

FILED

JUN 24 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 29649-1-III

JOHN LEPIANE and RUTH LEPIANE,
Plaintiffs/Respondents,

v.

IRREANTUM, LLC, MARK W. GILBERT and SUSAN G. GILBERT,
and WG NISSAN, LLC, Defendants/Appellants.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Appellants seek to void assignments of a commercial lease agreement and a personal guaranty under the statute of frauds because the documents inadvertently refer to the original lessee as a limited liability company rather than a corporation. In response to Respondents' motion for summary judgment, Appellants presented no facts suggesting that there was any confusion about the material terms of the lease or denying that the parties to the suit were the same parties to the transaction described in the various lease documents.

Because the original lease agreement contained a formal legal description of the subject property, and because the lease agreement was incorporated by reference into the subsequent assignments and personal guaranty, the trial court correctly held that the documents satisfied the statute of frauds. The trial court further held that Appellants had partially performed the agreement, thereby curing any technical defect in the written documents. Because the written agreements between the parties satisfy the statute of frauds, and because Appellants failed to present any questions of material fact obviating their liability under the written agreements, the trial court's judgment should be affirmed.

II. STATEMENT OF THE ISSUES

1. When a scrivener's error inadvertently refers to an entity party as a limited liability company rather than a corporation, is the error of sufficient magnitude to render the entire agreement void under the statute of frauds?
2. Do the assignments and the personal guaranty satisfy the statute of frauds by referencing and incorporating the original lease dated December 1, 2004, which contained a full legal description of the leased property?
3. By accepting the benefits of the lease and performing the obligations thereunder for two and one-half years before defaulting, did Appellants partially perform the agreement so as to cure any technical failure in the written documents?
4. Did Appellants fail to present a question of fact sufficient to defeat summary judgment when they did not dispute that they were parties to the transaction described in the various documents herein, or that they understood all the material terms of the lease agreement?

III. STATEMENT OF THE CASE

John and Ruth Lepiane leased a commercial property to Tri-City Nissan, Inc., for a five-year term under a written lease agreement dated December 1, 2004. Clerk's Papers (CP) 28. Exhibit A to the lease agreement set forth the legal description of the subject property. CP 32-39.

The lease was assigned first to WG Nissan, LLC, and then to Irreantum, LLC. CP 29, 62-64, 72-77, 79. Mark and Susan Gilbert personally guaranteed the performance of Irreantum, LLC, under the second assignment. CP 29, 41. While the assignments and the personal guaranty did not contain separate legal descriptions, all of them referenced the lease agreement dated December 1, 2004, between the Lepianes and Tri-City Nissan and included the street address of the leased property.

Irreantum, LLC, took possession of the property, paid rent and other amounts, and otherwise fulfilled all of the obligations arising under the lease agreement for approximately two and one-half years. CP 29, 104, Verbatim Report of Proceedings (RP) 10. One year before the tenancy expired, Irreantum, LLC, breached the lease by ceasing to pay rent, property taxes, and utilities. CP 29-30. This action for damages commenced, and the parties filed competing motions for summary judgment. CP 1-15, 24-27, 48-49.

As in this court, Appellants claimed that the assignments and the personal guaranty failed to satisfy the statute of frauds because of two minor scrivener's errors:

- (1) The personal guaranty inadvertently referred to the original lessor as "Tri-City Nissan, LLC" rather than "Tri-City Nissan, Inc." CP 41, 51-52, RP 5-6.
- (2) Both assignments, which are nearly identical in form and content, referred to:

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 property described as 715 West Poplar Avenue, Walla Walla, Washington ('the Leased Premises'). CP 62-64, 72-77, RP 6-7.

No lease agreement was attached to either assignment.

Appellants contend that these errors are material because the original lease was with Tri-City Nissan, Inc., not Tri-City Nissan, LLC, and because the second Assignor was not a party to the original lease agreement. Based on these minor drafting errors, Appellants then make an extraordinary metaphysical leap to assert that the lease agreement referenced in the assignment documents does not exist. CP 52, 54. However, Appellants did not deny that they executed the assignment

documents or that they were the proper parties to the transaction described in the documents. Nor did Appellants deny that they occupied the property and performed the tenant's obligations for two and one-half years before defaulting. CP 104; *see also* Appellant's Brief at p. 3.

