

No. 46571-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PORT OF KINGSTON, a Washington Port District,

Respondent,

v.

ROB BREWSTER and BETH BREWSTER, husband and wife, and
the marital community they compose, d/b/a KINGSTON
ADVENTURES, LLC, a Washington Limited Liability Company,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
THE HONORABLE JENNIFER A. FORBES

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellants Beth and Rob Brewster, d/b/a Kingston Adventures, overcomplicate the straightforward issue presented in this unlawful detainer action: Was the respondent Port of Kingston entitled to repossess berths at its marina given the Brewsters undisputedly breached their leases by using the berths for commercial purposes without the Port's permission? Two separate superior court judges correctly recognized that the Port had established its right to possession and that the Brewsters' sweeping allegations that the Port violated their constitutional rights should be adjudicated in the separate civil action they brought against the Port, not in a summary unlawful detainer proceeding.

On appeal the Brewsters continue to ignore the narrow scope of an unlawful detainer action, which can resolve only the issue of possession. Because the Brewsters did not have the Port's permission for commercial use of its marina, and thus were in breach of their leases, none of their "affirmative defenses" could have defeated the Port's right to possession of its berths and a jury trial of those "defenses" would have been useless. This Court should affirm and award the Port its attorney's fees on appeal.

II. RESTATEMENT OF ISSUES

1. Does a trial court appropriately exercise its discretion in refusing to vacate a judgment finding tenants in unlawful detainer because irrespective of the tenants' affirmative defenses alleging constitutional violations by their landlord, the tenants are undisputedly otherwise in breach of the lease?

2. Do commercial tenants defending an unlawful detainer action receive adequate due process when they are allowed to submit written oppositions to a landlord's show cause motion and are provided multiple opportunities to argue the merit of their defenses?

3. Does a trial court correctly refuse to abate an unlawful detainer action under the priority of action doctrine based on a purportedly preclusive civil action that involves different parties, different causes of actions, and that seeks different relief?

4. Does a trial court correctly award attorney's fees to a landlord when the landlord seeks and recovers rent owed under leases providing for the award of fees in "any action or proceeding for the collection of any sums which may be payable hereunder"?

III. RESTATEMENT OF FACTS

A. The Port leased the Brewsters eight small watercraft berths, which they used to launch their business, Kingston Adventures.

In April 2010, the Port of Kingston began licensing small watercraft berths to Beth and Rob Brewster. (CP 115-16) The Port eventually rented a total of eight berths to the Brewsters, which they used to launch a small watercraft rental business, Kingston Adventures, LLC. (CP 116) The Port and the Brewsters memorialized this arrangement with eight leases, each of which allowed the Brewsters to use a “berth space” at the Port of Kingston Small Watercraft Launch and Storage Facility. (CP 125-32)¹ Each lease prohibited use of the berths for “any commercial purpose, without the prior written permission of the Port” and identified both Rob and Beth Brewster as tenants. (CP 125-32) The leases were terminable “by either party giving thirty (30) days written notice of termination to the other” and provided that “[i]n any action or proceeding for the collection of any sums which may be payable hereunder, Lessee agrees to pay to the Port a reasonable sum for the Port’s expenses and attorney’s fees.” (CP 125-32)

¹ Because the Brewsters informally requested additional berths by calling the Port Office, four of the lease agreements are unsigned. (CP 116)

In January 2011, the Port and Kingston Adventures executed a “Business Use Agreement” (BUA) that allowed Kingston Adventures to use the berths for commercial purposes. (CP 119-24) The BUA was signed by the Port’s Commissioners, and Beth and Rob Brewster. (CP 123-24) The parties operated under the BUA until it expired in January 2012. (CP 116, 123) After the BUA expired, Kingston Adventures continued to use the berths, paying the Port the previous rent. (CP 116, 153)

B. After the parties could not agree on terms for a new commercial use agreement, the Port terminated the leases and brought an unlawful detainer action when the Brewsters refused to vacate.

In the winter and spring of 2014, the relationship between the Port and Brewsters deteriorated. (CP 203) The Brewsters objected to the Port’s relocation of a float owned by the City of Poulsbo Parks Department, and the Port’s request to have Kingston Adventures coordinate its use of the relocated float with Poulsbo’s sailing program. (CP 203-06) Although the Port was willing to relocate another tenant so that Kingston Adventures could rent a moorage site adjacent to the Port’s kayak facility, the Brewsters rejected that offer. (CP 203)

The parties also could not agree on terms for a new commercial use agreement, deadlocking over a number of provisions, including requirements that Kingston Adventures agree to limit the Port's liability and coordinate its use with other Port users, and a "Non-Disparagement" clause in which the parties promised to refrain from making negative public comments regarding each other. (CP 203, 262, 558-59) According to the Brewsters, "[t]he big sticking point in the negotiations" was the Port's proposed provision limiting its liability. (CP 558)

The Port was unwilling to continue to allow the Brewsters to operate a business out of the Port without a contractual agreement. On May 22, 2014, the Port served the Brewsters with a "Notice to Terminate Tenancy," advising them that their month-to-month tenancy over the eight berths would terminate on June 30, 2014. (CP 5-6, 10) On June 26, 2014, Kingston Adventures filed suit against the Port, its manager, and its commissioners in the Western District of Washington, alleging, among other things, that the Port had discriminated against a "woman-run commercial business" and retaliated against Kingston Adventures in response to it exercising its First Amendment rights. (CP 29-43) As part of its requested relief, Kingston Adventures sought compensatory and punitive

damages, as well as attorney's fees. (CP 43) The Brewsters were not named as individual plaintiffs in the federal lawsuit. (CP 29)²

After the Brewsters failed to vacate the berths by June 30, 2014, the Port filed an unlawful detainer action on July 2, 2014, against the Brewsters d/b/a Kingston Adventures. (CP 1-8) The Port sought a writ of restitution restoring it to possession of the berths, damages for unlawful detention, rent for the period of unlawful detention, and an award of reasonable attorney's fees and costs. (CP 7) A show cause hearing was set for July 18, 2014 to determine whether a writ of restitution should issue. (CP 19-22) The show cause order informed the Brewsters that if they did not appear at the hearing, the court could order the Port restored to the property. (CP 22)

On July 11, 2014, the Brewsters filed motions to abate and dismiss the unlawful detainer action. (CP 23-103) On July 17, 2014, the Brewsters filed a jury demand and answered asserting as "affirmative defenses" that the Port's eviction of the Brewsters was based on discriminatory and retaliatory motives. (CP 138-41, 145)

² For the remainder of the brief, the Brewsters and Kingston Adventures are referred to collectively as "the Brewsters" unless distinction is necessary.

The same day, the Brewsters filed declarations in opposition to the show cause motion. (CP 142-44, 147-289)

C. The Brewsters' motions to abate and dismiss were denied, and the Port was restored to possession of its berths without a jury trial of their "affirmative defenses."

A week after holding a hearing on July 18, 2014, Kitsap County Superior Court Judge Jeanette Dalton denied the Brewsters' motions to abate and dismiss, and rescheduled the Port's show cause hearing for August 1st. (CP 303-04)³ Kitsap County Superior Court Judge Jennifer Forbes presided over the August 1, 2014, show cause hearing, at which the Brewsters did not appear. (8/1 RP 1) Judge Forbes entered findings of fact and conclusions of law, concluding the Brewsters were in unlawful detention of the berths, awarding the Port \$451.36 for June and July rent, and awarding the Port its attorney's fees and costs, but reserving on the amount of fees and costs. (CP 346-50) Judge Forbes issued a writ of restitution restoring the Port to the property and entered judgment in favor of the Port. (CP 351-57)

On August 4, 2014, the Brewsters moved to vacate Judge Forbes' findings, judgment, and the writ of restitution. (CP 360-62)

³ On August 12, 2014, Judge Dalton denied the Brewsters' motion to reconsider her denial of their motion to abate. (CP 381-82)

On August 15, 2014, Judge Forbes heard the Brewsters' motion to vacate, and continued the hearing for additional briefing. (8/15 RP 17-25) Judge Forbes heard argument again on August 22, and on September 2, 2014, issued an order denying the motion to vacate. (CP 458-62) (Appendix A)

While accepting that their counsel's failure to attend the show cause hearing constituted excusable neglect, Judge Forbes found the Brewsters could not demonstrate a meritorious defense to the Port's unlawful detainer action because it was undisputed that they were in breach of the lease agreements, which prohibited any commercial use of the berths without the Port's approval:

The failure to enter into a business use agreement means that the Defendants were using the Plaintiff's property for commercial purposes without the benefit of "written permission of the Port" as required under the lease agreements. . . .

