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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 308405

STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

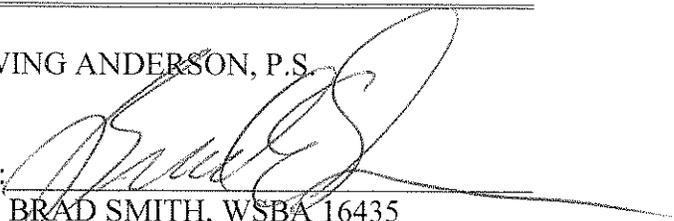
PEYTON BUILDING, LLC, a Washington Limited Liability Corporation,
Respondent/Plaintiff

vs.

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

BRIEF OF RESPONDENT

EWING ANDERSON, P.S.

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| I. ISSUES ON APPEAL | 1 |
| II. STATEMENT OF THE CASE..... | 1 |
| III. SUMMARY OF THE FACTS | 1 |
| IV. STANDARD OF REVIEW | 5 |
| V. RESPONSES TO APPELLANTS' ARGUMENTS..... | 5 |
| A. There Is No Genuine Issue Of Material Fact As To The Amount Of Damages Niko's Owes As A Result Of Its Breach Or Default Under The Lease | 5 |
| B. Peyton Has Standing To Enforce The Lease With Niko's As Evidenced By Peyton And Niko's Past Dealings And Laith Elaimy's Affidavit | 8 |
| C. Peyton Can Enforce The Guarantee Against The Guarantors..... | 9 |
| D. Peyton Is Not Seeking, And Did Not Seek, To Enforce Or Foreclose Upon A Landlord's Lien Against The Appellants..... | 11 |
| E. Peyton Did Not Attempt To Foreclose On A Landlord's Lien, And Niko's Forfeited All Of Its Rights In The Property To Washington Trust Bank, Thus There Was No Conversion..... | 15 |
| F. Peyton Was Not Unjustly Enriched And Did Not Convert Niko's Property When Niko's Willfully And Knowingly Surrendered All Rights To That Property In A Stipulation With Washington Trust Bank..... | 16 |
| VI. MOTION FOR ATTORNEY FEES | 17 |
| VII. CONCLUSION | 17 |

TABLE OF AUTHORITIES

Page

TABLE OF CASES

Jones v. Allstate Ins. Co.
146 Wn.2d 291, 300, 45 P.3d 1068, 1073 (2002).....5

Xio Ping Chen v. City of Seattle
153 Wn.App. 890, 898-99, 223 P.3d 1230, 1234 (2009).....5

Knight v. Am. Nat. Bank
52 Wn.App. 1, 9-10, 756 P.2d 757, 762 (1988).....6,8

Johnson v. Si-Cor Inc.
107 Wn.App. 902, 904, 28 P.3d 832, 833 (2001).....14

Washington Trust Bank v. Niko’s Gourmet/Elaimy
Spokane County Cause No. 11-2-01283-714

REGULATIONS AND RULES

RCW 60.72.01012,13

I. ISSUES ON APPEAL

Respondent is satisfied with Appellants' statement of issues.

II. STATEMENT OF THE CASE

This case involves enforcement of a Commercial Lease in downtown Spokane. Appellants, who were the the Lessee and Lease Guarantors, admit they were in breach, and admit they signed stipulations with Respondent and other interested entities forfeiting rights to all equipment, inventory, and personal property in the premises, yet they now seek to offset the admitted damages for their breach with meritless claims over the value of the forfeited property. The trial court granted summary judgment in Respondent's favor, which should be upheld on appeal.

III. SUMMARY OF THE FACTS

On May 20, 2002, Niko's Gourmet, Inc., a Washington corporation, ("Niko's") and Pacific Security Financial, Inc., a Washington corporation, entered into a "Commercial Space Lease" ("Lease") for property located in the Peyton Building at 10 N. Post Street in Spokane, Washington. (CP 6-23). The Lease was to run from September 1, 2002, to the last day of August 2012. (CP 6-23). Laith and Abir Elaimy, a marital community, ("Guarantors") signed as personal guarantors of the Lease. (CP 20). In 2003, Respondent Peyton Building, LLC ("Peyton") purchased the Peyton

Building from Pacific Security and became the successor-in-interest to the Lease. (CP 124).