Concluding that the assignment documents and the personal guaranty adequately set forth the material terms of the parties' agreement by reference to the December 1, 2004, lease agreement, and that the lease agreement contained an adequate legal description of the subject property, the trial court granted summary judgment to Respondents on the issue of liability. CP 97-101. Shortly before trial on the issue of damages, the parties stipulated to entry of judgment in Respondents' favor, reserving to Appellants the right to appeal. CP 115-18, RP 17-18. This appeal timely followed. CP 119-29.

IV. ARGUMENT

All of the material terms of the agreement between the parties were thoroughly documented. Consistent with the terms of the agreement, Appellants occupied the property, paid the rent, utilities, and property taxes, and conducted their business there for over two years. Now, Appellants want to be relieved of the burdens of their agreement (after accepting its benefits) on grounds that are hyper-technical at best, and

frivolous at worst. The written agreements fully satisfy the requirements of the statute of frauds, and Appellants' acceptance and full performance of the lease terms for over two years demonstrates that any minor defect in how the documents were drafted was not so significant as to affect the parties' understanding of the material terms. The trial court was correct to grant summary judgment to Respondents, and this Court should affirm.

In reviewing a ruling on a motion for summary judgment, the appellate court considers the legal issues *de novo* and views the facts in the light most favorable to the non-moving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Once the moving party meets its burden to show the absence of any material fact, the burden shifts to the non-moving party to set forth specific facts rebutting the moving party's contentions and showing that an actual factual dispute exists. *Greenhalgh v. Dept. of Corrections*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011). Mere allegations, conclusory statements, argumentative assertions, and speculation are inadequate to create triable issues that defeat summary judgment. *Id.*

Summary judgment is appropriate when the pleadings, admissions and affidavits on file show there is no genuine issue about any material fact, and the moving party is entitled to judgment as a matter of law.

Fidelity & Deposit Co. of Maryland v. Dally, 148 Wn. App. 739, 743, 201 P.3d 1040 (2009).

A. The written documentation of the parties' agreement satisfies the statute of frauds by including all material terms of the agreement.

Respondents certainly do not dispute that agreements to lease property for more than one year must be in writing and include all material terms to be enforceable. Rather, they dispute Appellants' claim that the written documents in this case fail in any material way.

The lease in this case contained a full legal description of the property to be leased at Exhibit A, as required. CP 39; *Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960). The assignments and the personal guaranty contained specific references to the December 1, 2004, lease agreement as the document being assigned and guaranteed. CP 41, 62-64, 72-77. A reference to a document containing a full legal description has long been recognized to satisfy the statute of frauds. *Id.* These documents do so.

Specifically, the assignments both refer to the document being assigned as "the lease dated December 1, 2004 ('Lease'), made and executed by Assignor, as Lessee, and John Lepiane and Ruth Lepiane as

Lessor, leasing the premises described as 715 W. Poplar, Walla Walla, Washington.” CP 62-64, 72-77. The assignments thus referenced the lease by date, by the parties thereto, and by the property to be leased. The reference was certainly adequate for the parties to know what document was being assigned, and the reference to the lease – which contained a full legal description of the leased property – was sufficient to identify the property to be leased without recourse to oral testimony. *See Knight v. American Nat. Bank*, 52 Wn. App. 1, 5, 759 P.2d 757 (1988).

Likewise, the personal guaranty signed by the individual Appellants stated,

[I]n order to induce Lessors’ consent for an assignment of lease to Irreantum, LLC, do hereby agree to personally guarantee the performance of that certain Lease dated December 1, 2004 between John and Ruth Lepiane, husband and wife, as Lessors, and Tri-City Nissan LLC, as Lessee, and Irreantum, LLC, as Assignee.

