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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 327051

COURT OF APPEALS, DIVISION 3
OF THE STATE OF WASHINGTON

FPA CRESCENT ASSOCIATES, LLC, a Delaware limited liability company, Respondent

v.

JAMIE'S LLC; PENDLETON ENTERPRISES, LLC, a Washington limited liability company, d/b/a The Daiquiri Factory Spokane; and JAMIE PENDLETON, an individual, Appellants.

BRIEF of APPELLANT

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A. ASSIGNMENTS OF ERROR

No. 1. The trial court erred in directing an Issuance of Writ of Restitution against the tenant appellant, by order entered on June 11, 2014

No. 2. The trial court erred in denying tenant appellant's Motion to Quash Writ of Restitution and Dismiss Action, by order entered on July 16, 2014.

No. 3. The trial court erred in granting partial summary judgment in favor of the landlord respondent, by order entered on August 12, 2014.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. In an unlawful detainer action filed by a respondent landlord under RCW 59.12 where the landlord claimed specific causes of action of failure to pay rent and breach of lease covenants; and where tenant clearly illustrated that the landlord failed to follow the prescribed statutory procedure by serving a defective notice that did not provide the tenant with an opportunity to cure pursuant to RCW 59.12.030(3) and RCW 59.12.030(4); is the tenant entitled to have the writ of restitution quashed, and the action dismissed? Assignment of Error No. 2.

II. In an unlawful detainer action filed by the respondent landlord pursuant to RCW 59.12, and based upon claimed causes of action of failure to pay rent and breach of lease covenants, where landlord refused to accept timely cure of rent, does the court have a basis to Issue a Writ of Restitution?

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III. In an unlawful detainer action filed by a landlord under RCW 59.12 based on claims of nonpayment of rent and breach of lease covenants, where the landlord failed to follow the prescribed statutory procedure by issuing a defective notice that did not provide the tenant with an opportunity to cure pursuant to RCW 59.12.030(3) and RCW 59.12.030(4), can a trial court continue asserting subject matter jurisdiction where it has knowledge that the landlord did not comply with the statutory notice requirements under RCW 59.12.030?

In Re Assignment of Error No. 2

IV. Is termination equivalent to expiration? Where a lease, the specified term of which was for ninety (90) months; for which the Lease Commencement Date was February 1, 2014; and, in which the Lease Expiration Date was defined as "Ninety (90) full

calendar months following the Lease Commencement Date", can a landlord unilaterally terminate a lease based on alleged breaches of the lease agreement, but prior to the end of the term specified in the lease agreement, and declare a tenant guilty of unlawful detainer under RCW 59.12.030(1), thereby circumventing the notice requirements of RCW 59.12.030(3) and RCW 59.12.030(4)?

In Re Assignment of Error No. 3

V. Where a moving party proffers an argument that is only contained in a supplemental brief in support of a motion for summary judgment, and where the trial Court explicitly states that it did not consider supplemental briefing in its decision to award summary judgment, but the trial court, in its written opinion, bases it award of summary judgment on the party's argument that is solely contained in the supplemental brief, is that party entitled prevail on the motion?

In Re Assignment of Error No. 3

VI. Where a moving party in an unlawful detainer summary judgment proceeding proffers no precedent in support of its awarded motion under RCW 59.12.030(1), no precedent supporting its position that notice and and opportunity to correct was not required, and, no

precedent supporting its right to a writ of restitution, and where the non-moving party proffered ten statutes, and multiple precedent cases spanning over one hundred years in support of its position, can a court be said to have viewed all facts and reasonable inferences in the light most favorable to the non-moving when it granted the moving party its motion?

In Re Assignment of Error No. 3

B. STATEMENT OF CASE

Appellants, Jamie Pendleton, Jamie's LLC, and Pendleton Enterprises LLC (hereinafter "Pendleton"), executed a lease with the Respondent landlord, FPA Crescent Associates, LLC (hereinafter "FPA"), on October 15, 2013. CP1 pg. 3, CP1 Ex. B. The purpose of the leased premises was for Pendleton to operate a nightclub, and the permitted use was stated as "restaurant and bar with dancing and music." *Id.* The lease was for a term of ninety months from the lease commencement date. CP1 Ex. B pg. 1. In the lease, rent was explicitly abated for the first six months. Id. Starting on the seventh month after the commencement of the lease, rent was to be charged at a rate of $4754 per month with 2% annual increases. *Id.* In addition to the original ninety month term of the lease, FPA further agreed to grant Pendleton an option to "extend the Lease Term for the entire Premises by a period of five (5) years" upon written notice delivered by the tenant to the landlord. *Id.* at 2. The lease was amended on December 2013 for the purpose of adding the proper entity name of the tenant to the lease Pendleton Enterprises, LLC. CP1 pg 3, CP1 Ex. D.

The parties executed a lease commencement date and agreement which declared February 4, 2014 to be the commencement date, and which explicitly stated the expiration date of the original lease term to be on July 31, 2021. CP1 pg. 3, CP1 Ex. E.