Accordingly, this Court finds that the Defendants were in breach of the lease agreements at the time that the Notice to Vacate was issued by Plaintiff. Thus, regardless of whether retaliation or discrimination occurred, those defenses are unavailable as the Defendants breached their lease.

(CP 462)

Judge Forbes found that it was undisputed that a number of issues, including the Port's desire to protect itself from unlimited

liability and to require the Brewsters to minimize conflict with other Port tenants arising from operation of their business, prevented the parties from signing a new commercial use agreement. (CP 460-61) Judge Forbes reasoned that the Brewsters ongoing dispute with the Port could not bar the Port from negotiating “provisions of a contract that do not implicate constitutional rights” and that “[t]o hold otherwise would create a situation where any party to a contract could hold a public entity hostage to their contract demands by simply complaining publicly about the entity prior to contract negotiations.” (CP 462)

On October 10, 2014, Judge Forbes ordered the parties to attempt to agree on a reasonable fee award for the Port, stating that if the parties failed to agree they should submit briefing to the court and she would rule on the pleadings. (CP 518) The parties failed to agree, and after extensive briefing (CP 519-86), Judge Forbes entered an order awarding the Port \$12,300 in reasonable attorney’s fees and \$781.21 in costs. (CP 590-93)

The Brewsters appeal. (CP 365-80, 443-49, 467-73, 587-89)

IV. ARGUMENT

- A. Judge Forbes properly followed the summary procedures in the unlawful detainer statute in restoring the Port to possession of its property.**
- 1. Judge Forbes correctly exercised her discretion in refusing to vacate her judgment to grant a jury trial on the Brewsters' "affirmative defenses" given their undisputed breach of the leases.**

Because the Brewsters appeal Judge Forbes' denial of their motion to vacate, this Court reviews her ruling for an abuse of discretion. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, ¶ 90, 314 P.3d 380 (2013), as corrected (Feb. 5, 2014). The unlawful detainer statute, RCW ch. 59.12, authorizes a commercial landlord to bring a summary action to resolve who is entitled to possession of leased property. A tenant cannot assert affirmative defenses in an unlawful detainer action when irrespective of those defenses the tenant is in breach of the lease. Because the Brewsters undisputedly breached their leases by commercially using the berths without the Port's permission, they were not entitled to a jury trial of their "affirmative defenses." Judge Forbes did not abuse her discretion in refusing to vacate her orders finding that the Port was entitled to possession of its berths.

“An unlawful detainer action under RCW 59.12.030 is a summary proceeding designed to facilitate the recovery of possession of leased property; the primary issue for the trial court to resolve is the ‘right to possession’ as between a landlord and a tenant.” *Angelo Prop. Co., LP v. Hafiz*, 167 Wn. App. 789, 808, ¶ 33, 274 P.3d 1075, *rev. denied*, 175 Wn.2d 1012 (2012). RCW 59.12.030 identifies seven wrongful acts of unlawful detainer, including a month-to-month tenant continuing in possession of the property after receiving a notice to quit the premises. RCW 59.12.030(2); *see also* Stoebuck & Weaver, 17 *Wash. Prac., Real Estate* § 6.80 at 440 (2d ed. 2004).

RCW 59.12.130 provides for a jury trial in unlawful detainer actions “[w]henever an issue of fact is presented by the pleadings.” Because of the action’s narrow scope, counterclaims or affirmative defenses cannot raise “issues of fact” requiring a jury trial unless they would defeat the landlord’s right to possession, *e.g.*, by excusing a tenant’s failure to pay rent. *Heaverlo v. Keico Indus., Inc.*, 80 Wn. App. 724, 728, 911 P.2d 406 (1996); *Sprincin King St. Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 67, 925 P.2d 217 (1996). Consistent with this rule, a governmental landlord’s retaliatory eviction or unlawful discrimination can only

be asserted as a defense if the tenant is not “otherwise in breach of the lease agreement.” *Port of Longview v. Int’l Raw Materials, Ltd.*, 96 Wn. App. 431, 438, 979 P.2d 917 (1999); *Josephinium Associates v. Kahli*, 111 Wn. App. 617, 625, 45 P.3d 627 (2002) (unlawful discrimination is affirmative defense if it is “based on facts which excuse a tenant’s breach.”).⁴

The Brewsters undisputedly breached the leases by operating their business without a commercial use agreement. None of their “affirmative defenses” excuse that breach and thus they cannot be raised in this narrow unlawful detainer action. The Brewsters’ breach distinguishes this case from *Longview*, where the tenant was not otherwise in breach of the lease. (App. Br. 29, 37) The Brewsters’ sweeping constitutional claims can be resolved in the separate action Kingston Adventures brought in federal court, but not in this unlawful detainer action, which can resolve only who is entitled to possession of the property.

⁴ See also *California Livestock Prod. Credit Assn. v. Sutfin*, 165 Cal. App. 3d 136, 143, 211 Cal. Rptr. 152, 156 (1985) (“A crucial premise underlying the ‘retaliatory eviction’ doctrine and the tenant’s right to raise the issue in an unlawful detainer proceeding is that, but for the landlord’s ‘invalid reason’ for the eviction, the tenant would be entitled to remain in possession of the premises pursuant to the underlying lease or rental agreement.”).

The 2011 Business Use Agreement did not authorize the Brewsters' commercial use of the berths in 2014, as they allege. (App. Br. 22-23, 30) By its plain terms, that agreement expired in 2012. (CP 123) The Brewsters' continued commercial use of the berths after the BUA expired did not require the Port to allow them to lease berths in perpetuity without a valid agreement allocating the parties' responsibilities related to commercial use of a public facility. *Ticor Title Ins. Co. of California, Inc. v. Nissell*, 73 Wn. App. 818, 823, 871 P.2d 652 (1994) (estoppel requires statement or act inconsistent with later claim, reliance, and injury; estoppel cannot apply “[i]f both parties . . . know the facts”). The Brewsters undisputedly knew that their commercial use of the Port's berths without its permission was a breach of their leases. Even assuming the 2011 BUA continued to govern the parties' relationship for some time after it expired in 2012, the parties had clearly repudiated it by 2014 when they started, and ended, negotiations for a new commercial use agreement.

As Judge Forbes recognized, the Port had a valid interest in conditioning its permission on negotiating a new commercial use agreement that would protect it from liability and conflicts with other Port users arising from the Brewsters' business, and that

disagreement over those issues kept the parties from reaching an agreement, independent from the non-disparagement clause. (CP 460-62; *see also* CP 558 (letter from Brewsters' counsel acknowledging that "[t]he big sticking point" was the limitation on liability clause)) The Port likewise had a valid interest in pursuing the non-disparagement clause, which it was free to do in its proprietary capacity without implicating constitutional concerns. *See Hite v. Pub. Util. Dist. No. 2*, 112 Wn.2d 456, 460, 772 P.2d 481 (1989) ("The power to contract is often mentioned specifically as one proprietary power that may be construed broadly"); *see also Henley v. Cuyahoga Cnty. Bd. of Mental Retardation & Developmental Disabilities*, 141 F. App'x 437, 446 (6th Cir. 2005) (confidentiality/non-disparagement clause did not violate First Amendment because it "was agreed to by both parties after negotiations with counsel and the court").

Allowing the Brewsters to remain in possession based on their "affirmative defenses" – when they were otherwise in breach – would make the leases interminable, contrary to their express provisions, as well as expose the Port to unacceptable liability as a commercial landlord. (CP 125-32) Further, as Judge Forbes noted, the Brewsters could indefinitely forestall their eviction "by simply

complaining publicly about the [Port] prior to contract negotiations.” (CP 462) *Longview* sensibly requires that a tenant establish that it is “not otherwise in breach of the lease agreement” to avoid this result and prevent unduly expanding the scope of an action designed to resolve only the issue of possession.

The Brewsters were undisputedly in breach of their lease agreements with the Port. None of their “affirmative defenses” would have established otherwise. Judge Forbes did not abuse her discretion in denying the motion to vacate her order restoring the Port to possession of its property without a jury trial.

2. The Brewsters were afforded ample due process through multiple hearings and extensive briefing, and no “irregularities” supported vacating Judge Forbes’ orders.

The Brewsters submitted voluminous pleadings arguing that they had meritorious affirmative defenses and argued those defenses before Judge Forbes, not once, but twice. This Court should reject the Brewsters’ unfounded – and unpreserved – claims that “irregularities” denied them due process.

