

No. 44985-4-II

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

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GROUP 44, INC.

Appellant,

and

EBONY KEYS, LLC and OUTLOUD ENTERTAINMENT GROUP, INC.,

Respondents.

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**BRIEF OF APPELLANT**

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**ORIGINAL**

**TABLE OF CONTENTS**

I.	ASSIGNMENT OF ERROR.....	1
II.	STATEMENT OF THE CASE.....	2
III.	ARGUMENT .....	7
	A.    Quantum Meruit.....	7
	B.    Ebony Keys Should Be Ordered To Return To Group 44 All Of The Property Belonging To Group 44.....	11
IV.	CONCLUSION .....	14

## TABLE OF AUTHORITIES

### **CASES**

<i>Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.</i> , 61 Wn.App. 151, 159, 810 P.2d 12, 814 P.2d 699, (1991).....	8
<i>Cingular Wireless, L.L.C. v. Thurston County</i> , 131 Wash.App. 756, 768, 129 P.3d 300 (2006) .....	7
<i>Heaton v. Imus</i> , 93 Wn.2d 249, 252, 608 P.2d 631 (1980).....	8
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wash.2d 340, 353, 172 P.3d 688 (2007).....	7
<i>Pardee v. Jolly</i> , 163 Wash.2d 558, 566, 182 P.3d 967 (2008).....	7
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wash.2d 873, 880, 73 P.3d 369 (2003).....	7

I.

**ASSIGNMENTS OF ERROR**

Appellant Group 44, Inc. (hereinafter "Group 44") assigns error to the Findings of Fact, Conclusions of Law and the Judgment entered in the above entitled matter on April 11, 2013 (CP 63-70) and the Order Denying Group 44, Inc.'s Motion for Partial Reconsideration filed May 10, 2013 (CP 85-86), and specifically as follows:

1. Finding of Fact 3 that Respondent Ebony Keys, LLC (hereinafter "Ebony Keys") relied on the earlier (2005) lease and the amount of rent identified therein.
2. Finding of Fact 5 that Ebony Keys relied on the misrepresentation regarding rental amount made by Outloud Entertainment Group, Inc. (hereinafter "Outloud").
3. Finding of Fact 10 that Ebony Keys was not aware that the closing disbursement included a rent payment to Group 44 based on the 2010 lease, and that Ebony Keys continued to believe the monthly rent conformed to the 2005 lease.
4. Finding of Fact 11 that Ebony Keys was not made aware of the existence of the 2010 lease until after closing the purchase transaction.
5. Finding of Fact 13 that Ebony Keys had operated under the misunderstanding that the 2005 lease was operable and in effect at the time of the purchase.
6. Finding of Fact 14 that the letter agreement between Ebony Keys and Group 44 represents a month-to-month tenancy.

7. Finding of Fact 26 that the only fixtures and equipment that Outloud did not own or have the right to sell were the hood, stove and two microwave ovens.
8. Conclusion of Law 5 that Ebony Keys relied on Outloud's misrepresentation regarding the rental amount in completing its purchase.
9. Conclusion of Law 7 that Outloud did own or have the right to convey all the property except those identified in Findings of Fact 26.
10. Conclusion of Law 8 that Ebony Keys is not liable to Group 44 for any rent other than as agreed to under the temporary occupancy agreement.
11. Conclusion of Law 13 that Ebony Keys must only return the two microwave ovens to Group 44.

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err in finding that Ebony Keys was unaware of the actual rent due for the Premises prior to taking possession of the Premises?
2. Did the trial court err in failing to find that Ebony Keys is liable to Group 44 for the actual rent that accrued during its tenancy of the Premises pursuant to the doctrine of quantum meruit?
3. Did the trial court err in finding that Group 44 somehow lost ownership of the personal property identified as owned by it in the 2010 lease addendum and referenced in Finding of Fact 1?

#### **II.**

#### **STATEMENT OF THE CASE**

Group 44 owns commercial premises located at 2702 6<sup>th</sup> Avenue in Tacoma (the "Premises"). In February 2005 Group 44

leased the Premises to Outloud Entertainment Group, Inc. ("Outloud") pursuant to a written lease. The lease had a five year term expiring February 28, 2010. As part of the lease Group 44 agreed that certain items of personal property it owned and that were identified in an addendum to the lease would remain on the Premises. The base monthly lease payment due under the lease was \$6,250.00, and an addendum to the lease required Outloud to pay its pro rata share of all assessments related to the Premises. (FF 1, CP 63-64)