On May 9, 2014, only three months after the lease commenced, FPA served a document to Pendleton entitled "Notice of Termination of Lease." CP1 pg. 4, CP1 Ex. F pg. 1. The notice stated that "[b]ased upon the failure to pay Rent...[FPA] has elected to terminate the Lease." CP1 Ex. F pg. 1. The termination notice further demanded Pendleton to immediately surrender the premises, and did not contain any reference to a tenant's right to cure. *Id.*

Immediately, upon receipt of the termination notice, Pendleton attempted to remit payment two separate times by sending payments via certified mail on May 10, and on May 16. CP16 pg. 9, CP16 pg. 11, CP 16 Ex. 12. The landlord, FPA, refused to accept both payments, and returned them to the tenant. *Id.*

On May 28, 2014 FPA filed a Verified Complaint for Unlawful Detainer against Pendleton. CP 1. The first alleged cause of action in the Complaint was for "issuance of writ of restitution ...[because Pendleton] failed to pay rent and other charges." CP1, pg. 5. The second alleged cause of action in the Complaint was for "breach of lease [because Pendleton failed] to make all payments due thereunder...." *Id.* The third alleged cause of action was for a breach of a covenant in the lease. *Id.* at 6. And, the fourth alleged cause of action was for breach of guaranty and contract. *Id.* at 7.

On May 28, 2014, the same day the Verified Complaint for Unlawful Detainer against Appellants and Amended Summons were filed, FPA filed an affidavit by Curt Lorenz, the property manager for the leased premises, in which he stated that he "caused to have hand delivered to Tenant a Notice of Termination of Lease (the "Notice"), immediately terminating the Lease pursuant to the failure to pay rent under the Lease, and demanding immediate surrender of the Premises." CP8, pg. 2. Again, the "Notice" did not give tenant any right to cure the alleged defaults. CP1 Ex. F.

Pendleton answered the Complaint in a response stating specifically that FPA refused to accept rent; that the payments were returned to Pendleton; that Pendleton deposited the estimated rent into its attorney's trust account; and, that Pendleton was ready, willing, and able to release the funds to FPA upon demand. CP 13 pg. 9. Pendleton further alleged in its response that FPA had, on multiple occasions, breached its right of quiet enjoyment; that FPA failed to give timely notice of Additional Rent; and, that FPA knowingly misrepresented late fees and rents due that were not accurate, or were not accrued. *Id.* at 12. After further research and review of tenants papers, Pendleton submitted a Response to Plaintiff's Motion to Show Cause, which contained a timeline of the communications between the parties, examples of the

misrepresented late fees and rents, and examples of harassment by the landlord FPA. *See Generally* CP 16.

After a hearing on June 11, 2014, at which both parties were in attendance and presented argument, the court entered an order directing an Issuance of Writ of Restitution against Pendleton and in favor of FPA. CP 21.

On June 18, 2104, Pendleton filed a Motion to Quash the Writ of Restitution and Dismiss the Action on the basis that Respondent FPA failed to give sufficient notice as prescribed in RCW 59.12.070 and 59.12.030(3); that Respondent failed to accept cure as prescribed in RCW 59.12.030(3); and, that Respondent willfully acted in violation of RCW 59.12.100 by executing on the writ of restitution prior to the expiration mandatory three day waiting period after service of said writ. CP 25, CP 26. At a hearing held July 3, 2014, the trial court denied the Pendleton's Motion on all counts. CP 46.

On June 30, 2014, FPA filed a Motion for Partial Summary Judgment based, in part, that "Defendants failed to timely pay Rent due and owning..."; that failure to pay is one of several events of default; and, that FPA terminated the lease by delivering a Notice to Pendleton. CP 39, pg. 2. Pendleton responded to the Motion by restating its legal position

that notice did not comply with the statutory requirements, and that without proper notice the trial court no longer had subject matter jurisdiction, and that dismissal with prejudice was proper. CP 48.

On August 8, 2014, the court heard FPA Motion for Partial Summary Judgment. CP 50. In that hearing the court stated that it would issue its opinion the following week. *Id.* Subsequent to the trial court hearing on the partial summary judgment motion, FPA sent the court by e-mail, with copy to the opposing party, a supplemental brief in support of summary alleging that Pendleton was guilty of unlawful detainer under RCW 59.12.030(1), stating that the lease had expired when it was terminated by the landlord, and that notice was not necessary in this case. CP 51. Pendleton immediately replied to the court by e-mail, with copy to the opposing party, a response to FPA's brief, informing the court that 59.12.030(1) only applies to a holdover tenant after the expiration of the lease term. CP 57 pg. 2. In addition to Pendleton's response to FPA's supplemental brief, Pendleton also sent the court a table of authorities referencing all applicable case law cited by Pendleton in support of its position up to this time, and contrasting that to the sparse case law cited by FPA to date, none of which provided a basis for an unlawful detainer ejectment under RCW 58.12.030(1). CP 57, and CP 58 judgment.

On August 12, 2014, the trial court issued an Order Granting Partial Summary Judgment stating, in part, that "Plaintiffs terminated the lease pursuant to its own terms and obtained a Writ of Restitution pursuant to RCW 52.12.030(1)" CP 53; Ex. 2, pg.2. With the Order, the court also sent a letter to the parties stating the court did not consider any of the supplemental documents filed after the hearing. CP 52. Other than FPA's Supplemental Brief Supporting Partial Summary Judgment, there is no prior reference to RCW 52.12.030(1) in the record. CP 65 pg. 13. Pendleton's response and table of authorities were subsequently filed with the court by Pendleton on August 13, 2014 for the purpose of maintaining a complete record for appeal in this case. *Id.*

Appellants, Pendleton then filed this Appeal. CP 59.

C. SUMMARY OF ARGUMENT

The question at the heart of the case, and this appeal therefrom, is whether or not a landlord who terminates a lease alleging nonpayment of rent and breach of a lease covenant or term is entitled to the benefit of, and relief under the unlawful detainer act RCW 59.12 et al., if the landlord does not give the tenant notice of right to cure, and does not honor the tenant's right to cure under the unlawful detainer statute.

