FILED
MAY 20 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 296491

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

JOHN LEPIANE and RUTH LEPIANE,
husband and wife,
Plaintiffs/Respondents,

vs.

IRREANTUM, LLC, a Washington limited liability company;
MARK W. GILBERT and SUSAN G. GILBERT, husband and wife,
individually and the marital community comprised thereof;
WG NISSAN, LLC, a Washington limited liability company,

Defendants/Appellants.

BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

A. The trial court erred in granting the plaintiffs' motion for partial summary judgment.

B. The trial court erred in denying the defendants' motion for summary judgment.

C. The trial court failed to correctly interpret and apply the applicable statutes of frauds.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the trial court err by concluding that the plaintiffs were entitled to judgment as a matter of law as to the liability of the defendants and granting the plaintiffs' motion for partial summary judgment?

B. Did the trial court err by determining that the defendants were not entitled to judgment as a matter of law regarding their defenses to plaintiffs' claims and thereby denying the defendants' motion for summary judgment?

C. Did the trial court err by failing to correctly interpret and apply the applicable statutes of frauds to the documents at issue in this case?

III. STATEMENT OF THE CASE

A. Factual Background

Plaintiffs, John Lepiane and Ruth Lepiane (collectively "Lepiane") are husband and wife and residents of Walla Walla County. Defendant Irreantum, LLC ("Irreantum") is a Washington limited liability company which was formed and is owned by defendants Mark W. Gilbert and Susan G. Gilbert (collectively "Gilbert"). Mr. and Mrs. Gilbert are married to one another and are residents of Walla Walla County. Defendant WG Nissan, LLC ("WG") is a Washington limited liability company. (CP 3-4)

Lepiane owns a tract of commercial real estate located in the City of Walla Walla at 715 W. Poplar, which has for years been the site of a new or used automobile dealership. On or about December 1, 2004, Lepiane leased the subject real estate to Tri-City Nissan, Inc. (who is not a party to this proceeding) for a five year period at a monthly rental of six thousand dollars ending on November 30, 2009, in connection with Tri-City Nissan's automobile dealership which it owned and operated for a period of time on the subject property. Tri-City Nissan assigned its interest in the lease to WG on or about March 8, 2006 when WG bought Tri-City Nissan's dealership. WG operated its own dealership on the site for a short

period of time, and then assigned its interest in the lease to Irreantum on July 1, 2006. Gilbert executed a document purporting to be a personal guaranty of Irreantum's obligation under the assigned lease on or about June 30, 2006. Gilbert operated an automobile dealership on the subject property from approximately July of 2006 until November of 2008. (CP 4-5)

Irreantum vacated the subject property at the end of November, 2008 after Mark Gilbert exchanged correspondence with Lepiane's attorney, John Lohrmann, earlier that year. (CP 29) Some confusion existed between Mr. Lohrmann and Mr. Gilbert as to the exact terms of the lease and specifically when it expired and, based upon information provided to him by Mr. Lohrmann, Mr. Gilbert was under the mistaken belief that the lease expired in November of 2008 (rather than in November of 2009 as provided in the lease). (CP 45)

Mr. Gilbert and Irreantum made arrangements during the summer of 2008 to move the automobile dealership to an alternate location at the end of November, 2008. Mr. Gilbert sent Mr. Lohrmann a letter on November 6, 2008 informing Lepiane that his company would be vacating the subject property by November 30, 2008, and also informing Mr. Lohrmann that he knew of a potential

tenant for the property, if Lepiane was interested. Mr. Gilbert also tendered a check in the amount of six thousand dollars for the "final" month of rent (for November, 2008), which check was returned to him by Lepiane. (CP 29 and 45)

After the property was vacated by Irreantum and Gilbert, it remained vacant for the entire next year which was the actual remaining term of the lease.