Upon expiration of the 2005 lease, on or about March 1, 2010 Group 44 and Outloud entered into a new lease, which again had a five year term, this time running through February 28, 2015. The base rent under the lease was increased to \$7,187.50. The lease also required Outloud to pay its pro rata share of assessments related to the Premises. (FF 2, CP 64)

Approximately a year later, in early 2011, Outloud entered into an agreement to sell its business to Ebony Keys, LLC ("Ebony Keys"). (FF 3, CP 64) Pursuant to that agreement, Outloud provided Ebony Keys with a preliminary profit and loss statement for 2010. (EX 14, RP 67). The profit and loss statement showed rent in the amount of \$104,351.00, which corresponded to the

actual rent being paid under the 2010 lease, not the rent that would have been due under the 2005 lease. (EX 14, RP 68-69).

After receiving the profit and loss statement, Ebony Keys' member George Hasenhorl took the rent listed in the profit and loss statement, \$104,351.00, and incorporated it into a business plan he prepared for Ebony keys' lender. (EX 16, RP 112-113)

In late March or early April, 2011, Outloud and Ebony Keys asked Group 44 on short notice to approve Outloud's assignment of its interest in the lease to Ebony Keys. (FF 3, CP 64) To support the request, Ebony Keys, through its agent, provided Group 44 with its business plan showing its income and expense projections and qualifications for running the business. (RP 163, EX 16) The business plan reflected that Ebony Keys had accounted for the monthly rent required under the 2010 lease. (RP 163, EX 16) So despite the fact that there was not time to conduct a complete review of Ebony Keys' credit worthiness, Group 44 approved of the assignment in April 2011 so that the sale could close. (FF 3, CP 64)

Prior to closing, Ebony Keys' agent also provided Group 44 with an agreement that Ebony Keys' lender wanted Group 44 as the landlord to sign in order to subordinate its interest in certain listed items of equipment to the lender. After reviewing the

proposed subordination agreement Group 44 sent a letter to Ebony Keys and Outloud informing them that some of the items on the list actually belonged to Group 44 and that Group 44 did not want to subordinate its interest in certain of those items to the lender. (FF 9, CP 65)

Outloud paid the \$5,000.00 lease assignment fee to Group 44 and Ebony Keys closed its purchase transaction with Outloud. Ebony Key's first payment, made to Group 44 out of the closing of the purchase transaction, included payment for Ebony Keys' pro rata share of the additional charges required under the lease. (FF 11, CP 65) Group 44 therefore allowed Ebony Keys to take possession of the Premises and commence operations. (RP 164)

Ebony Keys continued in possession of the Premises, but paid only the rent that would have been due under the 2005 lease, not the existing 2010 lease. (FF 12, CP 66) Because Ebony Keys refused to cure its defaults, Group 44 in October 2011 filed an unlawful detainer lawsuit against both Ebony Keys and Outloud. (FF 13, CP 66) In order to preserve the status quo pending the resolution of Ebony Keys' claims against Outloud, Group 44 and Ebony Keys accordingly reached an agreement whereby neither side acknowledged the validity of the other's claims or waived any

claims of its own, but provided that the unlawful detainer lawsuit would be dismissed and Ebony Keys would be allowed to remain in possession of the premises in exchange for payment of base rent pending further notice from either party. The parties further agreed that Ebony Keys would not remove any personal property, including any of the property owned by Group 44, from the Premises without providing advance written notice to Group 44. The unlawful detainer lawsuit was thereafter dismissed without prejudice. (FF 14, CP 66)

Ebony Keys subsequently filed this lawsuit against Outloud. Included in its complaint against Outloud was the allegation that Outloud breached its purchase and sale agreement with Ebony Keys by wrongfully claiming to have sold certain personal property to Ebony Keys when in fact the property is owned by Group 44. (FF 17, CP 67)

In July 2012 Ebony Keys informed Group 44 that it would vacate the Premises in August. Upon being informed that Ebony Keys intended to vacate the Premises, Group 44 moved to intervene in this lawsuit. The motion was granted, and Group 44 filed an intervention complaint against both Ebony Keys and Outloud. (FF 20, CP 67).

Trial of the parties' claims was held on January 10 and January 14, 2013. The Court entered its Findings of Fact and Conclusions of Law on April 11, 2013. Group 44 filed a motion for partial reconsideration on April 22, 2013 (CP 75-84). The Court entered an order denying that motion on May 10, 2013. (CP 85-86). This appeal followed.