Under the statute, RCW 59.12.030(3) and RCW 59.12.030(4), a tenant has a right to notice and opportunity to cure before a landlord is entitled to a writ of restitution. When a landlord does not strictly follow the statutory provisions, it is not entitled to relief under the statute. And, where the Superior Court's jurisdiction over the subject matter is authorized by the statute, the court loses its subject matter jurisdiction when a landlord fails to follow the necessary notice requirements as prescribed by the unlawful detainer statute.

Here the landlord failed to followed the necessary procedure prescribed by the unlawful detainer statute, and the Superior Court continued to assert subject matter jurisdiction after being notified of the landlord's failure to follow procedure.

The proper action by the court in this proceeding should have been to dismiss the action with prejudice. Instead, the court granted, by summary judgment, a judgment against the tenant, and upheld the writ of restitution restoring the premises to the landlord.

This Court of Appeals should reverse the trial court's rulings, should restore the tenant in its rightful possession and occupancy of the premises, and should award the tenant a judgment for its fees and costs in defending this action, pursuant to the statute and case law in this State.

D. ARGUMENT

I. The court erred when it denied tenant's Motion to quash writ of restitution, and dismiss the action with prejudice because landlord failed to give sufficient notice as prescribed in RCW 59.12.070.

The statutory purpose for an unlawful detainer action is to provide a speedy and summary resolution of possession and necessarily payment of rent. *Heaverlo v. Keico Industries, Inc.*, 80 Wn. App. 724, 733 (Div. 3 1996). The procedure with which a plaintiff must comply is codified in RCW 59.12 et al. RCW 59.12.

Before the unlawful detainer statute, now RCW 59.12 et al., was adopted in 1890, the common law rule was that when the tenant's right to possession ended, the landlord could use reasonable physical force to evict him. *Nelson v. Swanson*, 177 Wash. 187, 191(1934). A version of the unlawful detainer statute has been on the Washington books since its territorial days, and was nearly in its current form when the state was admitted to the Union. *See* Laws of 1889-1890, ch. 73, pg. 543. With limited modification the 1891 equivalent of RCW 59.12.030 is nearly identical to the current statute. Laws of 1891, ch. 96, § 3. (with the exception of gender neutral terms, and not including the gang provision).

The narrow purpose of the unlawful detainer statute is to determine

the question of rightful possession of the premises. *Granat v. Keasler*, 99 Wn.2d 564, 570 (1983); *Young v. Riley*, 59 Wn.2d 50, 52 (1961); *First Union Management, Inc. v. Slack*, 36 Wn. App. 849, 853 (Div. 2 1984). Accordingly, it is useful when a tenant fails to pay rent or otherwise defaults, but remains in possession. *Id.*

RCW 59.12.030 defines seven statutory bases, or " breaches," under which a landlord may find a tenant or person in "unlawful detainer" of real property. RCW 59.12.030. Unlawful detainer actions, and the notices required for the actions, come in two forms: they are either "absolute" or "alternative." *See Generally* RCW 59.12.030. A notice is absolute if the tenant is required absolutely to vacate within the notice period and can do nothing to retain the right to continued possession. Under sections 1, 2, 5, 6, and 7 of RCW 59.12.030, absolute notices are those based on the commission of waste, maintenance of a nuisance, trespass, or the provision allowing 20-day notice of termination in the case of a periodic tenancy. *Id.*

The procedure with which a landlord must comply is codified in RCW 59.12 et al. Because the unlawful detainer statues are in derogation of the common law, they must be strictly construed in favor of the tenant. *Negash v. Sawyer*, 131 Wn. App. 822, 826 (Div. 1 2006); *Wilson v.*

Daniels, 31 Wn.2d 633 (1948). In order to take advantage of its favorable and expedient provisions of an unlawful detainer action, a landlord must comply with the requirements of the statute. *Housing Authority of City of Everett v. Terry,* 114 Wn.2d 558, 563-564 (1990).

The first step required of a landlord in an unlawful detainer action is to give the tenant a pre-eviction notice. *See Generally* RCW 59.12.040. The pre-eviction notice requirements under the unlawful detainer statute must be strictly followed. *See Christensen v. Ellsworth*, 162 Wn.2d 365, 372 (2007); *Marsh-McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 640 (Div. 1 1999) (strict compliance necessary for time and manner requirements; substantial compliance necessary for form and content requirements). The purpose of the notice is to provide the tenant with "*at least* one opportunity to correct a breach Before forfeiture of a lease under the accelerated restitution provisions of RCW 59.12." *Hous. Auth. v. Terry,* 114 Wash.2d at 569. Furthermore, any date or time period referenced in the notice should comply with the longer period of notice required by the unlawful detainer statute or in the lease. *See Community Invs., Ltd. v. Safeway Stores, Inc.*, 36 Wn. App. 34, 36 (Div. 2 1983).

"In an action for unlawful detainer alleging breach of covenant, a notice which does not give the tenant the alternative of performing the

covenant or surrendering the premises does not comply with the provisions of the statute." *Hous. Auth. v. Terry*, 114 Wn.2d at 569. When an action is based on section RCW 59.12.030(4), for failure to perform some condition or covenant in the lease, then the tenant must be given an notice in the alternative wherein the tenant may either vacate the premises within the notice period, or cure the default within ten days after notice is served. *Id.* An identical logic is applicable when the unlawful detainer action is based under RCW 59.12.030(3), for a default in rent, that provides that the tenant must be given a notice in the alternative wherein the tenant may either vacate the premises within the notice period, or cure the default within three days after notice is served. RCW 59.12.030(3). These are the two types of breaches alleged by FPA, the landlord, in this action. *See* CP1.