B. Procedural History

Lepiane sued Irreantum, Gilbert and WG in Walla Walla County Superior Court to recover the entire amount of rent due under the remaining term of the lease from November 1, 2008 through November 30, 2009, together with certain other items of expense that were the alleged responsibility of the defendants under the terms of the lease, as well as their reasonable attorney fees and costs of suit. The trial court granted Lepiane's motion for partial summary judgment on the issue of liability, at the same time denying the defendants' motion for summary judgment which requested dismissal of Lepiane's claims in their entirety, based upon the Lepiane's purported failure to comply with the applicable statutes of frauds.

The matter was then scheduled for trial on the issue of Lepiane's damages only. On the day of trial, the parties entered into an agreement for a stipulated judgment in Lepiane's favor, specifically reserving the defendants' rights to proceed with this appeal.

IV. SUMMARY OF ARGUMENT

The plaintiffs' claims in the underlying lawsuit rest entirely upon the documents at issue in this case. Those documents fail to comply with the applicable statutes of frauds in numerous respects, not the least of which is the failure to include a specific legal description in one or more of the pertinent documents. In addition, the documents contain erroneous references to the underlying lease, by referring to legal entities which do not in fact exist.

To comply with the applicable statutes of frauds, a written memorandum must contain all essential and material parts of the contemplated lease with sufficient clarity and certainty to indicate the parties' meeting of the minds on all material terms with no material matter left for future agreement or negotiation.

In addition, the law in Washington is clear that in order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land

sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description of the subject property.

In the instant case, there is no legal description of the leased property in the pertinent documents purporting to act as the legal assignment of the lease. Thus there is no way to definitely locate the land to which the assignment documents refer without recourse to oral testimony. Nor is there a reference to another instrument which contains a sufficient legal description because both references refer to instruments or agreements which do not exist.

The Washington Supreme Court has held that the statute of frauds is not an equitable doctrine, but is an absolute statute. It may be that a strict application of the statute in some cases will operate to defeat a just claim, but that is not a sufficient reason for attempting to remove those cases from the operation of the statute. The trial court erred in its interpretation and application of the statutes of frauds.

There is no basis for claiming that application of the statutes of frauds in this case would have the effect of defrauding the plaintiffs. At most the defendants' conduct amounted to a failure to

perform promises, but that is not a sufficient reason to disregard the statutes of frauds, which are among the strictest in the nation.

Although it may be true that proper application of the statutes of frauds in this case would "elevate form over substance", about which the trial court was apparently concerned, that is the nature of the statutes of frauds as without the proper "form" there is no "substance", and there is no enforceable agreement.

V. ARGUMENT

A. Lepiane's underlying action was premised on documents that do not exist.

In the underlying action, Lepiane sought joint and several liability between WG, Irreantum and Gilbert for the defendants' alleged failure to perform the original lease dated December 1, 2004 between Lepiane as landlord and Tri City Nissan Inc., as tenant ("the Lease"). (CP 32-39) Lepiane alleged there was a valid assignment of the Lease to Irreantum and that Gilbert personally guaranteed the assigned Lease. The Lease requires consent in order for any assignment of it to be valid and enforceable. (CP 33)

The documents which Lepiane alleged imposed liability on Irreantum or Gilbert for the Lease include a document entitled "Consent of the Lessor to Assignment", dated June 27, 2006 (the

"Consent") (CP 43), a document entitled "The Personal Guarantee" signed by Mark and Susan Gilbert on June 30, 2006 (CP 41), and a document entitled "Assignment and Assumption of Lease" dated July 1, 2006, (the "Assignment"). (CP 62-64) Neither the Personal Guarantee nor the Consent contains a legal description of the leased property. The Assignment contains a street address of the leased property, but no legal description.

A review of the pertinent documents creates confusion as to what was to be assigned and to whom. All documents contain purported references to the Lease. The Consent (CP 43) describes it as "...that certain lease dated December 1, 2004 ("Lease") between Lessor and Tri-City Nissan LLC." (emphasis added). As noted above, the Lease was actually between Lepiane and Tri-City Nissan, Inc.