CP 41. Once again, the lease agreement – which contained a full legal description of the subject property – was specifically referenced by date and parties thereto. Notably, the personal guaranty also references the assignment to Irreantum, LLC, and establishes that the purpose of the guaranty is to ensure that the assignment to Irreantum, LLC, would be acceptable to Respondents. CP 41. That assignment, as noted above, also

references the December 1, 2004, lease agreement with considerable specificity. CP 62-64.

Thus, all of the documents obligating Appellants in this case referenced the original lease agreement, which contained an adequate legal description. The references are sufficient to satisfy the statute of frauds. Appellants rest their entire argument that their obligations should be null and void on the misidentification of Tri-City Nissan as a limited liability company rather than a corporation in the personal guaranty. But Appellants failed to raise any question of fact as to their intention to assume and guarantee the lease with Tri-City Nissan, Inc. Thus, summary judgment was appropriately granted.

B. Appellants failed to raise any issue of fact sufficient to defeat summary judgment because they did not dispute that they intended to assume and guarantee the lease with Tri-City Nissan, Inc.

Once again, Appellants rely on peculiar metaphysical assertions and speculative hypotheticals to argue that a written lease agreement does not exist because the original lease agreement was with Tri-City Nissan, Inc., rather than Tri-City Nissan, LLC. Of course, the lease agreement demonstratively *does* exist (CP 32-39); the only question raised by the discrepancy between the corporate identifiers is whether it constituted a

minor scrivener's error (as argued by Respondents, CP 82-83, RP 11-12), or evidenced a fundamental lack of meeting of the minds between the parties. In the Declaration of John Lepiane, Respondents asserted the basic facts constituting the transaction. CP 28-30. Respondents attached a copy of the lease agreement with Tri-City Nissan, Inc., to the Declaration. CP 32-39. The declaration asserted that the lease agreement was assigned first to WG Nissan, and then to Irreantum, LLC. CP 29. The declaration also established that the lease was personally guaranteed by Mark and Susan Gilbert upon being assigned to Irreantum, LLC. CP 29. Appellants did not contest any of these facts and further, did not present any facts, by affidavit or otherwise, that their intention was anything other than to assume and guarantee the lease with Tri-City Nissan, Inc. – the same lease attached to the Declaration of John Lepiane.

Because Appellants did not allege that the transaction was anything other than what Respondents asserted it to be, there was no question that they intended to assume and guarantee the lease with Tri-City Nissan, Inc., regardless of the misstated corporate identifier in the personal guaranty. Accordingly, Respondents argued that reformation of the guaranty to correct the misstated identifier was the appropriate remedy. CP 82-83, RP 11-12; *see Snyder v. Peterson*, 62 Wn. App. 522, 526-27, 814 P.2d 1204 (1991).

In *Snyder*, the court considered whether a deed that lacked a sufficient legal description could be reformed on the grounds that the omission constituted a scrivener's error or resulted from the mutual mistake of the parties. 62 Wn. App. at 524. The *Snyder* court stated,

[w]here there has been an agreement actually entered into which the parties have attempted to put in writing, but have failed because of a mistake either of themselves or of the scrivener, the courts having jurisdiction in matter of equitable cognizance have power to reform the instrument in such a manner as to make it express the true agreement.

62 Wn. App. 526 at n. 4 (citations omitted). In *Snyder*, as in this case, there was no factual question as to what the parties intended. 62 Wn. App. at 527. Accordingly, reformation of the agreement to correct the deficiency was permitted.

Similarly here, Appellants never attempted to claim that they intended to assume a lease with Tri-City Nissan, LLC, and not the lease with Tri-City Nissan, Inc. Instead, they rely on speculative claims of possible confusion by third-parties and the hypothetical possibility that some such entity known as Tri-City Nissan, LLC, might exist. *See, e.g.*, CP 53-54, 89, RP 5, 8. But hypothetical contingencies and argumentative assertions of confusion, without more, are insufficient to create a question of material fact. *Greenhalgh*, 160 Wn. App. at 714. As such, there was

no actual dispute over what the parties intended, and what they intended was to assign, assume, and guarantee the lease with Tri-City Nissan, Inc.