On February 23, 2011, Niko's was in default or breached the Lease by failing to pay rent and other charges. (CP 2). On or around March 11, 2011, Peyton brought an unlawful detainer action against Niko's. (CP 54). In order to resolve the issues relating to possession of the premises, Niko's, by and through its attorney, signed a "Stipulation and Agreed Order on Eviction Complaint for Unlawful Detainer" ("Stipulation"). (CP 53-56). Part of the Stipulation included a provision that Niko's would surrender certain property to Peyton:

Defendant agrees to surrender the Property to Plaintiff together with all non-perishable inventory (specifically including all wine and other alcoholic beverages), restaurant equipment and trade fixtures.

(CP 54).

In addition to the Stipulation between Peyton and Niko's, Washington Trust Bank filed an action as a secured creditor against Niko's for Niko's default on a promissory note. (CP 51; 59-61). On May 23, 2011, Washington Trust Bank and Niko's entered into a "Stipulation and Order for Possession and Foreclosure of Collateral" which provided that Washington Trust Bank is entitled to possession of and foreclosure on "Niko's inventory, chattel paper, accounts, equipment,

general intangibles, and fixtures....” (CP 59-61) Around the same time, the Internal Revenue Service filed a Federal Tax Lien against Niko’s Gourmet, Inc., which attached to certain property, including “fixtures, furnishings, and equipment.” (CP 63). On or around October 31, 2011, Peyton was able to re-let the premises, effectively mitigating Niko’s damages. (CP 34).

The aforementioned Stipulation between Peyton and Niko’s specifically provided that Washington Trust, Peyton, and the IRS would be negotiating as to the final disposition of Niko’s property after it was surrendered:

Defendant also acknowledges 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 claim to this property as well.

(CP 54). This is exactly what happened. Once the Stipulation with Washington Trust Bank was signed, the bank took possession of the wine (the most valuable inventory), and entered into negotiations with Peyton and the IRS to determine the disposition of the rest of the property. (CP 121-22; 51) The IRS ultimately released its lien, and Peyton took possession of the remaining equipment, furnishings, and personal

property, concluding its negotiations with Washington Trust Bank. (CP 51).

On May 20, 2011, Peyton filed its Amended Complaint for Breach of Commercial Lease and Foreclosure of Landlord's Lien against Niko's and Guarantors seeking damages resulting from Niko's breach or default on the Lease. (CP 1-3). On January 22, 2012, Peyton filed its Motion for Summary Judgment with an accompanying Declaration of Alison Bantz, which detailed the amount of money Niko's owed as a result of its breach or default on the Lease. (CP 36; 24-30). The amount of damages at that time was calculated to be \$104,558.08. (CP 25). On March 9, 2012, the court granted Peyton's motion, holding there were no genuine issues of material fact, and entered a judgment against Niko's and Guarantors for \$104,558.08 plus costs. (CP 141). On February 24, 2012, Niko's filed a Motion for Reconsideration arguing, in part, that Peyton did not have title to the property that was surrendered under the Stipulation, and that they were not successors-in-interest to the lease. (CP 104-115). On April 17, 2012, the court entered an Order on Motion for Reconsideration denying Niko's motion. (CP 149-152). Niko's subsequently brought this appeal. (CP 153-160).

IV. STANDARD OF REVIEW

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068, 1073 (2002). Summary judgment is appropriate when “the pleading, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” CR 56(c). A material fact is a fact in which the litigation depends in whole or in part. Xio Ping Chen v. City of Seattle, 153 Wn.App. 890, 898-99, 223 P.3d 1230, 1234 (2009). All reasonable inferences are drawn in favor of the nonmoving party. Id.