The Personal Guarantee refers to "that certain lease dated December 1, 2004 between John and Ruth Lepiane, husband and wife, Lessors, and Tri City Nissan, LLC as Lessee, and Irreantum, LLC, as Assignee". (CP 41) The Assignment refers to the December 1, 2004 lease "executed by Assignor, as Lessee and (the Lepianes)." (CP 62) However, the Assignor identified in the Assignment is WG Nissan, LLC, not Tri-City Nissan, Inc. which was the original tenant

under the Lease. In addition to the confusion created in those documents, none of them contains an attached copy of the Lease.

There is no December 1, 2004 lease between Tri-City Nissan LLC and Lepiane, nor with Tri-City Nissan LLC and Irreantum, nor with WG Nissan LLC. The Lease is only between Lepiane and Tri-City Nissan Inc. The purported references to a lease in the Consent, Personal Guarantee and Assignment are to three different lease documents, none of which exist. There can be no valid assignment of leases which do not exist. Likewise, there can be no contractual duties arising from leases which do not exist.

B. Since there is no legal description in either the Consent or the Personal Guarantee, and the references are to other instruments which do not exist, the documents violate the statute of frauds and are therefore unenforceable.

RCW 59.04.010 is the applicable statute of frauds regarding leases which purport to be in excess of one year, such as the Lease. That statute provides: "Tenancies from year to year are hereby abolished except when the same are created by express written contract. Leases may be in writing or print, or partly in writing and partly in print, and shall be legal and valid for any term or period not exceeding one year, without acknowledgment, witnesses or seals."

In addition to the lease statute of frauds, there is a separate statute of frauds pertaining to transactions involving real property which provides: "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed...." RCW 64.04.010 (emphasis added). Clearly an assignment of a lease, such as the Assignment at issue in this case, constitutes a conveyance of an interest in real estate and is therefore subject to the real property transactions statute of frauds.

To comply with the lease statute of frauds, a written memorandum "must embody all essential and material parts of the contemplated lease with sufficient clarity and certainty to indicate the parties' meeting of the minds on all material terms with no material matter left for future agreement or negotiation." *Saunders v. Callaway,* 42 Wn. App. 29, 36, 708 P.2d 652 (1985). Among other material terms, the writing must disclose the subject matter of the contract, *Friedl v. Benson,* 25 Wn. App. 381, 387, 609 P.2d 449 (1980) (quoting *Bharat Overseas Ltd. v. Dulien Steel Prods., Inc.,* 51 Wn.2d 685, 687, 321 P.2d 266 (1958)), and contain a description of the property by lot and block number, addition, city, county and state. *Martin v. Seigel,* 35 Wn.2d 223, 229, 212 P.2d 107, 23

A.L.R.2d 1 (1949). In *Bigelow v. Mood,* 56 Wn.2d 340, 353 P.2d 429 (1960), the court reiterated the long established rule that

> "...in order to comply with the statute of frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description.[*citations omitted*]"
>
> (Emphasis added).

Id. at 341.

Neither the Consent nor the Personal Guarantee contains a legal description of the leased property. This violates the long-standing rule set forth above, as stated by the Court in *Bigelow*. *See also Berg v. Ting*, 125 Wn.2d 544, 551,886 P.2d 564 (1995) (quoting *Bigelow*); and *Tenco, Inc. v. Manning*, 59 Wn.2d 479, 485, 368 P.2d 372 (1962).

As a review of the pertinent documents in this case reveals, there is no lease with Tri-City Nissan, LLC. The Lease is with Tri-City Nissan, Inc. Thus Lepiane was unable to show as a matter of law that either the Consent or the Personal Guarantee contains a reference to another instrument which contains a sufficient legal description of the leased property.

As this court is well aware, limited liability companies and corporations are distinct legal entities. RCW Title 23B provides the statutory framework for corporations while RCW Title 25.15 deals with limited liability companies. Each entity has its own separate characteristics and traits and it cannot be said that a corporation is a limited liability company or that a limited liability company is a corporation.

