FILED

SEP 25 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 308405

Spokane County Superior Court Cause No. 11-2-01768-5

PEYTON BUILDING, LLC, a Washington
Limited Liability Corporation,

Respondent,

v.

NIKO's GOURMET, INC., a Washington Corporation;
LAITH and ABIR ELAIMY, a marital community,

Appellants.

REPLY BRIEF

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I. ARGUMENT

SUPPLEMENTAL FACTS

Appellants Laith Elaimy and Abir Elaimy filed a Petition in Bankruptcy in the United States Bankruptcy Court, Eastern District of Washington in 2012, subsequent to the date of filing Appellants' Opening Brief on June 8, 2012. On December 18, 2012, an Order was entered pursuant to 11 USC §554(a) that the Trustee abandoned the following property:

> (a) Appeal case #308405, Spokane County Superior Court Case #11-2-017685-5.

Laith Elaimy and Abir Elaimy, husband and wife, were only affected by the Notice of Abandonment. Niko's Gourmet, Inc., a Washington corporation, did not file bankruptcy. It is involved as a party in this appeal. Elaimy has filed a motion to supplement the record as to the Notice and Order of Abandonment.

Elaimy and Niko's Gourmet, Inc. shall hereinafter collectively both be referred to as "Elaimy". Peyton Building, L.L.C. shall hereinafter be referred to as "Peyton".

A. PEYTON WRONGFULLY CONTENDS THERE ARE NO GENUINE ISSUES OF MATERIAL FACT.

There are genuine issues of material fact. The amount of rent due was disputed (CP 46-48, 68). The Affidavit of Elaimy controverts the Affidavit of Bantz (CP 24-26, 68). There are also issues of fact concerning the existence, validity and amount of Landlord's lien in the foreclosure (CP 48). Further, there are issues of material fact as to the foreclosure of the Landlord's lien for two months rent and whether it was timely commenced to preserve the lien (CP 67-68). *Paris American Corp. v. McCausland*, 52 Wn.App. 484, 757 P.2d 1210 759 (1988). There was an issue of fact as to whether or not there was a conversion of the personal property and if so the amount and value of the personal property (CP 46-49) (CP 116-117). The summary judgment was improper.

B. PEYTON CONTENDS IT HAS STANDING WITHOUT AN ASSIGNMENT OF LEASE.

The Landlord's lien establishment is strictly construed against the Landlord. *Paris American Corp. v. McCausland et al., supra.*

Peyton did not have an Assignment of Lease from Pacific Security Financial, Inc. It had no standing to enforce the lease or the guarantee. Elaimy pleaded lack of standing in their affirmative defense in their Answer (CP 38-39). Peyton was not in privity in contract with Elaimy (CP 38). Elaimy admitted in its pleadings that the terms and conditions of

the pre-existing lease with Pacific Securities was the lease that they were operating under. However, it would be under an oral arrangement. Peyton cannot assert any of the covenants of the lease, because it is not the real party in interest. CR 17(a) requires every action shall be prosecuted in the name of the real party in interest. RCW 4.08.080 requires an assignment where the fact of an assignment is put in issue. Peyton cannot assert any rights under the lease, nor under the guarantee, because it had no assignment of the documents. *Unifund CCR Partners v. Sunde,* 163 Wn.App. 473, 260 P.2d 915 (2011). Here the assignment was put in issue (CP 38). Peyton is an oral month to month tenant.

C. PEYTON CONTENDS THAT IT CAN ENFORCE THE GUARANTY WITHOUT AN ASSIGNMENT.

The Court entered judgment against Elaimy individually under the guaranty (CP 155-156). Peyton did not receive nor take an assignment of the guaranty. A guaranty is governed by terms of contract. The terms of the guaranty are strictly construed. There is no contract of guaranty between Peyton and Elaimy. Peyton cites no authorities to support its position. Therefore no judgment should have been taken against Elaimy and the community.

D. PEYTON CONTENDS IT DID NOT SEEK TO FORECLOSE LANDLORD'S LIEN.

Peyton admitted it did not foreclose the lien because of the secured interest of Washington Trust Bank and IRS and "any attempt to foreclose would be fruitless". (Page 11 of Peyton Brief). Peyton in its amended Complaint sought foreclosure (CP 3).

Peyton and Elaimy in a separate lawsuit entered into a Stipulation and Agreed Order stating:

> . . . Defendants specifically recognize Plaintiffs' claim to a lien on such inventory, equipment and fixtures, pursuant to RCW 60.72.010. Defendants also acknowledge the security interest of Washington Trust Bank in such property identified in this paragraph, and that Plaintiff and Washington Trust Bank will be negotiating in the future over the disposition of such property. The IRS makes a claim to this property as well (CP 54). (Emphasis added.)