A trial court does not violate due process by following the summary procedures outlined in the unlawful detainer statute. *Carlstrom v. Hanline*, 98 Wn. App. 780, 790, 990 P.2d 986 (2000)

(court did not violate tenant’s due process rights by issuing writ of restitution and judgment at show cause hearing when no issues of fact were presented for trial). Procedural due process requires only notice and an opportunity to be heard. *In re A.W.*, No. 90393-0, 2015 WL 710549, at *4 (Wash. Feb. 19, 2015).⁵ Due process is a flexible concept and “does not require any particular form or procedure.” *Hanson v. Shim*, 87 Wn. App. 538, 551, 943 P.2d 322 (1997), *rev. denied*, 134 Wn.2d 1017 (1998).

Consistent with principles of due process, a court may vacate a judgment under CR 60(b)(1) for “irregularities,” which occur when there is a failure to adhere “to some prescribed rule or mode of proceeding.” *Port of Port Angeles v. CMC Real Estate Corp.*, 114 Wn.2d 670, 674, 790 P.2d 145 (1990). Entering judgment based on a dispositive motion without oral argument is neither an “irregularity” under CR 60(b)(1) nor a due process violation. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 696, 41 P.3d 1175 (2002); *see also Hanson*, 87 Wn. App. at 551 (“oral argument is not a due process right”).

⁵ The Brewsters allege they were denied substantive due process because they had a “substantive due process right to have the fact issues raised in the pleadings decided by a jury.” (App. Br. 26) As explained in § IV.A.1, Judge Forbes correctly declined to hold a jury trial.

This Court should refuse to consider the Brewsters' argument that holding a show cause hearing in a commercial unlawful detainer action is an "irregularity" because they failed to raise it below. RAP 2.5(a); *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 674, ¶ 37, 303 P.3d 1065 (2013). Indeed, rather than object to the show cause procedure, the Brewsters used it as an opportunity to argue their "affirmative defenses." (CP 142-44, 147-289)

In any event, the Brewsters received ample due process and there were no "irregularities." The Brewsters filed written submissions opposing the Port's show cause order. (CP 142-44, 147-289) That alone satisfied due process. *Hanson*, 87 Wn. App. at 551-52 (court did not violate due process by confirming arbitration award without hearing because trial court considered written submissions); *Rivers*, 145 Wn.2d at 697 (no due process violation because "[p]rior to rendering judgment on Respondent's motion to dismiss, the trial court considered Petitioner's memorandum in opposition").

The Brewsters then submitted pleadings in support of their motion to vacate arguing that they had presented meritorious defenses. (CP 360-64, 391-410, 426-42, 450-57) The Brewsters

twice appeared before Judge Forbes to argue their defenses. Only after the Brewsters were afforded this process did Judge Forbes conclude that because they were undisputedly in breach of the leases, they had not raised a defense that required a jury trial. (CP 462)

Nor were there “irregularities” that justified granting the Brewsters’ motion to vacate. Even assuming the Brewsters had not (twice) been afforded oral argument, that would not be an irregularity. *Rivers*, 145 Wn.2d at 696-97. The Brewsters selectively quote *IBF, LLC v. Heuft*, 141 Wn. App. 624, 635, ¶ 16, 174 P.3d 95 (2007) (App. Br. 25) to argue that the show cause hearing was an irregularity, omitting the Court’s statement that “nothing in the [unlawful detainer] statute indicates the court may *not* allow a show cause proceeding.” *IBF, LLC*, 141 Wn. App. at 635, ¶ 16 (emphasis in original). Judge Forbes did not abuse her discretion in denying the Brewsters’ motion to vacate.

3. The Brewsters’ other scattershot allegations of error are without merit.

The Brewsters raise a host of other alleged errors, failing to provide supporting argument for many and failing to explain the prejudice from others. *Diaz v. State*, 175 Wn.2d 457, 475, ¶ 42, 285

P.3d 873 (2012) (error without prejudice is harmless). This Court should reject the Brewsters' indiscriminate arguments, all of which lack merit.

For example, the Brewsters allege that the trial court erred by finding that the Port acted in its proprietary capacity. (App. Br. 23-24) However, they do not argue that the result depends on whether the Port acted in its governmental or proprietary capacity. The Brewsters in fact argue the opposite by arguing "the Port's capacity is not relevant." (App. Br. 24) Regardless, the Port acted in its capacity as a property owner, not as a regulator or lawmaker, when it terminated the Brewsters' contractual leases. *United States v. Kokinda*, 497 U.S. 720, 725, 110 S. Ct. 3115, 3119, 111 L. Ed. 2d 571 (1990) (government acts in its proprietary capacity when it exercises "not the power to regulate or license, as lawmaker, but, rather, as proprietor, to manage its internal operations") (alterations omitted); *Hite v. Pub. Util. Dist. No. 2*, 112 Wn.2d 456, 460, 772 P.2d 481 (1989). In any capacity, the undisputed evidence demonstrated that the Port was entitled to possession of the property given the Brewsters' unauthorized commercial use of the berths in violation of their month to month leases. (See § IV.A.1)

The Brewsters also erroneously argue that they were not leasing real property from the Port, only “storage racks,” and thus this dispute was not properly the subject of an unlawful detainer action. (App. Br. 31-32) To the contrary, the leases state that the Brewsters were leasing “berth space” at the Port of Kingston Small Watercraft Launch and Storage Facility. (CP 125-32) A berth is “the space allotted to a vessel at anchor or at a wharf.” “Berth,” Dictionary.com, Random House Inc. (last visited March 10, 2015). The Brewsters’ leases granting them the right to use space at the Port’s marina undeniably concern real property. “Lease,” Black’s Law Dictionary (10th ed. 2014) (“A contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usu. rent.”); *see also Smith v. Mun. Court*, 202 Cal. App. 3d 685, 686, 245 Cal. Rptr. 300, 300 (1988) (“a rented boat slip in a marina is ‘real property’ for purposes of unlawful detainer”).

The Brewsters next assert, without analysis, that Ms. Brewster signed the leases as a corporate agent of Kingston Adventures and a jury trial was required of “this material fact in dispute.” (App. Br. 30, 34) The Brewsters’ failure to provide any supporting argument for this assertion precludes review. *Cowiche*

Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (errors without supporting argument are waived). In any event, the Brewsters' argument that Ms. Brewster signed the leases as an agent of Kingston Adventures is meritless. The leases were in the names of Beth and Rob Brewster. (CP 125-32) They nowhere mention Kingston Adventures. In contrast, the BUA specifically mentions Kingston Adventures. (CP 119) Moreover, the leases specifically precluded the only use Kingston Adventures could put them to – commercial. Even assuming the leases were in the name of Kingston Adventures, and not the Brewsters, the Port would still be entitled to possession of the berths because Kingston Adventures did not have a valid commercial use agreement.

The Brewsters likewise mistakenly argue that Mr. Brewster could not be liable individually because he did not sign the leases. (App. Br. 32-34) Mr. Brewster repeatedly demonstrated his agreement to the leases by paying the rent owed under them, a fact the Brewsters do not dispute. (CP 116) DeWolf et al, 25 *Wash. Prac., Contract Law And Practice* § 2:9 (3d ed.) (“a contract may arise by inference or implication from circumstances such as the ordinary course of dealing between the parties”); *Johnson v. Whitman*, 1 Wn. App. 540, 545, 463 P.2d 207 (1969) (“Acts and

conduct, as well as words, may show an offer and an acceptance.”). Likewise, Mr. Brewster ratified the agreements signed by his wife by never repudiating them, despite his undisputed knowledge of their terms. *See Consumers Ins. Co. v. Cimoch*, 69 Wn. App. 313, 322, 848 P.2d 763 (1993) (spouse’s failure to repudiate contract operates as ratification where he has “full knowledge of all the facts and a reasonable opportunity to repudiate the transaction”). And, even if Mr. Brewster never assented to the leases (despite his repeated payment of rent), that would only defeat his individual liability, not the Port’s right to possession of the berths.

The Brewsters again err when they argue that the Port was required to give them an opportunity to cure. (App. Br. 40) The Port did not bring a for-cause eviction; it simply gave the Brewsters notice that the Port was terminating their tenancy, as allowed by the leases. Such a notice to terminate is not “curable” – “the tenant has no choice but to vacate within the notice period.” *Stoebuck & Weaver, supra*, § 6.80 at 440 (citing RCW 59.12.030). The Port then noted that the Brewsters’ commercial use of the berths was a clear breach of their leases in response to their “affirmative defenses.” Even assuming the Port was required to allow them the opportunity to “cure,” any such error was harmless as the Brewsters

refused to cease Kingston Adventures' commercial operation. The Brewsters far-ranging and scattershot allegations of error are without merit.