Consequently, it is entirely possible that there could be a Tri-City Nissan, LLC as well as a Tri-City Nissan, Inc., so referring to a lease with Tri-City Nissan LLC when the lease is actually with Tri-City Nissan, Inc. is confusing, misleading, insufficient and shows there was no meeting of the minds between the parties in terms of the Consent and Personal Guarantee since neither of them correctly referenced the actual parties to the Lease.

Add to this the fact that the Consent refers to the Gilberts personally as the proposed Assignee, not Irreantum, LLC which Lepiane claims in the underlying action is the Assignee. There was thus no meeting of the minds as to whom the Lease was to be assigned.

In addition, the Personal Guarantee describes the Lease by adding the reference to Irreantum, LLC as assignee. However,

Irreantum, LLC was not a party to the Lease in 2004, so that reference is likewise mistaken and confusing, and further evidence of a lack of meeting of the minds.

Since there is no legal description of the leased property in the pertinent documents purporting to act as the legal assignment of the Lease, there is no way to definitely locate the land to which the assignment documents refer without recourse to oral testimony. Nor is there a reference to another instrument which does contain a sufficient legal description because both references refer to instruments or agreements which do not exist.

C. <u>The Assignment violates the statute of frauds as it contains no legal description and refers to documents which do not exist.</u>

The Assignment purports to assign the "...Lease dated December 1, 2004 ("Lease"), a copy of which is attached hereto and by this reference incorporated herein, made and executed by Assignor, as lessee, and John Lepiane and Ruth Lepiane, husband and wife, as Lessor, leasing the premises described as 715 West Poplar Avenue, Walla Walla, Washington (the "Leased Premises")."

The Assignment contains only an address for the subject property as to the purported lease. There is no legal description

contained in the Assignment. A street address of a property is not sufficient to satisfy the statute of frauds for leases which purport to be in existence for more than a year, or by extension for assignments of such leases. For platted property the statute of frauds requires the correct lot number(s), addition, city, county, and state. *Key Design, Inc. v. Moser*, 138 Wn.2d 875 at 882, 983 P.2d 653 (1999). (*Reaffirming Martin v. Seigel, supra.*)

There was no lease document with a legal description attached to the Assignment and the lease document described (between WG Nissan LLC and Lepiane) does not exist. Therefore the Assignment violates the statute of frauds and is likewise unenforceable.

D. The trial court's conclusion that the applicable statutes of frauds do not apply to the facts of this case is erroneous.

In its letter opinion informing the parties of the court's decision regarding the opposing motions for summary judgment (CP 97-98), the trial court stated that the purpose of the statute of frauds is to prevent frauds. The court went on to state that in order to accept the defendants' arguments regarding the application of the statutes of frauds would "...elevate form over substance in this case. That is not the purpose of the Statute of Frauds." (CP 98)

While few specific examples are readily apparent in the case law, Washington law does support strict application of the statutes of frauds in situations where the legal description in a conveyance of an interest in property is insufficient. Specifically, the courts have referred to the purpose of the statute of frauds as being "to prevent fraud arising from inherently uncertain oral agreements." *Maier v Giske*, 154 Wn. App. 6, 15 (2010). The requirements of the statutes of frauds "helps to create a climate in which parties often regard their agreements as tentative until there is a signed writing" including considering an agreement to be tentative if it does not contain a legal description. *Key Design, Inc. v. Moser*, *supra* at 887. "Washington courts have long held that to comply with the statute of frauds, a deed conveying land must describe the land conveyed in sufficient detail that it can be located without recourse to oral testimony . . . " and have gone so far as to say that an "agreement containing an inadequate legal description is void." *Maier*, 154 Wn. App. at 15. In fact, the Washington Court of Appeals has referred to the Washington rule (in regards to the statute of frauds) as the "strictest in the nation." *Id.*

One case in particular, *Carkonen v. Alberts*, 196 Wn. 575, 83 P.2d 899 (1938), stressed the importance of upholding the statute of

frauds where there had not been actual fraud. In *Carkonen*, the plaintiff employed the defendant, Alberts, (via oral agreement) as a real estate broker to negotiate on his behalf for the purchase of certain real property in King County. Alberts, however, purchased the property with his own money and then sold it for profit. Plaintiff brought suit against Alberts to establish a trust for the plaintiff in the proceeds from the sale of the property. The lower court dismissed the claim and the Washington Supreme Court affirmed, concluding that the agreement was not enforceable due to the statute of frauds. *Id.* at 576-577.