V. RESPONSES TO APPELLANTS’ ARGUMENTS

A. **There Is No Genuine Issue Of Material Fact As To The Amount Of Damages Niko’s Owes As A Result Of Its Breach Or Default Under The Lease.**

The Appellants argue that there is a genuine issue of material fact as to the amount owed under the Lease, which would preclude summary judgment. (Appellants Opening Brief at 7). Their argument is without merit. “Damages for breach of a lease should, as a general rule, reflect a compensation reasonably determined to place the lessor in the financial

position he would have occupied had the breach not occurred.” Knight v. Am. Nat. Bank, 52 Wn.App. 1, 9-10, 756 P.2d 757, 762 (1988). This position is easily calculated in the present case.

The amount of rent Niko’s owed each month, including applicable late fees, is clearly provided for in the lease. (CP 07). Niko’s is only responsible for unpaid rent from the time of its breach through October 2011, at which time the premises was re-let, effectively mitigating Niko’s damages. (CP 24-25; 34) The *new* tenant’s occupancy and duty to pay rent commenced on November 1, 2011, which is why Nikos Gourmet, Inc. is only responsible for unpaid rent through October 2011. (CP 98). Furthermore, the Lease provided that Niko’s would be responsible for any consequential damages resulting from its breach or default on the lease:

Lessee agrees to indemnify Lessor against and save Lessor harmless from any and all loss, cost, liability, damage and expense including, without limitation, penalties, fines and reasonable attorney fees, incurred in connection with...
(a) any default by Lessee in the observance or performance of any of the terms, covenants, or conditions of this Lease...

Thus, to place Peyton in the “financial position he would have occupied had the breach not occurred,” Niko’s owes damages equaling the unpaid rent plus consequential damages. Knight, 52 Wn.App at 9-10; 756 P.2d at 762.

Peyton filed a declaration by Alison Bantz, property manager for Peyton, which detailed the amount of rent past due, plus a breakdown of the consequential damages; this declaration was accompanied by ledger statements evidencing the charges. (CP 24-30).

Niko's responded with several affidavits from Laith Elaimy, one of the Guarantors and Niko's principal. (CP 49-49, 66-69). These affidavits form the basis for Niko's current argument that the damages arising from the admitted breach total only \$76,540.97, less than the amount awarded in the final judgment entered by the trial court. However, a close examination of those affidavits show that they fail to raise a genuine issue of material fact necessary to avoid summary judgment. The amount of accrued rent is not in dispute – Elaimy merely fails to account for the additional month of October 2011, and offers no argument against the contention that this month was due and owing before the new tenant began paying rent. Niko's does not dispute the damages for lease commissions and attorney fees (CP 68), and offers no factual or legal argument that the other consequential damages are not recoverable as damages under the lease. Rather, Elaimy only makes the unsupported legal conclusion in his Affidavit that the Lease does not provide for specific damages. (CP 49). This is insufficient to counter established Washington law which requires

the landlord to be placed in the position they would have occupied had the breach not occurred. Knight, supra, at 9-10.

Any issue concerning the “value” of the disputed equipment and inventory is moot, as argued below in Part V.D. Thus, there is no genuine issue of material fact regarding the amount of past due rent and consequential damages proven by Peyton. The trial court was correct in granting summary judgment.

B. Peyton Has Standing To Enforce The Lease With Niko’s As Evidenced By Peyton And Niko’s Past Dealings And Laith Elaimy’s Affidavit.

Appellants argue that Pacific Security Financial, Inc. failed to assign the lease to Peyton Building, LLC, thus Peyton has no standing to enforce either the Lease or the guarantee. (Appellants Opening Brief at 8). When Peyton Building, LLC purchased the Peyton Building from Pacific Security Financial, Inc. in 2003, all of the tenants were notified. (CP 124). At no time prior to the commencement of the underlying action in this case did Niko’s ever object to Peyton’s right to enforce the Lease. (CP 124). Additionally, Peyton initiated legal proceedings against Niko’s and sent tenant default letters in the past, specifically identifying Peyton as the new owner/landlord, and at *no* time did Niko’s or Guarantors *ever*

object to Peyton's right to enforce the Lease or argue that Peyton was not Pacific Security's successor-in-interest. (CP 124-125).