B. The priority of action doctrine does not apply to this case because the Port's unlawful detainer action is fundamentally different from Kingston Adventures' federal lawsuit asserting sweeping constitutional claims.

The Port brought an unlawful detainer action seeking to resolve the narrow issue of possession. This action is not identical, let alone similar, to Kingston Adventures' separate civil action in which it seeks to recover compensatory, as well as punitive, damages for the Port's alleged constitutional violations. Judge Dalton properly denied the Brewsters' motion to abate.

The priority of action doctrine "is generally applicable only when the cases involved are identical as to subject matter, parties and relief." *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981). "The identity must be such that a decision of the controversy by one tribunal would, as res judicata, bar further proceedings in the other tribunal." *Civil Serv. Comm'n of City of Kelso v. City of Kelso*, 137 Wn.2d 166, 177, 969 P.2d 474 (1999). "For res judicata to preclude a party from litigating a claim, a prior final judgment must have a concurrence of identity with that claim

in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made.” *Richert v. Tacoma Power Util.*, 179 Wn. App. 694, 704, ¶ 27, 319 P.3d 882, *rev. denied sub nom. Richert v. City of Tacoma*, 337 P.3d 326 (Wash. 2014). To determine whether two causes of action are the same, a court considers whether “(1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts.” *Richert*, 179 Wn. App. at 705, ¶ 28.

Because unlawful detainer actions are limited to the issue of possession, they will rarely be subject to the priority of action doctrine or *res judicata*. See *Phillips v. Hardwick*, 29 Wn. App. 382, 386, 628 P.2d 506 (1981) (no identity between unlawful detainer action and “separate cause of action [that] did not specifically relate to possession or related damages but was much broader and included issues relating to (1) breach of contract; (2) business interruption; and, (3) intentional infliction of emotional distress”); *Mead v. Park Place Properties*, 37 Wn. App. 403, 407, 681 P.2d 256 (“since the unlawful detainer action was limited to the

issue of possession, there was no identity of cause of action”), *rev. denied*, 102 Wn.2d 1010 (1984); Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 826 (1985) (“a superior court judgment may have less preclusive effect if the court is acting in a situation in which its jurisdiction is limited. Perhaps the best known instance is that of an unlawful detainer action wherein the superior court’s jurisdiction is limited to issues incident to the right of possession.”).

This unlawful detainer action is fundamentally different, both in nature and relief available, from Kingston Adventures’ federal lawsuit in which it seeks broad affirmative relief, including punitive damages and attorney’s fees. (CP 29-43) This narrow unlawful detainer action can decide only the issue of possession. It cannot resolve the Brewsters’ sweeping constitutional allegations given their undisputed breach of their leases. (§ IV.A.1) Nor can this action provide the Brewsters the relief sought by Kingston Adventures, not the Brewsters individually, in the federal action; the Brewsters’ “affirmative defenses” even if proven, would not entitle them to the compensatory and punitive damages that Kingston Adventures seeks in the federal action. (*Compare* CP 43 *with* CP 140-41)

Moreover, as the Brewsters concede, the parties in the two actions are different. (App. Br. 46) The Brewsters and Kingston Adventures are defendants in this action, but only Kingston Adventures is a party in the federal action. The Brewsters assert that “[t]he Port cannot destroy . . . identity by adding [Kingston Adventures’] owners individually” (App. Br. 46), but they cite no authority to support the proposition that the named lessees are not proper parties to an unlawful detainer action. Moreover, the Brewsters in their federal action sued not only the Port, but also its manager and its commissioners in their individual capacities. Judge Dalton correctly denied the Brewsters motion to abate.

C. The Port was entitled to its attorney’s fees under the lease agreements after recovering rent owed for June and July 2014.

The leases allowed the Port to recover its attorney’s fees in any action in which it collected sums owed under the leases. Judge Forbes awarded the Port the rent owed to it for June and July 2014. The Port could not have recovered that rent if it had not overcome the myriad of motions filed by the Brewsters in an attempt to delay and obfuscate this straightforward unlawful detainer action. This Court should affirm Judge Forbes’ reasonable exercise of her discretion in awarding fees to the Port.

A court may award a party attorney's fees when authorized by contract, statute, or a recognized ground of equity. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wn. App. 728, 739, ¶ 23, 253 P.3d 101 (2011). Documentation adequately establishes the basis for a fee award where it informs the court of the “number of hours worked, . . . the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.).” *Miller v. Kenny*, 180 Wn. App. 772, 822, ¶ 127, 325 P.3d 278 (2014). A trial court's fee award is reviewed for an abuse of discretion. *Hall v. Feigenbaum*, 178 Wn. App. 811, 827, ¶ 35, 319 P.3d 61, *rev. denied*, 180 Wn.2d 1018 (2014).

The leases granted the Port the right to recover attorney's fees and expenses in “any action or proceeding for the collection of any sums which may be payable hereunder.” (CP 125-32) The Port did not recover “damages unrelated to the Lease,” as the Brewsters allege. (App. Br. 48) The Port sought in its complaint “any rent and charges coming due during the period of unlawful detention.” (CP 7) The Port then recovered “rent and leasehold tax due and owing for June and July 2014.” (CP 375; *see also* CP 367-68 (“Plaintiff is awarded judgment . . . for unpaid rent and leasehold taxes”), 593)

Judge Forbes unequivocally awarded the Port rent owed under the lease, entitling it to an award of its reasonable attorney's fees.

The Brewsters fail to establish that Judge Forbes abused her discretion in determining the amount of the Port's fee award. Judge Forbes did not unquestioningly accept the Port's fee request, as the Brewsters allege. (App. Br. 48-49) Rather, she called for briefing on the issue and ruled only after the Port had submitted extensive documentation of its fees and the Brewsters had raised their objections. (CP 518-86) *See Hall*, 178 Wn. App. at 827, ¶ 36 (trial court did not abuse its discretion in determining fee amount after considering moving party's request and nonmoving party's objections). Judge Forbes was well within her discretion in determining that the Port was entitled to \$12,300 in fees after the Brewsters prolonged what should have been a simple unlawful detainer action by filing a motion to dismiss, a motion to abate, a motion for reconsideration, a motion to vacate, and supplemental pleadings on the motion to vacate.

The Brewsters' remaining objections to the fee award are without merit. No segregation of fees is required because the same facts establishing the Port's right to back rent established the Port's right to possession. *See Ethridge v. Hwang*, 105 Wn. App. 447,

461, 20 P.3d 958 (2001) (“the court is not required to artificially segregate time in a case, such as this one, where the claims all relate to the same fact pattern”); *Miller*, 180 Wn. App. 772, 823, ¶ 131. The Port could not have recovered the back rent unless it overcame the Brewsters’ numerous attempts to delay and dismiss this proceeding.

Likewise without merit is the Brewsters’ allegation that Judge Forbes abused her discretion by awarding fees for duplicative time and time not billed to the Port. (App. Br. 49) The Brewsters make no citation to the record and point to no specific time entries in support of this assertion. This Court need not consider their unsupported argument. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, the Brewsters have their repeated motions, not the Port, to blame for driving up the fees in this action.

The Port adequately explained the experience of the paralegal that assisted its attorneys, contrary to the Brewsters’ assertion. (App. Br. 50) That paralegal has worked for the firm of Sanchez, Mitchell, Eastman & Cure for 28 years. (CP 523) At a rate of \$125 per hour, her services reduced the fees incurred. *See*

Absher Const. Co. v. Kent Sch. Dist. No. 415, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995).

Finally, the Brewsters did not tender into the court registry under RCW 4.84.110 the June and July rent recovered by the Port, as they allege. (App. Br. 50) The Brewsters stated that they were willing to do so, but never actually did. (7/18 RP 8; CP 374) Judge Forbes did not err in awarding the Port its reasonable fees and costs.⁶

D. The Port is entitled to its attorney’s fees on appeal.

“A contract providing for an award of attorney fees at trial also supports such an award on appeal.” *Hall*, 178 Wn. App. at 827, ¶ 37. Pursuant to RAP 18.1, the Port asks for its fees on appeal based on the lease agreements that authorized fees below.