Division 3 of the Washington Court of Appeals has stated a simple, three-prong test to determine whether or not a landlord is entitled to relief under the unlawful detainer statute. *DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 317 P.3d 543, 552 (Div. 3 2014). Relief under the unlawful detainer statute requires: (1) the tenant's breach, (2) notice to the tenant of the existence of a breach with an opportunity to correct, and (3) failure by the tenant to correct the breach. *Id.*

As stated earlier, an unlawful detainer action is a "narrow one, limited to the question of possession and related issues such as restitution of the premises and rent." *Munden v. Hazelrigg,* 105 Wn.2d 45, 45 (1985). As such, the court only sits as a special statutory tribunal to summarily decide the issues authorized by statute and not as a court of general jurisdiction with the power to hear and determine other issues. *Granat v. Keasler*, 99 Wn.2d at 571. And, where the landlord fails to comply with the procedures prescribed in the statute, dismissal is proper. *See Community Invs., Ltd. v. Safeway Stores, Inc.*, 36 Wn. App. at 34, 37-8. (failure to serve proper notice of unlawful detainer); *Hinkhouse v. Wacker*, 112 Wn. 253, 257 (1920) (improper service of unlawful detainer notice); *Draper Mach. Works v. Hagberg*, 34 Wn. App. 483, 489-90 (Div. 1 1983) (improper form of summons); *Dobbins v. Mendoza*, 88 Wn. App. 862, 872-3 (Div. 3 1997) (improper service of summons and due diligence of service in general).

In this case the plaintiff/landlord brought an unlawful detainer action against the defendant, and a writ of restitution was granted by the court, based on the tenant's alleged failure to pay rent. Defendants believe that the court erred in this ruling in light of the fact that the tenant made a timely attempt to cure the alleged default in rent, even without proper

notice.

Because the notice that the landlord gave to the tenant/appellant in this case does not comply with the statutory requirement to give the tenant an opportunity to cure, the court erred when it denied tenant's Motion to quash writ of restitution, and dismiss the action with prejudice for failure to give sufficient notice as prescribed in RCW 59.12.030 and RCW 59.12.040.

Appellant, Pendleton, asks this court to reverse the error of the Superior Court, to dismiss FPA's action with prejudice, and to restore the property to the tenant.

II. The court erred when it granted a writ of restitution to the landlord despite the fact that tenant made a timely attempt to cure the alleged default rent payments, without having proper notice.

A tenants right to cure any default in rent is central to the unlawful detainer statute. *See* RCW 59.12.030(3). While the statute provides a landlord with a remedy to reclaim its real property from a tenant in breach, in order to take advantage of its favorable provisions, a landlord must comply with the requirements of the statute. *Hous. Auth. v. Terry,* 114 Wn.2d at 564. Where the landlord fails to comply with the procedures

prescribed in the statute, dismissal is proper. *See Community Invs., Ltd. v. Safeway Stores, Inc.*, 36 Wn. App. at 37-8.

As stated in the previous section, relief under the unlawful detainer statute requires: (1) the tenant's breach, (2) notice to the tenant of the existence of a breach with an opportunity to correct, and (3) failure by the tenant to correct the breach. *DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 317 P.3d at 552. Consequently a landlords refusal to accept cure is contrary to the statute, and fails the third prong of the test. In this case, when FPA served the Pendleton with Summons and Verified Complaint, the landlord was in possession of payments from the defendant in the total amount of $5719.93 – an amount more than sufficient to cure any of the alleged arrears. It is untenable that a landlord can seek the protection and benefit of a statute and simultaneously refuse to agree to the liability in doing so.

Because the landlord was in possession of payments sufficient to cure the default in rent at the time of commencing the action, the court erred when it granted a writ of restitution in favor of the FPA.

Appellant, Pendleton, asks this court to reverse the error of the Superior Court, to dismiss FPA's action with prejudice, and to restore the property to the tenant.

III. Upon notice that the landlord failed to follow the prescribed statutory procedure by issuing a defective notice that did not provide the tenant with an opportunity to cure pursuant to RCW 59.12.030(3) and RCW 59.12.030(4), the trial court erred when it continued to assert subject matter jurisdiction in this matter.

"Where a special statute provides a method of process, compliance [with that method] is jurisdictional." *Hous. Auth. v. Terry*, 114 Wash.2d at 569.

Proper statutory notice under RCW 59.12.030 is a " 'jurisdictional condition precedent' " to the commencement of an unlawful detainer action. *Id.* (quoting *Sowers v. Lewis*, 49 Wash. 2d 891, 894 (1957). The purpose of the notice is to provide the tenant with "at least one opportunity to correct a breach before forfeiture of a lease under the accelerated restitution provisions of RCW 59.12." *Id.* Strict compliance is required for time and manner requirements in unlawful detainer actions. *Smith v. Seattle Camp No. 69*, 57 Wash. 556, 557 (1910); *Truly v. Heuft*, 138 Wash.App. 913, 920-21 (2007); *Community Inv. v. Safeway,* 36 Wn. App. at 37. Thus, any noncompliance with the statutory method of process precludes the superior court from exercising subject matter jurisdiction over the unlawful detainer proceeding. *Christensen v. Ellsworth* 162 Wn. 2d 365 (2007) quoting *Hous. Auth. v. Terry*, 114 Wash. 2d at 560.