In its memorandum ruling, the trial court observed with respect to the assignment documents, “No party is claiming they are not genuine, that they were not signed by the parties thereto, or that there was a misunderstanding as to their purpose in this overall transaction.” CP 98. In other words, Appellants presented no material facts that would call into question the applicability of the documents entered into the court record to their transaction with the Lepianes. Absent any evidence of a contrary intent, reformation of the scrivener’s error erroneously referring to Tri-City Nissan as a limited liability company rather than a corporation was appropriate, and such reformation completely defeats Appellants’ claim that the lease agreement referenced in the assignments and the personal guaranty somehow does not exist.

As observed by the trial court, Appellants are simply trying to elevate form over substance in this case by arguing that confusion *could* exist without claiming that it actually did. CP 98. But mental exercises are not factual, triable disputes. The trial court did not err in granting summary judgment to Respondents on the grounds that the statute of frauds was satisfied.

C. Appellants' partial performance of the lease agreement for two and one half years constituted a sufficient performance to overcome any minor deficiency in the written documents.

Even if, notwithstanding the absence of any factual dispute as to what the parties intended, the misstatement of the corporate identifier was such an egregious error as to void the agreement under the statute of frauds, Appellants amply demonstrated through their actions subsequent to the assignment and guaranty (which were also not disputed) that they were not confused about what the agreement was. Moreover, for more than two years, Appellants occupied the property and complied with all the requirements of the lease, including the payment of rent, utilities and property taxes. And Appellant Mark Gilbert acknowledged the lease and the assignment when he informed Respondents' attorney that he was sending "the final months [sic] rent" thirteen months before the end of the lease term. CP 45. Under these circumstances, there is adequate part performance to bring the lease agreement, assignments, and personal guaranty outside of the statute of frauds for enforcement purposes.

Ben Holt Industries, Inc. v. Milne, 36 Wn. App. 468, 675 P.2d 1256 (1984), establishes the applicable standard for enforcing a lease that has been partially performed, but fails under the statute of frauds. In *Ben*

Holt, the lease agreement was incorrectly acknowledged using the individual form rather than the corporate form. 36 Wn. App. at 472-73. The lease was, therefore, defective under the statute of frauds. Nevertheless, the *Ben Holt* court considered the circumstances of the transaction to determine whether there was sufficient clarity as to the parties' intentions to apply the doctrine of part performance and determined that the agreement was enforceable notwithstanding the technical defect in the writing. 36 Wn. App. at 475-76.

Observing that the purpose of the statute of frauds is to prevent fraud, rather than encourage it, the court in *Ben Holt* noted that the primary concern of the court in such circumstances is whether there is sufficient proof of the agreement to remove doubt as to the parties' intentions. 36 Wn. App. at 475 (citing *Miller v. McCamish*, 78 Wn.2d 821, 828-29, 479 P.2d 919 (1971)). Thus, the court should consider first whether there is proof of an agreement that is clear and unequivocal. *Ben Holt*, 36 Wn. App. at 475. Second, acts relied upon to establish part performance must point to the existence of the claimed agreement. *Id.* at 476.

In *Ben Holt*, the first requirement was met because the written lease agreement was entered into evidence and the parties admitted that

they signed it and intended to enter into a lease. 36 Wn. App. at 475-76. Similarly here, the written lease, assignments, and personal guaranty were all admitted into evidence. CP 32-39, 41, 62-64, 72-77. In the Declaration of John Lepiane, Respondents established that the lease was entered, assigned first to WG Nissan, LLC, and then to Irreantum, LLC, upon the execution of the personal guaranty of Mark and Susan Gilbert. CP 28-29. The documents are signed by the parties herein and correctly acknowledged. Appellants controverted none of these facts and, indeed, appear to admit them here. *Appellants Brief*, pp. 2-3.