V. CONCLUSION

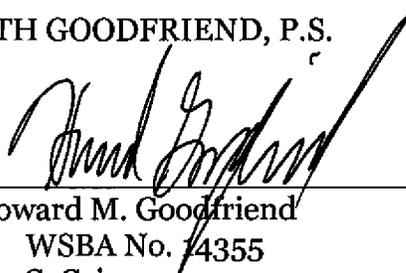
This Court should affirm and award the Port its attorney’s fees on appeal.

⁶ To the extent this Court concludes there was any deficiency in Judge Forbes’ fee award, the Brewsters’ remedy is a remand for further proceedings, not reversal. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, *order corrected on denial of reconsideration*, 966 P.2d 305 (Wash. 1998).

Dated this 11th day of March, 2015.

SMITH GOODFRIEND, P.S.

By:


Howard M. Goodfriend
WSBA No. 74355
Ian C. Cairns
WSBA No. 43210

SANCHEZ MITCHELL &
EASTMAN, PSC

By:


Carrie E. Eastman
WSBA No. 40792

Attorneys for Respondent

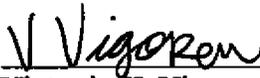
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 11, 2015, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Carrie E. Eastman Sanchez Mitchell & Eastman, PSC 4110 Kitsap Way, Suite 200 Bremerton, WA 98312-2401	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Dennis J. McGlothin Robert J. Cadranell Western Washington Law Group, PLLC 7500 212th St. S.W., Ste. 207 Edmonds, WA 98026-7616	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 11th day of March, 2015.



Victoria K. Vigoren

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8 SUPERIOR COURT OF WASHINGTON FOR KITSAP COUNTY

9 PORT OF KINGSTON, a Washington Port
10 District,

NO. 14-2-01280-4

11 Plaintiff,

12 v.

13 MEMORANDUM OPINION AND
ORDER ON DEFENDANTS' MOTION
TO VACATE

14 ROB BREWSTER and BETH BREWSTER,
15 husband and wife, and the marital
community they compose, d/b/a Kingston
Adventures, LLC, a Washington Limited
Liability Company,

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18 Defendants.

19
20 **THIS MATTER** came before the undersigned judge upon Defendants' Motion to
21 Vacate the Court's Order issued August 1, 2014. Having considered Defendants' Motion and
22 the supporting materials, Plaintiff's Response and the supporting materials, along with oral
23 argument from counsel, **THIS COURT** rules as follows:

24 **OPINION**

25 **FINDINGS:**

- 26
27 1. This matter was properly scheduled and heard by this Court on August 1, 2014. The
28 matter was rescheduled by Judge Dalton; and an order was properly issued and
29

COURT'S MEMORANDUM OPINION ON
DEFENDANTS' MOTION TO VACATE - 1

HONORABLE JENNIFER A. FORBES
KITSAP COUNTY SUPERIOR COURT
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

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served on all parties. Plaintiff received the order prior to the hearing and timely appeared. There was no irregularity in the proceedings.

2. It appears that Defendants' legal counsel did not receive notice of the hearing prior to August 1, 2014. Accordingly, this Court concluded that the Defendants have established the existence of excusable neglect. It was noteworthy to the Court that counsel did not indicate in the initial materials that the order was not received prior to the hearing date. However, at the hearing on the Motion to Vacate, counsel stated on the record that the order had not been received in his office prior to his leaving the day before. As counsel is an officer of the court, the Court accepts this statement at face value. Had this evidence not been presented, the Court would have found that the Defendants failed to establish excusable neglect.

3. Plaintiff is a government entity. In the context of this case, it appears that Plaintiff is operating in its propriety capacity.¹

4. At different points in time, dating back to 2010, lease agreements and business use agreements were executed between Plaintiff and one or more of the Defendants. As of the filing of the Complaint, the business use agreements had expired. The only agreements in place were the lease agreements, each of which contained a 30-day termination clause. Under the lease agreements, the Defendants could not use the property for commercial purposes without permission of the Plaintiff. It is understood by this Court that the permission to use the property had previously been

¹ See, *United States v. Kokinda*, 497 U.S. 720, 725-726, 110 S.Ct. 3115 (1990) ("The Government's ownership of property does not automatically open that property to the public." *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129, 101 S.Ct. 2676, 2685, 69 L.Ed.2d 517 (1981)). It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when "the governmental function operating ... [is] not the power to regulate or license, as lawmaker, ... but, rather, as proprietor, to manage [its]

2 given in the form of the business use agreements. These previous business use
3 agreements appear to have been negotiated at arms' length in good faith, and freely
4 entered into by the mutual assent of the parties.

5 5. At some point in 2014, the parties attempted to negotiate new business use
6 agreement(s). According to Defendants, there were a number of provisions upon
7 which the parties could not reach an agreement. Noteworthy to the Defendants was a
8 non-disparagement clause. However, there were other clauses which pertained to use
9 and liability that the Defendants did not agree to. Defendant Beth Brewster makes
10 clear in her declaration that she would not agree to these provisions. Negotiations
11 ultimately broke down, and a new business use agreement never came to fruition.

12 6. Without a renewed business use agreement in place, the Defendants nevertheless
13 continued to operate a commercial business on the Plaintiff's property.

14 7. Plaintiff initiated a notice to vacate and the subsequent unlawful detainer action. In
15 Defendants' materials submitted to the Court, there is a press release from the
16 Plaintiff which details its concerns for ongoing use of the Plaintiff's property without
17 the protection and benefit of an executed business use agreement.

18 8. Sometime during early 2014, Defendant Beth Brewster became dissatisfied with some
19 of Plaintiff's decisions in the operation of the facilities. It is asserted that these
20 complaints were made publicly, but it is unclear to the Court when or how these
21 public statements were made. In any event, for purposes of this motion the Court
22 assumes that the complaints were made publicly. It is not clear from the materials
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29 internal operation [s]...." *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6
L.Ed.2d 1230 (1961).).

COURT'S MEMORANDUM OPINION ON
DEFENDANTS' MOTION TO VACATE - 3

HONORABLE JENNIFER A. FORBES
KITSAP COUNTY SUPERIOR COURT
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

whether Defendant Beth Brewster acted in her individual capacity or on behalf of Defendant Kingston Adventures, LLC.²

CONCLUSIONS:

1. As discussed above, this Court has concluded that there was no irregularity in the proceedings. The Court has found that there was excusable neglect.
2. The second question for the Court, which is required for consideration of a Motion to Vacate, is whether the Defendants have submitted a prima facie defense, such that a trial is not a "useless formality."³ Presuming there is a prima facie showing of discrimination or retaliatory eviction, the Plaintiff may still pursue eviction if there is a breach of the contract.⁴
 - a. It is undisputed that the parties do not have a current agreement on the commercial use of the property. The parties have failed to reach a meeting of the minds. The parties not only disagree about a non-disparagement clause, but also disagree on a number of other provisions. These provisions include a limitation on use and a waiver of liability.
 - b. Putting aside the proposed non-disparagement clause, there has been no legal authority presented to the Court that would indicate that the other disputed contract provisions were not properly the subject of negotiations between the parties.⁵

² Whether this is significant to this matter has not been briefed or argued to the Court. It's not clear whose "rights" are relevant to the Court's decision from the Defendants' perspectives.

³ *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn.App. 191, 212-213, 165 P.3d 1271 (Div. 1, 2007).

⁴ This Court is not finding, one way or the other, discrimination or retaliation. The Court need not address this issue if there is evidence of a breach of contract.

⁵ If the only disputed provision of the proposed business use agreement been the provision relating to non-disparagement, the Court may have reached a different conclusion.

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- c. The failure to enter into a business use agreement means that the Defendants were using the Plaintiff's property for commercial purposes without the benefit of "written permission of the Port" as required under the lease agreements.
 - d. The existence of a prior history of complaints against a government entity cannot be the basis for denying a government entity the right to negotiate provisions of a contract that do not implicate constitutional rights. To hold otherwise would create a situation where any party to a contract could hold a public entity hostage to their contract demands by simply complaining publicly about the entity prior to contract negotiations. This result would create bad public policy and would place government entities, and by extension tax payers, in an untenable position.
 - e. Accordingly, this Court finds that the Defendants were in breach of the lease agreements at the time that the Notice to Vacate was issued by Plaintiff. Thus, regardless of whether retaliation or discrimination occurred, those defenses are unavailable as the Defendants breached their lease.
 - f. The Plaintiff has otherwise complied with all of the statutory requirements to initiate and prosecute this unlawful detainer action due to the Defendants' breach of the lease.