This Stipulation was drafted by the Landlord's attorney. The Landlord, in effect, claimed a lien pursuant to RCW 60.72.010 (CP 54). Elaimy and Peyton specifically recognized the lien (CP 54). Once the lien is claimed there is a statutory limit of time in which to foreclose and the amount is limited to two months of rent past due on foreclosure. There is no question that possession was taken of the personal property pursuant to the Stipulation wherein the lien was asserted (CP 54). Peyton took

possession of the personal property under the stipulation regarding the lien and maintained possession of all personal property thereafter (CP 54). The Landlord's lien statute is strictly interpreted against the Landlord claiming the lien. *Paris American Corp. v. McCausland, supra.* Peyton had a duty and obligation under RCW 60.72.040 to properly and timely foreclose the lien for two months' rent and failure to do so resulted in a conversion. *Kohout v. Brooks*, 185 Wash. 4, 9, 52 P.2d 905 (1935), *Paris American Corp. v. McCausland*, 52 Wn.App. 438, 759 P.2d 1201 at Page 443. Peyton retained possession of the personal property and never returned it to Elaimy (CP 116-117).

Peyton had the obligation if it did not foreclose the lien to return the personal property that it took possession of to Elaimy. This Court should rule clearly that Peyton is guilty of conversion.

Under this same heading, Peyton argues that judicial estoppel operates to prevent Elaimy from claiming ownership interest in the inventory and equipment. Peyton contends that Elaimy is "taking a contrary position to the position it took when it entered into the Stipulation with Washington Trust Bank". (Peyton Brief, Page 14).

Elaimy did not take a contrary position with Washington Trust Bank. Paragraph 6 of the Stipulation and Order with Washington Trust reads:

> 6. WTB is entitled to an order of possession of, and foreclosure on, Niko's inventory, chattel paper, accounts, equipment, general intangibles, and fixtures, and an order that the same may be sold at a private sale pursuant to Uniform Commercial Code, or at Sheriff's sale (CP 60).

Washington Trust abandoned the right to foreclose on the fixtures and equipment and only proceeded against the wine inventory. Judicial estoppel is not present (CP 67, 117).

In *Kellar v. Estate of Kellar*, 172 Wn.App. 562, at Page 579, the Court said:

> Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a Court proceeding and later seeking an advantage by taking a clearly inconsistent position. . . . In determining whether the doctrine applies, we look at three primary considerations: (1) whether a party's later position is clearly inconsistent with its earlier position, (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second Court was misled, and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage, or impose an unfair detriment on the opposing party, if not estopped. *Arkison,* 160 Wn.2d at 538-39. These factors are not an exhaustive formula and additional considerations may guide a Court decision.

The additional consideration is a key factor. The additional considerations require that a judgment must have been rendered, and the position must be clearly inconsistent and that the parties in question must

be the same. These factors necessary to constitute judicial estoppel are missing in these proceedings. Judicial estoppel does not apply.

E. PEYTON WRONGFULLY CONTENDS IT WAS NOT UNJUSTLY ENRICHED.

Peyton took possession of the personal property owned by Elaimy recognizing the Landlord's lien. Peyton did not foreclose on the personal property (67-68). Foreclosure would be only for two months rent. Without foreclosure, title remained in Elaimy. Peyton should have returned possession of the personal property to Elaimy. Peyton was unjustly enriched. Elaimy sought an offset of the value of the equipment against the unpaid rent (CP 68-69). This offset would have more than satisfied the rent and left some residue of overage which Peyton retained and was unjustly enriched (CP 69). The equipment had a value of over $100,000.00 (CP 92-93). Elaimy fixed the value at $60,000.00 (CP 48). Two months rent is $15,866.00 (CP 47). Peyton was substantially unjustly enriched by retention of the equipment as it was entitled to the lien amount on the foreclosure.

II. CONCLUSION

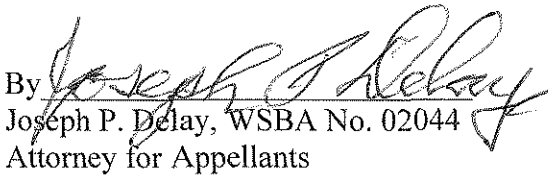
Peyton, having taken possession of the personal property, and the other lien claimants, namely the IRS and Washington Trust, having abandoned their lien interest, had the obligation to foreclose the

Landlord's lien timely. The lien is valid only for two months. Peyton failed to foreclose the lien. Since the statute is strictly construed against the Landlord, Elaimy seeks to the relief sought in its opening brief including a dismissal of the claim against Elaimy and the community under their guaranty. This Court should find that Peyton converted the personal property in failing to foreclose the lien and the amount converted should be an offset against the unpaid rent. The Summary Judgment should be reversed and Elaimy be awarded attorney fees as the prevailing party and their costs.

Dated this 24 day of September, 2013.

Respectfully Submitted.

DELAY, CURRAN, THOMPSON, PONTAROLO & WALKER, P.S.

By 
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