### III.

#### **ARGUMENT**

Appellate Courts review de novo questions of law and a trial court's conclusions of law. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). Appellate Courts review findings of fact "under a substantial evidence standard." Pardee v. Jolly, 163 Wash.2d 558, 566, 182 P.3d 967 (2008). "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." Cingular Wireless, L.L.C. v. Thurston County, 131 Wash.App. 756, 768, 129 P.3d 300 (2006). In the end "[a] trial court's findings of fact must justify its conclusions of law." Hegwine v. Longview Fibre Co., 162 Wash.2d 340, 353, 172 P.3d 688 (2007).

#### **A. Quantum Meruit.**

Ebony Keys is liable to Group 44 for the amounts that accrued during its tenancy, but that it failed to pay, under the

doctrine of quantum meruit. Through the end of its tenancy those unpaid and accrued charges, including late fees and interest, totaled \$39,140.82.

The doctrine of quantum meruit is one of "quasi contract" that "arises from an implied duty of the parties not based on a contract, or on any consent or agreement." Heaton v. Imus, 93 Wn.2d 249, 252, 608 P.2d 631 (1980). The purpose of the doctrine is to avoid unjust enrichment to one party when, under the circumstances, he is not entitled to it, and provides a remedy that provides for reasonable compensation for services provided. The elements of a quantum meruit claim are: (1) valuable services rendered; (2) to persons from whom payment was sought; (3) which were accepted and enjoyed by the persons; and (4) under circumstances that reasonably notified them that the plaintiff expected to be paid. Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc., 61 Wn.App. 151, 159, 810 P.2d 12, 814 P.2d 699, (1991).

The evidence at trial clearly established that Ebony Keys was not only in possession of the actual figures for the rent due under the 2010 lease prior to taking possession of the Premises, it incorporated those figures into its business plan. (Exs 14 and 16, RP 112-113) Ebony Keys then asked for and obtained Group 44's

approval of its assumption of the lease in April 2011, and to support its request provided Group 44 with its business plan (Exhibit 16). Group 44's approval of Ebony Keys' taking possession of the Premises was thus based in large part on Ebony Keys having provided it with documentation showing it was not only aware of the rent that was due, but had accounted for that rent in its business plan. (RP 163).

In addition, the escrow agent handling the closing of Ebony Keys' purchase of the business from Outloud sent a check out of closing to Group 44 for April 2011's rent in the full amount due under the 2010 lease. Ebony Keys was provided a closing statement showing that amount being paid, yet rendered no objection based on its supposed belief that the correct rent due would have only been that due under the 2005 lease. (RP 122-123).

The buyer's preliminary closing statement, provided to Ebony Keys prior to the closing of its purchase, also showed that escrow would pay Group 44 \$7,289.15 for 25 days of pro-rated rent for the month of March 2011. That amount was more than the total amount that would have been due under the 2005 lease for the month of March, \$7,187.00. (EX 18, RP 123-125)

Moreover, even if Ebony Keys had not clearly had knowledge of the actual amount of rent due prior to taking possession of the Premises, Group 44 brought the issue to its attention shortly after it took possession of the Premises. In response Ebony Keys did not assert a claim against Outloud or seek to rescind its purchase of the business, or even stop making payments on its promissory note to Outloud. (RP 120-121) Instead, it chose to remain in possession of the Premises, accepting the benefit of its purchase and Group 44's approval of its assumption of the lease, but refused to pay the full amount of the rent due. Only after Group 44 filed an unlawful detainer action did Ebony Keys belatedly decide to assert a claim against Outloud.

It is clearly inequitable to allow Ebony Keys to take possession of the Premises and maintain possession of the Premises without at the same time requiring Ebony Keys to pay the full amount of rent due to Group 44 through the end of its tenancy of the Premises. Ebony Keys knew the actual amount that was due for the Premises prior to taking possession of them, yet paid only a portion of the rent that was due. Having accepted the benefit of the Premises with full knowledge of the rent due for the Premises,

Ebony Keys is liable for the actual rent that accrued, not just the portion it voluntarily paid.

The Trial Court's findings of fact that Ebony Keys was unaware of the actual amount of rent due under the 2010 lease are not supported by the evidence in the record. Because Ebony Keys had actual knowledge of the rent that was due under the 2010 lease and accepted the benefits of possession of the Premises through August 2012, Ebony Keys should be found liable to Group 44 under the doctrine of quantum meruit for all of the unpaid charges that accrued during its tenancy of the Premises, together with late fees and interest on the unpaid charges. Through the end of its tenancy those unpaid and accrued charges total \$39,140.82.

