Lease regarding cam expenses as the Lease allows only "reasonable" common area expenses to be passed onto the tenant. The management fee is no different than the common area expenses. The Court must determine what is reasonable in the event of a dispute. There was no dispute that a 5% management fee is reasonable in this case. Viking Bank did not dispute the reasonableness of the fee. It only disputed whether the fee was payable by the bank. This Court should reverse the trial court and enter a judgment for $20,970.00 for management fees owed.

VIKING BANK ASKS THE COURT TO REWRITE THE CONTRACT

At page 25 of its opening brief, Viking Bank argues that Firgrove is requesting that the court rewrite the contract to include a management fee. As part of that argument the bank cites *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 549 P.2d 9 (1976) for the proposition that the court should neither disregard contract language which the parties have employed nor revise a contract under the theory of construing it. The bank's argument that a court

may not disregard contract language under the theory of construing the contract supports Firgrove. Rather than asking this Court to rewrite the Lease signed by the parties to this case, Firgrove is asking this Court to enforce Paragraph 3.5 of the Lease as written. Viking Bank asks this Court to do what the trial court did and disregard the language of Paragraph 3.5 that requires the bank to pay any expense incurred by the landlord in connection with the Ground Leased Premises and Property whether separately enumerated in the Lease or not. The bank's request to have the Court disregard Paragraph 3.5 of the Lease directly violates, the authority relied on by the bank, *Farmers Ins. Co., supra*, because it asks the Court to disregard contract language. The bank argues that the Court should disregard the contract language because the parties could have included in the Lease a provision explicitly stating that the bank is required to pay management fees instead of including the language of Paragraph 3.5 which provides that the tenant is to pay any expense incurred by the landlord in connection with the ground leased premises and property whether expressly enumerated in the Lease or not. The bank cites no authority that provides that parties to a commercial lease agreement cannot require the tenant to pay any expense incurred by the landlord in connection with the leased property. Paragraph 3.5 of the Lease is clear and unambiguous and should be enforced as written. It

requires the bank to pay the management fee incurred by the landlord in connection with the property leased by Viking Bank.

VIKING BANK PROVIDES NO ALTERNATE INTERPRETATION OF LEASE LANGUAGE

At page 27 of its brief, Viking Bank cites *Allied Stores Corp. v. Northwest Bank*, 2 Wn. App. 778, 469 P.2d 993 (1970) for the proposition that an ambiguous lease that is capable of more than one interpretation should be construed against the landlord if it was drafted by the landlord. That authority has no application to the facts of this case for several reasons. First, the Lease was not drafted by the landlord. The trial court made no finding that the Lease was drafted by the landlord and it was not. Second, Viking Bank has not even attempted to provide an alternate interpretation of Paragraph 3.5 of the Lease that does not require the bank to pay the management fee. The bank's only argument regarding ambiguity is a claim that the Court should look at a lease recital set forth in recital B of the Lease to find an ambiguity with Paragraph 3.5. As a matter of law it would be error for the court to do that as lease recitals may be considered only if there are ambiguities within the operative lease provisions. *Brackett v. Schafer*, *supra*, *Rains V. Wallaby*, *supra*. Viking Bank cites no ambiguities within the lease provisions and the trial court found that the Lease was not ambiguous. There is no ambiguity to be resolved by interpretation

of the contract language against the landlord and Firgrove does not ask the Court to rewrite any contract provision.

ALLIED STORES DOES NOT SUPPORT VIKING BANK

At page 30 of its brief, Viking Bank cites *Allied Stores*, *supra*, alleging that the case stands for the proposition that if management fees are to be paid under a Lease they must be specifically set forth. *Allied Stores*, *supra*, does not so hold and has no application to this case. The Lease at issue in that case called for the tenant to pay personal property taxes for the personal property on the leased premises. The Lease had no provision describing who would pay the real property taxes. The Lease was drafted by the landlord's attorney. The landlord claimed that the tenant had to pay the real property taxes and brought a declaratory judgment action to determine the tenant's obligation to pay the real property taxes. The court cited the general rules for contract interpretation as follows:

> 1. The court's function is to ascertain and give effect to the intention of the parties as set forth in the agreement.
> 2. The agreement must be read and considered as a whole and, if, when so considered, or its terms are plain and unambiguous, the intention of the parties will be deduced from the language used.

The court then went on to hold that where there is no agreement between lessor and lessee to the contrary, real estate taxes are the obligation of the landlord. Since the lease did not at any provision

apportioning the real estate taxes between landlord and tenant, the landlord was responsible to pay them. *Allied Stores, supra* has nothing to do with this case. The issues in this case do not deal with real estate taxes and there is a specific provision in this Lease that requires the tenant to pay every expense incurred by the landlord in connection with the premises leased by Viking Bank. Viking Bank's reliance on *Allied Stores, supra*, is misplaced.