Perhaps most damaging to the Appellants' argument that Peyton cannot enforce the Lease is the fact that one of the Guarantors and Niko's principles, Laith Elaimy, admitted, under oath, that the Lease attached as "Exhibit A" to the Complaint "is a true copy of the Lease Agreement between the Peyton Building, LLC and Niko's Gourmet, Inc." (CP 47). Yet, despite acquiescing in the landlord/tenant relationship for years with no objections, the Appellants now take the position that Peyton Building, LLC is not the successor-in-interest to the Lease, and that a valid lease does not exist between Peyton and Niko's. (Appellants Opening Brief 9-10; 25). The trial court noted this discrepancy in its "Order for Motion on Reconsideration, "The plaintiff and defendants have had a relationship as landlord and tenant since 2003/2004 when plaintiff purchased the building." (CP 150). Thus, the trial court was correct in its conclusion that Peyton is the successor-in-interest to the Lease and does in fact have standing to enforce it.

C. Peyton Can Enforce The Guarantee Against The Guarantors.

Appellants again proffer the argument that Peyton has no standing to enforce the Lease, and as such, the guarantee made by Laith and Abir

Elaimy is not enforceable. (Appellants Opening Brief at 13). And again, argument is moot. Laith Elaimy admitted, under oath, that “Exhibit A” attached to the Complaint “is a true copy of the Lease Agreement between the Peyton Building, LLC and Niko’s Gourmet, Inc.” (CP 47). This is the same Lease signed by Laith and Abir Elaimy as Guarantors. (CP 20). While Elaimy admitted in his Affidavit that there was a valid lease between Peyton and Niko’s/Guarantors, they now take an opposite stance and say there was no valid lease. (Appellants Opening Brief at 13).

Appellants also argue that, “The lease does not provide that the guarantors extend to any successor in interest to the Lessor’s interest.” (Appellants Opening Brief at 12). This is not the case. The guarantee provisions in the Lease clearly contemplated a successor to Pacific Security Financial, as evidenced by a portion of Paragraph 43:

If now or hereafter (a) Lessee shall be or become insolvent, Guarantor hereby forever waives and relinquishes in favor of lessor, and **their respective successors**, any claim or right to payment which Guarantor may now have...

(CP 19) (emphasis added).

Appellants go to great lengths to cite cases that deal with guarantee clauses in contracts, specifically cases holding that a guarantee clause is a separate obligation from the principal obligation, (Appellants Opening Brief at 10-13), yet none of these cases support their contention that the

Guarantors are not liable under these facts. Their argument is that there is no principal obligation or debt between Peyton and Nikos (i.e., no lease) thus there can be no guarantee. Again, their argument fails by virtue of the fact that Appellants admitted that a valid lease existed between Peyton and Niko's (CP 47), thus there *is* a principal obligation and debt for which the Guarantors are liable.

Appellants, right up to their default, treated Peyton as the successor-in-interest to Pacific Security, never objected to Peyton's right to enforce the Lease, and one of the Guarantors even admitted to a valid lease between Peyton and Niko's (CP 124-125; 47). As such, the guarantee provision of this Lease should be enforceable against the Guarantors.

D. Peyton Is Not Seeking, And Did Not Seek, To Enforce Or Foreclose Upon A Landlord's Lien Against The Appellants.

Appellants argue that Peyton did not follow the statutory requirements for enforcement of a landlord's lien. (Appellants Opening Brief at 14). Appellants are mistaken in their belief that Peyton is seeking, or sought, to enforce or foreclose on a landlord's lien against them. (CP 120). Peyton made the decision not to foreclose any landlord's lien, as it recognized that the secured interests of Washington Trust Bank and the IRS would likely take precedence, and any attempt to foreclose would be fruitless. (CP 121).