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ORDER

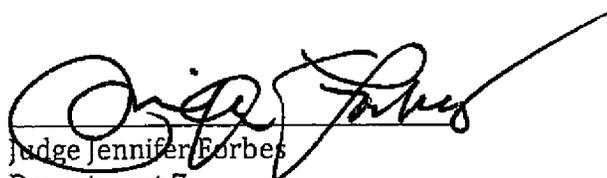
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Defendants' Motion to Vacate is DENIED.

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DONE IN OPEN COURT this 2nd day of September 2014

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29


Judge Jennifer Forbes
Department 7

No. 46571-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PORT OF KINGSTON, a Washington Port District,

Respondent,

v.

ROB BREWSTER and BETH BREWSTER, husband and wife, and
the marital community they compose, d/b/a KINGSTON
ADVENTURES, LLC, a Washington Limited Liability Company,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
THE HONORABLE JENNIFER A. FORBES

RESPONDENT PORT OF KINGSTON'S GR 14.1 AUTHORITY

141 Fed.Appx. 437

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28) United States Court of Appeals, Sixth Circuit.

Annaliesa HENLEY, Plaintiff–Appellant,

v.

CUYAHOGA COUNTY BOARD OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, Defendant–Appellee.

No. 04–3406. | July 7, 2005. |
Rehearing En Banc Denied Oct. 12, 2005

Synopsis

Background: Employee sued county board of mental retardation and developmental disabilities, asserting Title VII claims for alleged race discrimination, retaliation, and retaliatory hostile work environment, § 1983 claim for alleged violation of her free speech and due process rights, and state-law claims. After summary judgment was granted for board on all claims except race discrimination claims, parties entered settlement agreement and case was dismissed. Employee moved to reopen action. The United States District Court for the Northern District of Ohio denied motion and enforced terms of settlement agreement. Employee appealed.

Holdings: The Court of Appeals, Cleland, District Judge, sitting by designation, held that:

[1] district court had jurisdiction to enforce settlement agreement;

[2] dismissal order did not provide parties with unconditional right to reopen case;

[3] district court did not violate employee's due process rights;

[4] employee's execution of release of her claims was constructive condition precedent to board's duty to pay settlement proceeds;

[5] incorporation into release language of term excluding interest on settlement proceeds did not materially alter terms of settlement agreement;

[6] employee failed to establish board's material alteration of settlement agreement with respect to early retirement incentive program; and

[7] including confidentiality-nondisparagement clause in settlement documents did not violate employee's First Amendment rights.

Affirmed.

West Headnotes (7)

[1] Federal Courts

– Settlements

170B Federal Courts

170BVIII Jurisdiction of Entire Controversy;

Pendent and Supplemental Jurisdiction

170Bk2551 Particular Motions or Proceedings

170Bk2553 Settlements

(Formerly 170Bk25)

District court had jurisdiction to enforce settlement agreement, given provision in order of dismissal retaining such jurisdiction.

4 Cases that cite this headnote

[2] Counties

– Modification or rescission

Public Contracts

Rescission, Termination, or Abandonment

104 Counties

104V Contracts

104k127 Modification or rescission

316H Public Contracts

316HVIII Rescission, Termination, or Abandonment

316Hk320 In general

Statement in order dismissing settled case, indicating that either party had right to seek reinstatement “should the settlement not be concluded,” did not provide parties with

unconditional right to avoid their settlement contract and reopen employment discrimination case against county board of mental retardation and developmental disabilities.

1 Cases that cite this headnote

[3] Constitutional Law

- Dismissal

Federal Civil Procedure

- Order

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3989 Dismissal

(Formerly 92k305(3))

170A Federal Civil Procedure

170AXI Dismissal

170AXI(A) Voluntary Dismissal

170Ak1710 Order

District court did not violate plaintiff's due process rights by failing, in order dismissing case pursuant to settlement, to detail the law that would support successful reopening of case, following plaintiff's decision to reach voluntary settlement, or by requiring plaintiff to make a prima facie showing that defendant was materially altering the terms of settlement agreement to reopen case, given that plaintiff had notice that she had to show that defendant was materially altering settlement terms to avoid settlement's enforcement and had two opportunities to support motion to reopen based on alleged material alterations. U.S.C.A. Const.Amend. 5.

5 Cases that cite this headnote

[4] Compromise and Settlement

- Conditions

89 Compromise and Settlement

89I In General

89k10 Construction of Agreement

89k13 Conditions

(Formerly 104k126)

Employee's execution of release of her claims was constructive condition precedent to duty of county board of mental retardation and developmental disabilities

to pay settlement proceeds, notwithstanding employee's contention that she believed she would receive settlement proceeds within 30 days regardless of whether she executed release of claims. Restatement (Second) of Contracts § 234.

1 Cases that cite this headnote

[5] Counties

- Modification or rescission

Public Contracts

- Material amendments doctrine

104 Counties

104V Contracts

104k127 Modification or rescission

316H Public Contracts

316HVII Modification

316Hk314 Material amendments doctrine

Incorporation into release language of term excluding interest on settlement proceeds, including citation to state-law precedent, did not materially alter terms of settlement agreement between employee and county board of mental retardation and developmental disabilities, given that parties reasonably expected 30-day period for payment of settlement proceeds, that settlement documents would have been in employee's hands, ready for execution, had delivery glitch not occurred, and that provision limiting interest otherwise recoverable under state law was part of agreement and intended to protect county board from paying interest caused by any delay by employee in executing settlement.

1 Cases that cite this headnote

[6] Counties

- Modification or rescission

Public Contracts

- Material amendments doctrine

104 Counties

104V Contracts

104k127 Modification or rescission

316H Public Contracts

316HVII Modification

316Hk314 Material amendments doctrine

In seeking to reopen her employment discrimination action on grounds that county board of mental retardation and developmental disabilities had materially altered terms of settlement agreement, employee failed to establish that, during settlement negotiations, county board had assured her that 16 employees would be eligible for buyout under early retirement incentive program, pursuant to collective bargaining agreement (CBA), and that she would thus receive certain benefits, given district court's recollection of settlement discussions in which board's representative indicated that it was projected that 16 employees would be eligible to participate in program, but that there were no guarantees as to benefits that employee would receive.

Cases that cite this headnote

[7] **Constitutional Law**

- Filing of discrimination charges

Counties

- Validity and Sufficiency

Public Contracts

- Validity and Sufficiency of Contract

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(P) Public Employees and Officials

92k1950 Filing of discrimination charges

(Formerly 92k90.1(7.2))

104 Counties

104V Contracts

104k122 Validity and Sufficiency

104k122(1) In general

316H Public Contracts

316HIII Formation of Contract

316Hk186 Validity and Sufficiency of Contract

316Hk187 In general

Employee voluntarily agreed, as part of settlement agreement in her employment discrimination action against county board of mental retardation and developmental disabilities, not to discuss settlement or make disparaging remarks about board related to her case, and therefore inclusion of confidentiality-nondisparagement clause in settlement documents did not violate employee's

First Amendment rights, given that board's legitimate interest in resolving employee's claims and employee's waived right not to make disparaging remarks pertaining to case were closely related and arose from same set of circumstances, and that employee received significant consideration for giving up right to seek recovery at trial. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

*439 On Appeal from the United States District Court for the Northern District of Ohio.

Attorneys and Law Firms

Merrie M. Frost, Patterson & Frost, Willoughby, OH, for Plaintiff-Appellant.

David K. Smith, David A. Rose, Britton, Smith, Peters & Kalail, Cleveland, OH, for Defendant-Appellee.

Before BOGGS, Chief Judge; GILMAN, Circuit Judge; and CLELAND, * District Judge.

Opinion

CLELAND, District Judge.

Annaliesa Henley appeals a district court's order denying her motion to reopen her civil rights action and enforcing the terms of a settlement agreement between the parties. Because she has failed to carry her burden to show that the terms of the settlement were materially altered, that the settlement contract was invalid based on fraud or mutual mistake, or that *440 the lower court abused its discretion in enforcing the terms of the parties' settlement agreement, we AFFIRM the judgment of the district court.

I.

On December 1, 2001, Henley, an instructor with Defendant Cuyahoga County Board of Mental Retardation and Developmental Disabilities ("the Board"), filed suit against her employer, alleging race discrimination, retaliation, and retaliatory hostile work environment in violation of Title VII of the Civil Rights Act of 1964, a § 1983 claim for violation of her free speech and due process rights, and several state

law claims. On March 20, 2002, the parties consented to the exercise of jurisdiction by a magistrate judge pursuant to 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73.