**B. Ebony Keys Should Be Ordered To Return to Group 44 All Of The Property Belonging To Group 44.**

It is undisputed that when Group 44 leased the Premises to Outloud Entertainment Group, Inc. ("Outloud") in 2005 it agreed that certain items of property it owned and that were identified in an addendum to the lease would remain on the Premises. (FF 1, EX 13A, RP 58-59) That property remained the property of Group 44 and was never transferred to Outloud.

Prior to closing, Ebony Keys' agent also provided Group 44 with an agreement that Ebony Keys' lender wanted Group 44 as the landlord to sign in order to subordinate its interest in certain listed items of equipment to the lender. At that time Group 44 was not aware that Outloud had purported to sell any of Group 44's personal property and Group 44 was not asked to identify property that it owned. After reviewing the proposed subordination agreement Group 44 sent a letter to Ebony Keys and Outloud informing them that it did not want to subordinate its interest in certain of those items to the lender. Group 44 was never thereafter presented with a revised subordination agreement and thus never subordinated its interests to Ebony Keys' lender.

In Conclusion of Law 7 the Court found that Outloud owned or had the right to convey all the personal property used in the business except for the items that Group 44 had identified in its April 7, 2011 letter as those it would not subordinate its interest in to Ebony Keys' lender. (EX 21) But there is no dispute that Addendums A and B to the original lease identified many items of personal property that belonged to Group 44. Those items were never transferred to Outloud, which thus never had the right to sell them to Ebony Keys.

It appears that the Court has concluded that Group 44, by indicating that it was willing to subordinate its interest in all of the remaining items of personal property it owned to Ebony Keys' lender, somehow lost its ownership rights in all of the remaining property. But when Group 44 sent its April 7, 2011 letter it was not aware there was a any question regarding what property it owned, much less was it ever asked to release its interest entirely in any of the property it owned.

Instead, Group 44 was asked to subordinate its interests in all personal property at the Premises to Ebony Keys' lender, and in response to that request it indicated it was not willing to subordinate its interests in the property identified in EX 21. The bank never followed up on its initial request for subordination, so Group 44 never actually subordinated its interest in any of the property it owned.

Moreover, Group 44's willingness to subordinate its interests to Ebony Keys' lender was predicated on Ebony Keys assuming the existing lease. Ebony Keys ultimately refused to assume the lease. Having failed to do so, it cannot accept the benefits that would have accrued from that assumption, even if Group 44's agreement to

subordinate to its lender could possibly be construed as a release of its ownership interest in any property.

Group 44 thus remains the rightful owner of all of the personal property identified in the 2005 lease, and Ebony Keys should be ordered to return all of that property to Group 44.

#### IV.

#### **CONCLUSION**

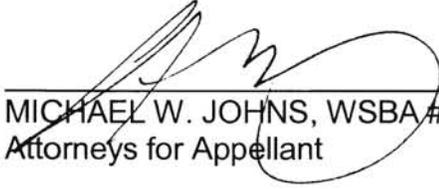
The Court erred in finding that Ebony Keys did not have knowledge of the actual rent that was due for the Premises when it took possession of the Premises. Because Ebony Keys accepted the benefit of possession of the Premises with full knowledge of the rent due for the Premises, Ebony Keys should be liable for all the rent that accrued during its possession of the Premises under the doctrine of quantum meruit.

The Court also erred in finding that the only fixtures and equipment that Outloud did not own or have the right to sell were the hood, stove and two microwave ovens. All of the personal property that was referenced in Ex 13A as belonging to Group 44 remained the property of Group 44 and was never transferred to

Outloud. Ebony Keys thus should be ordered to return all of the personal property belonging to Group 44 to Group 44.

Respectfully submitted this 15<sup>th</sup> day November, 2013.

ROBERTS JOHNS & HEMPHILL, PLLC



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Attorneys for Appellant

STATE OF WASHINGTON  
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STATE OF WASHINGTON

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing BRIEF OF APPELLANT on the following individuals in the manner indicated:

Douglas N. Kiger  
Jonathan W. Blado  
Blado Kiger Bolan, P.S.  
4717 S. 19<sup>th</sup> St., Suite 109  
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(X) Via Hand Delivery

Outloud Entertainment Group, Inc.  
c/o Marc Drewry  
2641 – 39<sup>th</sup> Ave. W.  
Seattle, WA 98199

(X) Via U.S. Mail

SIGNED this 20<sup>th</sup> day of November, 2013, at Gig Harbor, Washington.

  
\_\_\_\_\_  
KRISTINE R. PYLE