While much of the Court's discussion focused on whether a trust was created between Carkonen (as a broker) and Alberts, the Court ultimately determined that the case fell within the statute of frauds. Of note the Court discussed the danger of making exceptions to the statute of frauds, as dong so would virtually abrogate the statute. *See id.* at 588. The Court also noted that fraud cannot be predicated upon promissory statements, essentially concluding that a breach of a contract is not fraud. *See id.* at 608. Specifically the Court said:

> "While the breach of a mere verbal promise to purchase and convey land or negotiate as agent for the purchase of that land for a principal is a moral wrong, such breach is not a legal fraud, and, standing alone, is not a sufficient basis upon

> which to establish a constructive trust or a trust *ex maleficio.* We quote as apt, with reference to the conflict among the cases on the question presented, the following language from *Farrell v. Mentzer*, 102 Wn. 629, 174 P. 482: 'By no honest process of reasoning can the different decisions be harmonized or reconciled, and by no sophisticated reasoning should it be attempted to be done. . . . the statute of frauds is not an equitable doctrine, but is an absolute statute. . . . It may be that a strict application of the statute in some cases will operate to defeat a just claim, but that is not a sufficient reason for attempting to remove those cases from the operation of the statute.'"

Id. (emphasis added)

The Ninth Circuit quoted the *Carkonen* decision with approval in *Schlaadt v. Zimmerman*, 206 F.2d 782 (1953). In that case, the appellant contended that the respondent's oral promise to leave all of his property to her if she married him should be enforced despite the lack of a written agreement, otherwise the appellant would be defrauded. The Ninth Circuit disagreed, relying in part upon the decision in *Carkonen*, stating that a claim of fraud may not be predicated upon the mere non-performance of a promise. *Id.* at 784.

Despite the trial court's conclusions to the contrary, that is the situation present in this case. At most, the defendants failed to perform a promise. There is nothing in the facts of this case to support a claim that the defendants perpetrated a fraud on Lepiane, and so there is no basis for claiming that application of the statutes of

frauds in this case would have the effect of defrauding the Lepianes. Although it may be true that proper application of the statutes of frauds in this case would "elevate form over substance", that is in fact the nature of the statutes of frauds and without the proper "form" (written agreement with all of the necessary components) there is no "substance", as there is no enforceable agreement. The trial court erred by refusing to apply the statutes of frauds to the documents at issue in this case. The Court of Appeals should rectify that error by reversing the trial court's decision and properly applying the applicable statutes of frauds.

VI. CONCLUSION

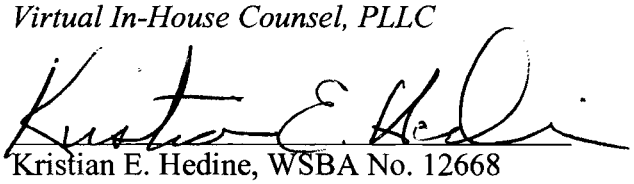
The Lepianes' underlying claims against the defendants stand or fall on the documents from which they derive. Those documents are clearly subject to the applicable statutes of frauds. Since those documents fail to comply with the statutes of frauds, and there is no applicable exception which would excuse the application of the statutes of frauds to those documents, the Lepianes' claims against the defendants must likewise fail.

The Court of Appeals should reverse the trial court's decision granting partial summary judgment in favor of the Lepianes and denying the defendants' motion for summary judgment and should

hold as a matter of law that the defendants are entitled to judgment in their favor on all of the Lepianes' claims against them.

Respectfully submitted this 18th day of May, 2011.

Virtual In-House Counsel, PLLC



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