Unlawful detainer cases are distinguishable to the extent that they

rely on the notice required by statute before suit can be filed. *DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 317 P.3d at 552. While a tenant may contract for a notice period longer than the statutory period (*See Community Inv.v. Safeway*, 36 Wash.App. at 38), the notice time and opportunity for cure prescribed by the statute is the absolute minimum. *See IBF, LLC v. Heuft,* 141 Wn. App. 624, 632 (Div. 1 2007) and *Community Inv. v. Safeway*, 36 Wn. App. at 36.

Subject-matter jurisdiction may be challenged at any time and cannot be waived. CR 12(h)(3). Any matters not contemplated by the seven breaches listed in RCW 59.12.030 are outside of the Court's subject matter jurisdiction in an unlawful detainer Action. *Little v. Catania*, 48 Wash. 2d 890, 893 (1956). Furthermore, the court can not transform the special statutory proceedings into an ordinary lawsuit, and determine the issues and grant relief therein as though the action was a general proceeding." *Id.*

In this case, FPA, the landlord, commenced a **statutory action** in its *Verified Complaint for Unlawful Detainer Under RCW 59.12.* CP1. The title of the pleading itself cites the statute. Plaintiff had the option to bring an ordinary civil action to enforce its alleged rights under the lease agreement. But, in doing so, the landlord would have foregone the

expedited restitution provisions under RCW 59.12, and, the Pendleton would have had an absolute right to assert their affirmative defenses, to assert counterclaims, to partake in discovery, and to have the equitable protections of the Rules of Civil Procedure.

Because the court's jurisdiction over unlawful detainer proceedings arises under statute, and because strict compliance with the statute is required for the court to maintain subject matter jurisdiction, the court erred when it failed to dismiss this action upon notice that FPA did not comply with the time and manner requirements of the unlawful detainer statute when it failed to give Pendleton notice, and when it refused to allow Pendleton to cure.

Appellant, Pendleton, asks this court to reverse the error of the Superior Court, to dismiss FPA's action with prejudice, and to restore the property to the tenant.

IV. A landlord may not unilaterally terminate a lease based on alleged breaches of the lease agreement, but prior to the end of the term specified in the lease agreement, and declare a tenant guilty of unlawful detainer under RCW 59.12.030(1), thereby circumventing the notice requirements of RCW 59.12.030(3) and RCW 59.12.030(4).

RCW 59.12.030 outlines the different circumstances under which a tenant may be guilty of unlawful detainer. *Savings Bank of Puget Sound v. Mink*, 49 Wn.App. 204, 206-207 (Div. 1 1987). The first section, RCW 59.12.030(1) applies to holding over by a tenant after the expiration of tenancy for a specified time. *Id.*

Specifically, RCW 59.12.030(1) states that a tenant is guilty of unlawful detainer "[w]hen he or she holds over or continues in possession, in person or by subtenant, of the property or any part thereof *after the expiration of the term for which it is let to him or her*. RCW 59.12.030(1) (emphasis added). This section of RCW 59.12.030 is applicable only after the expiration of the entire term as specified in the lease agreement. *See Shannon v. Loeb,* 65 Wash. 640, 640 (1911) and *Kessler v. Nielsen*, 3 Wn. App. 120, 124 (Div. 1 1970) (stating that "*Shannon* was an action brought under the then equivalent of RCW 59.12.030(1), i.e., holding-over after end of term.").

The unlawful detainer statute states that where a lease is set to expire on a fixed date, "a person is guilty of an unlawful detainer when he

holds over or continues in possession after the expiration of the specific term for which real property is let to him." *Stanford Land Co. v. Steidle*, 28 Wash. 72, 74 (1902). This to say that a lease expires only at the end of its fixed term. *Id.* At 76-77. In cases where the lease has not expired, but the tenant has failed to pay rent, or to observe some other provisions of the lease, the statutory requirements of notice apply. *See Id.* At 77.

In this case FPA, in a supplemental brief, made the argument that a lease that is terminated by the landlord under the contract, is de facto expired. The court erred when it accepted this argument and granted FPA's Motion for Partial Summary Judgment, as this position is completely unsupported, and is in conflict with the plain reading of the statute, and with all case law based on the statute since Washington was granted statehood.

RCW 59.12.030(1), as relied on by the Plaintiff and the Court, states, in part, that "the tenancy *shall be terminated without notice* at the expiration of the specified term or period." *See* RCW 59.12.030(1) *(emphasis added).*

But, expiration is **not** synonymous with termination. Expiration is defined as "the ending of a fixed period of time." BLACK'S LAW DICTIONARY 700 (10th ed. 2014). Termination is defined as "the act of

ending something." BLACK'S LAW DICTIONARY 1700 (10th ed. 2014). Furthermore, "Term of Years" is defined as a fixed period covering a precise number of years. BLACK'S LAW DICTIONARY 1699 (10th ed. 2014). Compare this to Merriam-Webster which states that expiration is "the fact of coming to an end or no longer being valid after a period of time." compared to termination which is defined as "an act of ending something." *See* Termination - Definition and More from the Free Merriam-Webster Dictionary (2014), *at* http://www.merriam-webster.com/ dictionary/termination; Expiration Definition and More from the Free Merriam-Webster Dictionary (2014), *at* http://www.merriam-webster.com/dictionary/expiration. In simple terms, expiration is a passive process whereas termination is an active process.

At the time that Washington was admitted to the union, other courts had the following to say about termination and expiration:

> "[T]he uniform construction of the courts has been that where the statute speaks of the "expiration of the lease," the meaning is that the lease has come to an end either by effluxion of time or its own limitation. The ending of the lease by the exercise of the landlord's option, after condition broken, is the termination, not the expiration, of the lease." *Kramer v. Amberg*, 4 N.Y.S. 613 (1889).