The Board filed a motion for summary judgment on all claims, which the district court granted in substantial part, but denied as to Henley's race discrimination claims. Thereafter, on December 1, 2003, the magistrate judge mediated a settlement conference. Both sides were represented by counsel during this conference and the magistrate judge directly assisted the parties in negotiating their settlement.

The parties reached a settlement on December 1, 2003, the essential terms of which were put into writing by the court and signed by the parties and their counsel. Neither party, unfortunately, has made this signed document part of the record on appeal, although its absence does not inhibit our analysis, as shall be seen below. The central piece of the parties' settlement was the payment of \$15,000.00 to Henley in exchange for her voluntary retirement at her earliest eligibility and the Board's promise to render her eligible for an early retirement incentive program ("ERIP") under the controlling collective bargaining agreement.

Based on the parties' settlement agreement, the district court entered an order of dismissal on December 1, 2003. The dismissal order provides, in relevant part:

This action having been reported to the Court as settled,

IT IS HEREBY ORDERED that plaintiff[s] complaint (and counterclaims, cross-claims, third-party complaints or other pleadings seeking relief, if any) is/are dismissed with prejudice, without prejudice to the right of plaintiff (or any other party seeking affirmative relief) to seek reinstatement within sixty (60) days hereof should the settlement not be concluded. The parties, may if they so desire, submit for this Court's signature a supplemental judgment entry setting forth for purposes of the record such terms and conditions of settlement as they may choose.

Following the settlement conference, the Board's counsel prepared formal settlement documents based on the parties' December 1, 2003 agreement, including a release of all claims, an agreement to resolve claims, a letter regarding Henley's eligibility for the ERIP controlled by a collective bargaining agreement, and a copy of the collective bargaining agreement's specific language relating to the ERIP. The Board's counsel mailed copies of these documents to Henley's counsel on December 19, 2003, along with a cover letter

explaining that, pursuant to the parties' agreement, upon receipt of the executed documents and Henley's resignation letter, the Board would forward her a check for \$15,000.00. The mailed documents, however, were returned to the Board's counsel as undeliverable, and the Board resent them on January 1, 2004.

Henley objected to certain provisions contained in the settlement documents *441 prepared after the conference, claiming that the terms materially altered the agreement reached on December 1, 2003. On January 13, 2004, within the sixty-day period permitted by the district court's order, Henley, by counsel, filed a one-page motion to reopen the case. In her motion, she informed the court that she found the terms in the Board's settlement documents unacceptable.

Thereafter Henley's counsel filed a motion to withdraw, and the district court held Henley's motion to reopen the case in abeyance, noting that it would not permit Henley to abandon the settlement based on a case of "seller's remorse," nor would it permit the Board to vary the terms of the settlement agreement. The district court refused to reopen the case based on Henley's "amorphous representation that she finds the terms of the settlement documents to be unacceptable." Instead, the court provided Henley ten days to make a prima facie demonstration that the Board was varying the terms of the settlement agreement.

On January 27, 2004, Henley filed her initial brief in support of her motion to reopen the case. She identified three ways that the Board was allegedly attempting to alter the terms of the settlement: (1) by adding the condition precedent that Henley execute the settlement documents before the Board would have to make payment of the \$15,000.00 (Henley claims an absolute right to receive the money within thirty days); (2) by incorporating a provision under Ohio law, *see Hartmann v. Duffey*, 95 Ohio St.3d 456, 768 N.E.2d 1170 (2002), seeking to relieve the Board from paying interest on the settlement proceeds in the event of delay (Henley claims that she never waived her right to recover such interest); and (3) by misrepresenting to Henley the number of employees who could receive benefits under the terms of the ERIP.

On January 29, 2004, Merrie M. Frost filed an appearance on Henley's behalf, and the district court permitted Henley's new counsel to file a supplemental memorandum in support of her motion to reopen the case. In her supplemental memorandum, Henley charged a fourth material alteration by the Board. Henley argued that the confidentiality/non-

disparagement clause contained in the formal settlement documents unlawfully restricted her First Amendment rights.

The district court, based on its own recollection of the settlement conference, rejected all four arguments, finding that the documents drafted by the Board reflected the parties' intended settlement agreement and did not materially alter the terms of the parties' settlement agreement.

II.

[1] Enforcement of a settlement agreement "is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). It is well established, however, that "a district court does have the authority to dismiss pending claims while retaining jurisdiction over the future enforcement of a settlement agreement." *Re/Max Int'l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 641 (6th Cir.2001).

In *Re/Max Int'l, Inc.*, we recognized that the *Kokkonen* Court contemplated the potential for a district court to exercise ancillary jurisdiction to enforce a settlement "if the parties had provided for the court's enforcement of a dismissal-producing settlement agreement." *Id.* at 641. A district court may establish its jurisdiction to enforce a settlement in one of two ways: (1) by expressly including a provision retaining *442 jurisdiction in the order of dismissal; or (2) by incorporating the terms of the settlement agreement in the order. *Id.* at 641-42; *Kokkonen*, 511 U.S. at 381, 114 S.Ct. 1673. Here, we are satisfied that jurisdiction to enforce the settlement agreement exists because the district court's order of dismissal contained a provision retaining jurisdiction to enforce the settlement agreement. We now turn to the merits of Henley's appeal.

Henley makes three unconvincing arguments on appeal. First, she argues that the district court erred by requiring her to make a prima facie demonstration that the Board had materially altered the terms of the parties' settlement agreement. Henley maintains that, to reopen the case, the district court's order merely required that she show that the settlement was "not concluded." She claims that the district court failed to provide reasonable notice that she would have to prove anything beyond this simple fact to have the court reopen her case. She posits that, by requiring her to make a prima facie case of material alteration in the terms of the settlement, the district

court "trampled" her due process rights under the Fourteenth Amendment.

Second, Henley argues that the district court erred in finding that the Board's proposed settlement documents accurately reflected the terms of the parties' agreement. She claims that the settlement documents materially altered the terms of the agreement and that the court's decision enforces an agreement containing terms to which she did not assent.

Third, and finally, she argues that the confidentiality/non-disparagement clause contained in the Board's settlement documents, and found by the district court to be included in the parties' agreement, unlawfully restricts her First Amendment right to speak on matters of public concern. In short, Henley maintains that she did not agree to waive any First Amendment rights to make disparaging remarks about her employer, a public entity.

"It is well established that courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them." *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152 (6th Cir.1992) (quoting *Brock v. Scheuner Corp.*, 841 F.2d 151, 154 (6th Cir.1988)). The district court's power to summarily enforce settlements extends to cases where the parties' agreements are not in writing and even to those settlement agreements made off the record, not in the presence of the court. *Bowater N. Am. Corp. v. Murray Mach., Inc.*, 773 F.2d 71, 76-77 (6th Cir.1985); *Kukla v. Nat'l Distillers Prods., Co.*, 483 F.2d 619, 621 (6th Cir.1973) ("[T]he power of a trial court to enforce a settlement agreement has been upheld even where the agreement has not been arrived at in the presence of the court nor reduced to writing."). The existence of a valid settlement agreement "is not diminished by the fact that the parties have yet to memorialize the agreement." *Re/Max Int'l, Inc.*, 271 F.3d at 646.

This inherent power derives from the policy favoring the settlement of disputes and the avoidance of costly and time-consuming litigation. *Kukla*, 483 F.2d at 621. "Agreements settling litigation are solemn undertakings, invoking a duty upon the involved lawyers, as officers of the court, to make every reasonable effort to see that the agreed terms are fully and timely carried out." *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir.1976). As such, courts should uphold settlements whenever equitable and policy considerations allow. *See id.*

To enforce a settlement, a district court must conclude that agreement has been reached on all material terms. *Re/Max Int'l, Inc.*, 271 F.3d at 645–46; *Brock*, 841 F.2d at 154. “The intent of the parties when entering a settlement agreement is an issue of fact to be decided by the district court.” *Brown v. County of Genesee*, 872 F.2d 169, 174 (6th Cir.1989) (citing *Jennings v. Metro. Gov't of Nashville*, 715 F.2d 1111, 1114 (6th Cir.1983)). Summary enforcement is appropriate “where no substantial dispute exists regarding the entry into and the terms of an agreement.” *Re/Max Int'l, Inc.*, 271 F.3d at 646. When making factual findings regarding the material terms of a settlement agreement, the district court is not required to adhere strictly to the requirements of Federal Rule of Civil Procedure 52. *Bowater N. Am. Corp.*, 773 F.2d at 77.