Furthermore, after the filing of Peyton's Amended Complaint (which did raise the issue of a landlord's lien right) Niko's gave up *all* rights it had to the property when it signed *two* separate stipulations forfeiting its rights to the property it now claims should act as an offset of its obligations under the lease. (CP 100-101). Niko's first entered into a "Stipulation and Agreed Order On Eviction Complaint For Unlawful Detainer" with Peyton. Part of that stipulation included a provision that Niko's would surrender the property in question to Peyton:

Disposition of Inventory, Equipment, and Personal Property on Property, Defendant agrees to surrender the Property to Plaintiff together with all non-perishable inventory (specifically including all wine and other alcoholic beverages), restaurant equipment and trade fixtures. Defendant specifically recognizes Plaintiff's claim to a lien on such inventory, equipment and fixtures pursuant to RCW 60.72.010.

(CP 54). Niko's also entered into another stipulation forfeiting any rights it had in the property to Washington Trust Bank. (CP 59-60). Washington Trust Bank had a secured interest in Niko's property as a result of Niko's default on a promissory note, thus the parties entered into a stipulation whereby Washington Trust would take possession of Niko's property. (CP 59-60) This "Stipulation and Order for Possession and Foreclosure of Collateral," stated, in pertinent part:

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 the Uniform Commercial Code, or at a sheriff's sale.

(CP 60). The effect of these two stipulations was that Niko's surrendered any ownership or possessory interest it had in the property, first to Peyton and then to Washington Trust Bank. Thus, there was no need for Peyton to foreclose on a landlord's lien. Niko's had already relinquished all rights to the property in question. Once the stipulation with Washington Trust Bank was signed, the bank took possession of the wine inventory (the most valuable inventory), and entered into negotiations with Peyton and the IRS to determine how to dispose of the rest of the inventory. (CP 121-22; 51) Peyton acquiesced in the forfeiture of the wine, as RCW 60.72.010 subordinates any landlord's lien (as well as its other non-secured claims) to all tax liens and the claims of parties with secured interests in the personal property (i.e., the IRS and Washington Trust). The IRS ultimately released its lien, and Washington Trust Bank agreed that Peyton should take possession of the rest. (CP 51).

Although it is irrelevant to the Court's determination of the issues on appeal, it should further be noted that much of the property that Niko's claims should be credited towards the judgment against it was actually

part of the leased premises pursuant to the Lease, and thus owned outright by Peyton. (CP 51). Other than the conclusory allegations of ownership in the Elaimy affidavits, these hearsay claims are unsupported by any language in the Lease, proof of ownership, or any other documentation which would establish any ownership interest of Niko's in the personal property it relinquished to Peyton and Washington Trust Bank.

Regardless of whether or not the property is or was part of the leased premises, judicial estoppel operates to prevent Niko's from taking a contrary position to the position it took when it entered into the stipulation with Washington Trust Bank. (CP 122). As the trial court noted:

The stipulation and order entered in this case involving Washington Trust Bank judicially estops the defendant from claiming an ownership interest in the inventory and equipment. If they do not own the personal property they cannot claim an 'offset' against their obligations to plaintiff from the disposition of the personal property.

(CP 152). "Judicial estoppel precludes a party from taking a position inconsistent with a position that the party previously took in litigation." Johnson v. Si-Cor Inc., 107 Wn.App. 902, 904, 28 P.3d 832, 833 (2001). In this case, Niko's and Guarantors are taking an inconsistent position. In Washington Trust Bank v. Niko's Gourmet/Elaimy, Spokane County Cause No. 11-2-01283-7, Niko's entered into the aforementioned stipulation with Washington Trust Bank, effectively giving up *all* rights to

possession they had in the property at issue. (CP 121). Thus, the trial court was correct in concluding that Niko's and Guarantors are estopped from now taking the position that they have rights in the property. (CP 151-152).