The same issue, when addressed by the Federal Courts yielded the same result.

> When used in reference to a contract or lease, the word "expiration" means "termination by mere lapse of time, as the expiration date of a lease, insurance policy, statute, and the like." BLACK'S LAW DICTIONARY 579 (6th ed. 1990). The word "termination," on the other hand, in the same context, means, "an ending, usually before the end of the lease or contract, which termination may be by mutual agreement or may be by exercise of one party of one of his remedies due to the default of the other party." BLACK'S LAW DICTIONARY 1471 (6th ed. 1990). The word expire, including all of its derivatives, is an intransitive verb. As such, it expresses an action or state which is limited to a subject, and does not otherwise require a direct object to complete its meaning. For example, "The lease has not expired," or "The unexpired lease may be assumed." In contrast, the word "terminate" is a transitive verb, which expresses an action between a subject and an object and requires a direct object to complete its meaning. For example, "The notice delivered by the lessor terminated the lease."
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> *In re Morgan*, 181 B.R. 579, 583-584 (Bkrtcy.N.D.Ala. 1994).

"The Washington statute dealing with unlawful detainer is so plain that the Supreme Court of the State repeatedly has declared that its various provisions are 'not susceptible of construction'." *Western Union Telegraph Co. v. Hansen & Rowland Corp.*, 166 F.2d 258, 261 (9th Cir. 1948). The statute at the time of the action, Sec. 812(1), supra, provided that a tenant of real property is guilty of unlawful detainer if he holds over after the expiration of the term. The same subsection added, however, that the tenancy shall be terminated without notice at the expiration of the term. *Id.* It should be noted that the statute remains unchanged today. *See*

RCW 59.12.030. While recognizing the distinction between the lease-term and the tenancy itself, the law of Washington holds that the expiration of the former results in the termination of the latter. *Id* at 262. Since the days when Washington was only a territory, the Laws of Washington hold that "[i]n all cases where premises are rented, for a specified time, by express or implied contract, the tenancy shall be deemed terminated at the end of such specified time." *Id* at 262. (Quoting original statutes, and the revised statutes in effect at the time of the ruling).

Any notice that is based upon nonpayment of rent does not have any legal effect for want of compliance with the statutory requirements. *Deming v. Jones*, 173 Wash. 644, 648 (1933). In *Deming,* the parties executed a twenty year lease commencing September 14, 1928 and expiring on March 31, 1949. *Id.* At 645. In this case, the plaintiff attempted to terminate the lease "on three grounds: (1) Nonpayment of rent; (2) that intoxicating liquor had been permitted upon the premises in violation of the terms of the lease; and (3) that gambling devices were there maintained and operated in violation of the state law...." *Id.* First, the plaintiff served a 'Notice of Forfeiture of Lease'; the plaintiff followed this up with second notice stating that the lease had been terminated by the former notice. *Id.* The court held that "[a]s the lease had not been forfeited or terminated by the former notice, [the second notice] was of no

effect." *Id. at* 646. Plaintiffs then served a third notice a week later. *Id.* "This was a three day notice, and was not given in the alternative, nor did it set forth the amount of rent claimed to be due." *Id.* at 647. Like our present case, the Defendants also attempted to tender all rents due to the Plaintiff, and the Plaintiff refused. *Id.* The court dismissed the action because of the non-compliant notice stating that "[t]he law does not favor forfeitures, and equity abhors them. *Id.* at 648.

In a separate case, *Richardson,* the tenant breached the contract, and the landlord refused to accept rent subsequent to the alleged breach. *Richardson v. Sears*, 74 Wash. 499, 505 (Wash. 1913). But, the court held, that in order to have terminated the lease it would have been necessary to serve written notice to pay rent or vacate the premises, as required by the statute. Because the notice was defective the court held that it had no need to determine whether or not there was a breach giving rise to a right of termination under the lease. *Id.* at 506.

"The action of unlawful detainer or forcible entry and detainer is a special statutory summary proceeding in derogation of the common law, and to confer jurisdiction upon the court each step provided by the statute must be strictly complied with." *State v. Superior Court of Pierce County*, 102 Wash. 215, 216 (1918). In order to recover under the statute, a plaintiff "must set forth the facts on which he seeks to recover" is the

language of this act, as it has been construed to be the express or implied requirement of all the acts governing this kind of proceeding. *Lowman v. West*, 8 Wash. 355, 358 (1894). It is the landlord's burden in an unlawful detainer action to prove, by a preponderance of the evidence, the right to possession of the premises. *Duprey v. Donahoe,* 52 Wash.2d 129, 135 (1958). "Mere conclusions of law have, perhaps, a less appropriate place in a complaint of this kind than anywhere in the realm of civil pleading, for it is proposed to summarily take the possession of real property from one man, and give it to another, without opportunity to plead anything but the general issue, or some affirmative defense like payment, eviction by the holder of paramount title, or some matter occurring since the tenancy commenced sufficient to terminate it." *Lowman v. West*, 8 Wash. 355 at 358. "[T]he right of the court to entertain the summary proceeding depends upon whether the tenant has failed either to pay rent or surrender the premises within three days after the service of the notice "in the manner hereafter in this act provided," *Id. a*t 359. The tenant has a right to stand upon proof of the exact service required by the statute before he can be adjudged guilty, and the service proved must be of that kind which the circumstances pointed out in [the statute] justify. *Id.*

A lease is a conveyance of a limited estate for a limited term with conditions attached. *Shepard v. Sullivan*, 94 Wash. 134, 135 (1916). It is

not, as FPA asserted in the present action asserts, an executed contract. *Id.* It cannot become wholly executed until the term expires and the conditions are fulfilled. *Id.* The term may expire at the end of the stated term, or it may be terminated sooner by lawful eviction. *Id.* A lawful eviction may be made either through an ordinary civil action for ejectment, or under the unlawful detainer statute. *See Generally, Petsch v. Willman*, 29 Wn.2d 136 (1947).