If the parties reached agreement on all material terms, then existing precedent “dictates that only the existence of fraud or mutual mistake can justify reopening an otherwise valid settlement agreement.” *Brown*, 872 F.2d at 174. More importantly, once a settlement is reached, it is the party challenging the settlement who bears the burden to show that the settlement contract was invalid based on fraud or mutual mistake. *Id.* (citing *Callen v. Pennsylvania R. Co.*, 332 U.S. 625, 630, 68 S.Ct. 296, 92 L.Ed. 242 (1948)).

A.

[2] Henley first argues that the district court erred by not reopening the case because the parties' settlement was “not concluded.” She claims that the terms of the district court's order dismissing the case permitted reinstatement and that requiring her to establish a prima facie showing that the Board was materially altering the terms of the settlement denied her due process.

This argument too narrowly targets the district court's statement that either party had the right to seek reinstatement “should the settlement not be concluded.” Henley relies on this statement to assert her right, under the dismissal order, to reinstatement *regardless of the reason that the settlement was not concluded*. Such a contorted construction of the district court's order, however, would give either party the unfettered right to reinstate based on a change of heart, essentially rendering illusory the promises made to reach the settlement.

Henley's argument ignores the clear language of the district court's order stating that the case was “settled,” her own sworn

admission that a settlement agreement was in fact reached, and the language in the district court's order merely extending a right “to seek” reinstatement. When reading the entire order in context, there is no doubt that the lower court determined that the parties had reached a settlement agreement. The district court did not provide the parties with an unconditional right to avoid their settlement contract and reopen the case.

[3] We also find that the district court did not violate Henley's due process rights by failing to detail the law that would support a successful reopening of the case following her decision to reach a voluntary settlement or by requiring Henley to make a prima facie showing that the Board was materially altering the terms of the agreement. Although she may dispute its terms, Henley admits that she reached a settlement agreement with the Board. The law is clear that “[o]ne who attacks a settlement agreement must bear the burden of showing that the contract he made [was] tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.” *Callen*, 332 U.S. at 630, 68 S.Ct. 296.

The fundamental elements of procedural due process are notice and an opportunity *444 to be heard. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir.1992) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). Here, the lower court provided ample opportunity for Henley to satisfy her burden to avoid enforcement of the settlement agreement under existing law. The district court put Henley on notice that she would have to show that the Board was materially altering the settlement terms, and it provided her with two opportunities to support her motion to reopen the case based on alleged material alterations.

B.

A complete review of the record and the district court's detailed ruling on each term disputed by Henley reveals no basis for this court to conclude that the lower court committed error. Henley has failed to carry her burden to show that *any* material terms of the parties's settlement agreement were altered.

[4] First, the district court held that it was inconceivable that Henley and her attorneys would argue that Henley was entitled to receive payment of the settlement proceeds before executing a release of claims. As the district court stated, “[t]o

pay any plaintiff before then would be sheer folly.” Henley argues that the lower court erred in not crediting her statement that she believed that she would receive the \$15,000.00 in settlement proceeds within thirty days whether she executed the release of claims or not.

We find no error or abuse of discretion in the district court's determination that Henley's execution of a release of her claims was a constructive condition precedent to triggering a duty to pay settlement proceeds. When parties to a bilateral contract neglect to expressly state the order in which their promises will be performed, the court must fill the gap under the doctrine of constructive conditions. *See* John D. Calamari & Joseph M. Perillo, *Contracts* §§ 11–17 (3d ed.1987); Restatement (Second) of Contracts § 234. The Restatement (Second) of Contracts provides the black letter basics on this point:

(1) Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary.

(2) Except to the extent stated in Subsection (1), where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 234.

Henley has presented no basis for us to conclude that the lower court abused its discretion in imposing a constructive condition or erred in finding that the parties intended that Henley would not be entitled to the settlement proceeds until she executed the release.

[5] Second, the lower court found that the incorporation of a term excluding interest on the settlement proceeds and a reference to *Hartmann v. Duffy*, 95 Ohio St.3d 456, 768 N.E.2d 1170 (2002), in the release language did not represent a material change in the terms of the parties' settlement agreement. The provision in the release states that Henley “specifically waives any right to interest on the amount of settlement for any delay in payment from December 1, 2003, the date of settlement, until the date of payment, and specifically releases and discharges [the Board] ... from any claim or demand for *445 interest on the settlement amount to which [Henley] may or may not otherwise be

entitled in accordance with [*Hartman*.]” The lower court ruled that the parties reasonably expected that there would be a thirty-day period for payment. The court further found that, in the absence of the mailing/delivery glitch occurring in December 2003, the Board's settlement documents would have been in Henley's hands ready for execution, and she would have likely received her settlement proceeds by the end of December 2003. The district court held that the inclusion of the provision limiting interest otherwise recoverable under *Hartmann* was part of the agreement and was intended to protect the Board from paying interest caused by any delay by Henley in executing the settlement. These conclusions are also supported by the record.

[6] Henley's third alleged material alteration by the Board concerns her agreement to retire and the Board's promise to ensure that she was eligible for an early retirement buyout under the ERIP of the collective bargaining agreement. If eligible and selected, Henley claims that she would be entitled to receive an additional approximate \$25,000.00 in severance pay. Henley asserts that, during settlement negotiations, the Board assured her that there would be sixteen employees eligible for a buyout under the ERIP in 2005. Henley argues that there are now only twelve. The district court again credited the Board's version of the facts giving rise to the settlement agreement, finding that there was no express promise that 16 employees would be eligible under the ERIP in 2005:

Next, as signed off by the plaintiff, the proviso pertaining to participation in the ERIP reads “[plaintiff] deemed to have opted to participate in buyout program in effect as of her retirement date, [defendant] to provide [plaintiff's] counsel with letter detailing buyout procedures.”

This Court has a very clear memory of the discussions which led up to this aspect of the settlement. [The Board's agent] stated at the conference: that the ERIP was controlled by the collective bargaining agreement; that he believed, but could not be sure, that at the time of plaintiff's projected retirement sixteen employees would be eligible to participate, and that he would check further as to that number; that an employee with less seniority than plaintiff had previously participated; and, that considering that the plaintiff's retirement date was to be October 1, 2005 *there could be no guarantees as to the plaintiff receiving the benefit which might be available under the ERIP*

(Emphasis in original.)

Henley has failed to establish any error in the district court's factual findings based on the evidence presented to it and the court's participation in the settlement conference.

C.

[7] Lastly, Henley argues that the confidentiality/non-disparagement clause contained in the settlement documents was not part of the parties' agreement and violates her First Amendment rights. The provision at issue reads:

HENLEY and the BOARD agree to refrain from making disparaging remarks about the other. [The parties] further agree to keep the terms of this Agreement and the accompanying Release confidential, including but not limited to, refraining from contracting, speaking with, communicating with, or otherwise releasing any information to the media concerning the terms of this Agreement. The BOARD agrees it shall keep the terms of this Agreement *446 confidential to the maximum extent permitted under law.

The district court found this term to be completely in accord with the parties' settlement discussions where they agreed to keep the terms of their agreement confidential. The district court further eliminated any prior restraint concerns associated with the broad first sentence contained in this provision by ruling that the language permits Henley "to exercise her First Amendment right to freedom of speech as to any/all issues she may have with the Board so long as they do not include disparaging remarks pertinent to this case." In short, the lower court found that Henley voluntarily agreed not to discuss the settlement or make disparaging remarks about the Board related to her specific case.

"[C]onstitutional rights, like rights and privileges of lesser importance, may be contractually waived where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver." *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir.1988) (citing *D.H. Overmyer v. Frick Co.*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972) and *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972)). "Such volition and understanding are deemed to be, and indeed have been held to be, present, where the parties to the contract have bargaining equality and have negotiated the terms of the contract, and where the waiving party is advised by competent counsel and has engaged in other contract negotiations." *Id.*

Again, we find no error in the district court's specific factual finding. The lower court found that the confidentiality provision was agreed to by both parties after negotiations with counsel and the court. It did not find that Henley voluntarily relinquished any First Amendment rights other than those specifically related to the parties' particular dispute, and it was not error to conclude that this term was part of the parties' bargain to resolve the case. The Board's legitimate interest in resolving the underlying claims and the specific right waived (not to make disparaging remarks about Henley's case only) are closely related, they arise from the same set of circumstances, and Henley received significant consideration for giving up her right to seek recovery at trial.

III.

For the forgoing reasons, we AFFIRM the district court's order denying Henley's motion to reopen the case.

Parallel Citations

2005 WL 1579781 (C.A.6 (Ohio)), 2005 Fed.App. 0567N

Footnotes

* Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

SMITH GOODFRIEND PS

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