E. Peyton Did Not Attempt To Foreclose On A Landlord's Lien, And Niko's Forfeited All Of Its Rights In The Property To Washington Trust Bank, Thus There Was No Conversion.

Appellants again argue that Peyton failed to foreclose on its landlord's lien, and thus Peyton somehow converted Niko's personal property. (Appellants Opening Brief at 19-20). Yet again, Niko's fails to acknowledge that Peyton did not foreclose on any landlord's lien – rather, it's judgment was based on breach of contract principles. (CP 120). Niko's willingly and knowingly forfeited all of its rights to the property when it signed the stipulation with Washington Trust Bank. (CP 121). Thus, Niko's retained no rights to the property that it now claims has been converted. If Niko's has an issue with the ultimate disposition of the property it forfeited in the stipulation, its dispute is with Washington Trust Bank, not with Peyton. There can be no conversion of property when Niko's has no right to the property in the first place.

F. **Peyton Was Not Unjustly Enriched And Did Not Convert Niko's Property When Niko's Willfully And Knowingly Surrendered All Rights To That Property In A Stipulation With Washington Trust Bank.**

Appellants rehash their landlord's lien argument and claim there was a conversion of Niko's property because Peyton allegedly withheld property worth more than two months' rent under a landlord's lien. (Appellants Opening Brief at 22-23). Again, Peyton is not seeking, and has never sought, to foreclose on a landlord's lien. (CP 120). Niko's willfully and knowingly forfeited all of its rights to the property it now claims it owns when it entered into two stipulations, first with Peyton and later with Washington Trust Bank, both of which included provisions where it forfeited its rights to the personal property in the premises. (CP 54, 121). Niko's cannot now claim that it has an interest in this property and should receive a credit against the judgment Peyton received. If Niko's wishes to bring a claim of conversion, it should do so against Washington Trust Bank, which had the superior secured claim to the property, received the property pursuant to an Order signed by the trial court, and then resolved any remaining issues concerning possession of the property with Peyton and the IRS.

VI. MOTION FOR ATTORNEY FEES

The Lease provides, in paragraph 25, that in any action to enforce the Lease the prevailing party would recover its reasonable attorney fees and costs. As the Court herein should enforce the Lease and affirm the summary judgment entered, Peyton is entitled to recover all its attorney fees and costs incurred in this appeal, which will be supported by a later affidavit and motion.

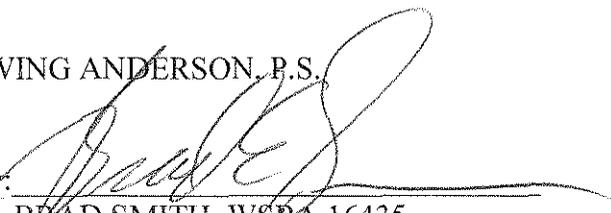
VII. CONCLUSION

There was a valid Lease between Appellants and Respondents. (CP 6-23). One of the Guarantors of this Lease admitted that it was the valid Lease between Peyton Building, LLC, and Nikos Gourmet, Inc. (CP 47). There is no dispute that the Guarantors, in that Lease, guaranteed the performance of Niko's to the landlord under the Lease, be it Pacific Security or its successor, Peyton. Appellants admit that they breached or defaulted on this Lease. (CP 47). The damages resulting from Appellants' breach or default were clearly established by Appellants (CP 24-30), thus there is no genuine issue of material fact precluding summary judgment. Respondents request that this court affirm the trial court's granting of its

Motion for Summary Judgment and denial of Appellants' Motion for Reconsideration, and award Peyton its attorney fees and costs on appeal.

DATED this 12th day of September, 2013.

EWING ANDERSON, P.S.

By: 

BRAD SMITH, WSBA 16435
Attorney for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2013, a true and correct copy of the foregoing document was served on the following in the manner set forth herein:

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