Since leases are contracts, as well as conveyances, it is axiomatic that the rights and obligations of the parties to a contract are defined by the provisions of that document. *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wash.App. 269, 272 (1985). Consequently, where a lease provides the tenant with greater protection than he or she would receive under the unlawful detainer statute, the landlord must comply with the lease in any eviction action. *Id. referring to Comm. Invs. v. Safeway,* 36 Wash.App. at 36-37. Thus, in *Community Investments*, the courts determined that where the parties' lease contained a provision requiring that a tenant be allowed 20 days to cure a default (and not the 10 days required by the statute), the provisions of the lease must prevail. *Id.* The same is not true where a lease provides less protection than the statute. *See Id.*

The only other possible means of terminating a lease before the

expiration of the term result from major acts outside of the parties' control. (*The Stratford, Inc. v. Seattle Brewing & Malting Co.*, 94 Wash. 125 (1916) (where the lease was terminated because the newly enacted prohibition laws frustrated the purpose of the lease of a saloon). Or *State v. Sheets*, 48 Wn. 2d 65 (1955) where the property was condemned through eminent domain.

In the present case, the lease provides for an original term of ninety (90) months. *See* CP1 Ex B pg. 1, Item 5.1. The Commencement Date of the lease was February 1, 2014. *See* CP1 Ex E pg. 1. The Commencement Date and Agreement states that "The initial Term of the Lease shall expire at midnight on July 31, 2021." *Id.*, Item. 4. Any argument that the Plaintiff's unlawful detainer action was to be commenced pursuant to RCW 59.12.030(1) is approximately seven years short of being ripe.

In FPA's Complaint, FPA declared that Curt Lorenz, the property manager, served "a Notice of Termination of Lease on the Lease for *failure to pay amounts due under the lease*." CP1 pg. 4, §2.11 (*emphasis added*). Furthermore, FPA also declared in its First Cause of Action: Action for Writ of Restitution that "[tenants] *have failed to pay rent* and other charges due under the Lease...." CP1 pg. 5, Section 3.3 (*emphasis*

added).

Where a **tenant** terminates a lease pursuant to the terms of the agreement, fails to continue to pay rent, but continues to occupy the premises, then RCW 59.12.030(1) applies. *Pan Abode Homes Inc. v. Abdulfhafid*, Unpublished Opinion 58545-2-I (Div. 1, 2007).

The courts have addressed the issue of whether the interpretation of an 'option to terminate' lease provision properly can or should be part of the subject of an unlawful detainer action brought by the lessor pursuant to RCW 59.12. *Pine Corp. v. Richardson*, 12 Wn.App. 459, 459-460 (Div. 1 1975). Under Washington law, the special jurisdiction conferred upon the superior court through operation of the provisions of RCW 59.12 is limited to the consideration of the issue of who has the right to possess the subject property. *Id.* Any issue not incident to the right of possession within the specific terms of RCW 59.12 or not in the nature of an affirmative equitable defense must be raised in an ordinary civil action. *Id* at 462.

An unlawful detainer action for alleged failure to pay rent is based on RCW 59.12.030(3). If the issue is whether RCW 59.12.030(1) can be used to circumvent RCW 59.12.030(3), then the courts have made it clear that expiration and termination are not synonymous, that notice IS

required for an termination that is not the result of the expiration of the term of the lease, that the statutory requirements MUST be strictly followed in order to confer subject matter jurisdiction, and ,since the unlawful detainer statues are in derogation of the common law, they must be strictly construed in favor of the tenant. *Negash v. Sawyer*, 131 Wn. App. at 826. (*emphasis added*).

A landlord may not unilaterally terminate a lease based on alleged breaches of the lease agreement, but prior to the end of the term specified in the lease agreement, and declare a tenant guilty of unlawful detainer under RCW 59.12.030(1), thereby circumventing the notice requirements of RCW 59.12.030(3) and RCW 59.12.030(4). The trial courts ruling on this question was contrary to the language of the statute, contrary to the policy of an unlawful detainer action, and contrary to precedent case law.

Appellant, Pendleton, to reverse the error of the Superior Court, to dismiss FPA's action with prejudice, and to restore the property to the tenant.

V. The court erred when it granted partial summary judgment to FPA based on RCW 59.12.030(1), where FPA's argument was not stated in an pleadings prior to the hearing, and where the Court claimed that it did not consider Supplemental documents filed after the hearing on August 8, 2014 which contained the sole reference to this argument.

On August 12, 2014, the Court issued its Order Granting Partial Summary Judgment Regarding Liability On Second And Fourth Causes Of Action And Damages stating, in part, that it was based on: "Plaintiff's May 28, 2014 Amended Summons and verified Complaint for Unlawful Detainer Under RCW Ch.59.12; Defendants' May 30, 2014, Answer and Affirmative Defenses; and all subsequent pleadings including: Plaintiff's June 30, 2014, Motion for Partial Summary Judgment Regarding Liability on Second and Fourth Causes of Action and Damages; Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment Regarding Liability on Second and Fourth Causes of Action and Damages; Second Affidavit of Todd Reuter Regarding Attorney's Fees and Costs; Defendants' July 22, 2014, Response and Memorandum Opposing Plaintiff's Motion for Summary Judgment; and Plaintiff's July 28, 2014, Reply Brief in Support of Motion for Partial Summary Judgment." CP 51. The order further states that "[FPA] terminated the lease pursuant to its own terms and obtained a Writ of Restitution pursuant to RCW 52.12.030(1)". With with the order counsel for the parties received a letter

to counsel stating in part that "[T]he Court has not considered supplemental documents filed after the hearing on August 8, 2014." CP 52.