CASES CITED BY VIKING BANK DO NOT SUPPORT A TRIAL COURT'S DECISION

Viking Bank asserts that 3 cases that it cites between page 36 and page 39 of its brief support the trial court's decision. A simple review of those cases demonstrates they do not. None of those cases contains a triple net provision let alone an absolute net provision as is contained in the Lease at issue in this case. In *K's Merchandise Mart Inc. v. Northgate Limited Partnership,* 359 Ill.App.3d 1137, 835 N.E. Ad. 965 (2005) the court considered whether the tenant had to pay management fees under a lease which provided that the tenant would pay:

> (i) all expenses for the operation, maintenance, repair, replacement, policing and protecting and lighting of the exterior common areas; and,
>
> (ii) all expenses for painting, cleaning and routine maintenance of the exterior of the building of the shopping center.

Since management fees at issue in the case were not in any way the obligation of the tenant under that language the court held that they

could not be charged to the tenant. It is difficult to conceive how that case assists this court in interpreting the language of Paragraph 3.5 of the lease that bears no resemblance to the lease language at issue in the case in *K's Merchandise Mart Inc, supra.*

Viking bank next cites *McDonald's Corporation v. Golar,* 251 Neb. 934, 560 N.W. 2d 458 (1997) as authority supporting its claim that the Lease does not require the tenant to pay management fees in this case. At issue there was whether the tenant was required to pay management fees other than those incurred in connection with the common areas. The landlord asserted that the tenant had to pay its share of all management fees of both the common areas and the leased areas. The lease in that case required the tenant to pay:

> "all costs and expense of any kind and nature paid or incurred by landlord during the lease term in conjunction with the common area including ... operating, managing ... and maintaining the common areas".

The Court held simply that the lease required the tenant to pay management fees related to managing the common area but not management fees expended on operation, management or maintenance of portions of the property other than the common area. Since that case does not address a lease provision like the provision here that is an absolute triple net lease that requires the tenant to pay all expenses incurred by the landlord in connection

with the ground leased premises it does not assist the court in interpreting our lease.

Finally, Viking bank cites *Tin Tin Corporation v. Pacific Rim Park, LLC,* 170 Cal.App. 4th 1220, 88 Cal Rptr.3d 816 (2009) as authority supporting its claim that the management fees are not payable by the bank under the Lease in the instant case. The expense at issue in that case was the annual cost of the fees to maintain the LLC that owned the real property. It was not disputed that those fees would not exist if the property were held by an individual rather than a limited liability company. The lease at issue in *Tin Tin, supra*, did not contain a triple net provision but the landlord presented an expert who testified that the lease was an absolute triple net lease. The Appellate Court rejected the trial court's finding that the Lease was triple net and held that the Lease provisions that required the tenant to pay common area operating expenses did not include the annual fees for maintaining the existence of the LLC. The expenses incurred had nothing to do with the real property and were not payable by the tenant under the Lease. That case is distinguishable from the instant case because in the instant case the management fees at issue were incurred by the landlord in connection with the leased property and by the express terms of Paragraph 3.5 the Lease are to be paid by the tenant.

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VIKING BANK CITES NO ABSOLUTE NET LEASE CASE SUPPORTING ITS POSITION

In addition to being unable to articulate any interpretation of Paragraph 3.5 of the Lease in this case that does not require the tenant, Viking bank, to pay the management fees, Viking Bank has been unable to cite any authority from any jurisdiction that would not require a management fee paid in connection with leased property to be paid by the tenant where the tenant leases under an "absolutely net" lease. The term absolutely net is not ambiguous. When an absolute net provision is coupled with the language of the Lease in the instant case that states that the tenant is to pay:

> "all costs... expenses... and assessments of every kind and nature incurred for, against, or in connection with the ground leased premises and property"

as this Lease provides, there is simply no ambiguity in the Lease and the tenant is required to pay the management fees at issue in this case. Paragraph 3.5 of the Lease expressly requires the tenant Viking Bank to pay the management fees at issue. The trial court should be reversed and this court should enter judgment against Viking bank for management fees incurred through January 2013 in the amount of $20,970.00 as requested at trial.

CONCLUSION

This Court should reverse the trial court and rule as follows:

1. That Paragraph 3.5 of the Lease at issue in this case requires the tenant to pay the management fee incurred by Firgrove in connection with the property leased by Viking Bank;

2. The Court should award Firgrove a judgment for management fees of $20,970.00 as proven at trial;

3. The Court should award Firgrove reasonable attorney's fees incurred on appeal to be determined on motion filed after the decision by this Court.

RESPECTFULLY SUBMITTED this 3 day of March, 2014.

BART L. ADAMS, WSBA 11297
Attorney for Appellant

CERTIFICATE OF MAILING

STATE OF WASHINGTON)
) ss.
County of Pierce)

The undersigned, being first duly sworn on oath, deposes and states:

That I am a citizen of the United States; over legal age; not a party to this proceeding; competent to be a witness herein; that on the 3rd day March, 2014, I mailed a true and correct copy of Appellant's Reply Brief, which is identical to the original thereof, which are on file with the Clerk of this Court addressed to:

Gary John Krohn
Northgate Executive Center II
9725 3rd Avenue NE, Suite 600
Seattle, Washington 98115-2061
GaryKrohn@aol.com

That the same was deposited into the United States mail in a sealed envelope, with correct postage affixed, by first class mail.

Jeanne Gleim

SUBSCRIBED AND SWORN to before me this 3rd day of March, 2014.

NOTARY PUBLIC in and for the
State of Washington,
Residing at FOX 15
My Commission Expires: 11-15-16