The second requirement was met in *Ben Holt* by possessing the property and paying the rent, including an increased rent under a second lease agreement, for more than one year. 36 Wn. App. at 476. The tenant in *Ben Holt* never informed the landlord that he believed they were on a month-to-month tenancy. *Id.* Again, in this case, Appellants occupied the property subject to the lease and conducted their business on it. CP 104, RP 10. The lease required payment of rent, utilities, and property taxes, all of which requirements were performed until the final breach in November 2008. CP 32. And, in announcing their intention to vacate the property and cease paying rent thirteen months before the expiration of the

lease term, Appellants acknowledged the existence of the lease, claiming merely that they had misunderstood its length.¹ CP 45.

As in *Ben Holt*, the trial court in this case determined that there was part performance of the terms of the lease. CP 98. Thus, even if the accidental reference to Tri-City Nissan, LLC, rather than Tri-City Nissan, Inc., caused the written agreements to be invalid, nevertheless, the acts of the parties demonstrated that they intended to assume and guarantee the terms of the lease and, in fact, did so for almost two and one-half years. The *Ben Holt* court observed that to invalidate a partially performed lease for a technical defect does not prevent fraud or uncertainty, but rather, enhances it. 36 Wn. App. at 476. Appellants here raised no questions about the lease while they accepted its benefits and operated their car dealership there. Having sought and received the benefits of the lease, they should not be permitted to escape its obligations over minor technical misstatements. The trial court was correct to find that invalidating the lease in this case would elevate form over substance, and its order granting summary judgment to Respondents should be affirmed.

¹ Appellants refer to correspondence exchanged between Appellant Mark Gilbert and former counsel for Respondents to suggest that there was confusion as to the term of the lease. Appellants did not raise the issue of confusion below and are thereby precluded from asserting it for the first time on appeal. RAP 2.5(a); *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 621, 358 P.2d 975 (1961). Moreover, except for one letter from Appellant Mark Gilbert, the referenced correspondence is not part of the record on appeal. Consequently, the record is not adequate for this court to consider the issue.

D. Respondents should be awarded their attorney fees and costs on appeal.

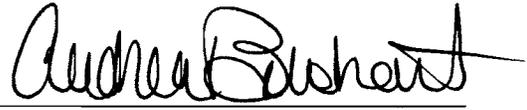
The lease agreement in this case provides that in “any action by way of enforcement or interpretation of this lease . . . the prevailing party hereunder shall be entitled to a reasonable sum for and as attorney fees and costs incurred.” CP 34. This appeal is an action to enforce the lease by defending the judgment entered in Respondents’ favor below. Similarly, the judgment entered in this case expressly reserved to Respondents the right to recover post-judgment attorney fees and costs incurred in attempting to collect the judgment. CP 116. Similarly, defending this appeal is an attempt to protect the judgment for collection.

Attorney fees are recoverable if they are authorized by contract, statute, or recognized equitable grounds. *Bowles v. Wash. Dept. of Retirement Systems*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). Such authorized fees are recoverable on appeal as well as in the trial court. RAP 18.1(a). Respondents respectfully request that this court award them their attorney fees and costs on appeal under the terms of the lease and the stipulated judgment herein.

V. CONCLUSION

The question presented in this case is whether a minor technical defect in written lease documents establishes grounds to invalidate the entire transaction when there was no actual misunderstanding as to what was intended, when the Appellants did not assert any facts indicating that the technical defect was anything other than a minor scrivener's error subject to reformation, and when Appellants acknowledged, undertook, and performed the lease for over two years before ultimately breaching. Notwithstanding Appellants' mental gymnastics in attempting to transform the error from something minor to something material, it remains the case that Appellants' objections are all speculative and hypothetical assertions of confusion, insufficient to meet their burden in opposing summary judgment. There was, and is, no question of material fact for a jury to determine in this case, and both the written lease documents and the undisputed actions of the parties demonstrate that Respondents were, and are, entitled to judgment as a matter of law. The order granting Respondents' motion for summary judgment and denying Appellants' motion for summary judgment should be affirmed, and Respondents awarded their attorney fees and costs for defending this appeal.

RESPECTFULLY SUBMITTED this 23rd day of June, 2011.

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written in a cursive style. The signature is positioned above a horizontal line.

Andrea Burkhart, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the Brief of Respondents upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 23rd day of June, 2011 in Walla Walla, Washington.


Andrea Burkhart