None of the pleadings, motions, affidavits, or documents filed by the FPA prior to the hearing on August 8, 2014 made mention of RCW 52.12.030(1). Nor was the statute was not cited by any party during oral argument. (*See generally, Verbatim Report of Proceedings).*

The first citation by the Plaintiff to RCW 52.12.030(1) was made in the Plaintiff's Supplemental Brief in Support of Motion for Partial Summary Judgment dated August 11, 2014. - a brief submitted subsequent to the August 8, 2014 hearing. CP 51. Pendleton responded to the Supplemental Brief on the same day it was served by email. CP 52.

If the Court relied only on documents submitted prior to the August 8 hearing, then it had no basis for awarding Summary Judgment based on an argument that was never made by FPA.

Appellant, Pendleton, asks this court to reverse the error of the Superior Court, to dismiss FPA's action with prejudice, and to restore the property to the tenant.

VI. The Court failed to review all facts and reasonable inferences in the light most favorable to the Defendant as required for summary judgment and under the unlawful detainer statute.

Summary judgment is only appropriate where, after reviewing all facts and reasonable inferences in the light most favorable to the non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law based on the facts presented. *Viking Properties Inc. v. Holm*, 155 Wn. 2d 112, 119 (2005). In an unlawful detainer action, the burden is upon the plaintiff to prove, by a preponderance of the evidence, the right to possession. *Housing Authority of City of Pasco and Franklin County v. Pleasant*, 126 Wn. App. 382, 392 (Div. 3 2005). Furthermore, since the unlawful detainer statues are in derogation of the common law, they must be strictly construed in favor of the tenant. *Negash v. Sawyer*, 131 Wn. App. at 826.

In this case, Pendleton believes the court ignored the standard of review which is required for both summary judgment and for unlawful detainer actions.

In filings prior to this motion and memorandum, the Pendleton cited ten (10) statutes, and no less than thirty-six (36) cases spanning over one hundred years in support of its position. *See* CP 58. Whereas FPA proffered two cases on the subject of unlawful detainer, both of which,

ironically, strongly support the the tenant's position. CP 51, pg, 2-3. (Appellants note that the only cited cases related to FPA's argument were proffered until its reply brief to Pendleton's Response & Memo Opposing Summary Judgment, CP 48.) FPA proffered no precedent in support of its awarded motion under RCW 59.12.030(1), no precedent supporting its position that notice and and opportunity to correct was not required, and, no precedent supporting its right to a writ of restitution. *Id.* Yet, based almost solely on the Plaintiff's affidavits, the court determined that statutory notice was not an issue, was not required, and that the court could issue a general breach of contract ruling under an unlawful detainer action, and that, even if objections and questions of fact were posed by the the tenant, that they were not material. CP 53, CP 52.

If the pleadings in an unlawful detainer action disclose a material issue of fact, the issue must be resolved at trial. *Housing Authority of City of Pasco and Franklin County* 126 Wn.App. at 39. And, when a tenant challenges a landlord's allegations that he was in material noncompliance with the lease terms, the tenant is entitled to a trial *Id.* In the present case, the court found no genuine or material factual dispute. CP 53.

Because the Court failed to review all facts and reasonable inferences in the light most favorable to the Defendant as required for

summary judgment and under the unlawful detainer statute, and because the Court failed to find the existence of a material factual dispute where the tenant challenged the landlord's allegations that he was in material noncompliance with the lease terms, the Summary Judgment should be set aside.

Appellant, Pendleton, asks this court to reverse the error of the Superior Court, to dismiss FPA's action with prejudice, and to restore the property to the tenant.

E. CONCLUSION

When a landlord alleges a breach of lease by a tenant, that landlord has the choice of whether to proceed with a breach of lease claim under the unlawful detainer statute RCW 59.12, or as a general civil claim in the Superior Court. If a party chooses to proceed under the unlawful detainer statute, then it gets the benefit a special statutory proceedings with the limited purpose of hastening recovery of possession of rental property. *Bar K Land Co. v. Webb*, 72 Wn.App. 380, 383 (Div. 3 1993). This provides for an expedited process, but it also has the liability that the plaintiff must abide by the statutory requirements prescribed in the statute. *Christensen v. Ellsworth*, 162 Wn.2d at 365.

Plaintiff had the option to bring an ordinary civil action to enforce its alleged rights under the lease agreement. In doing so, Plaintiff would have foregone the expedited restitution provisions under RCW 59.12. And, in such an action, the Defendants would have an absolute right to assert their affirmative defenses, to assert counterclaims, to partake in discovery, and to have the equitable protections of the Rules of Civil Procedure. Plaintiff clearly sought the benefits of both the statutory unlawful detainer action and the broadness of an ordinary civil action without the pitfalls and detriment that come with either one. In a court of equity, no such jaded, biased, and egregious remedy should be available as it was made so by the trial court in this action.

Here, the Plaintiff made a choice. It chose to seek its remedy pursuant to RCW 59.12. But, it failed to follow procedures and processes required in order to continue under the statute.

Relief under the unlawful detainer statute requires: (1) the tenant's breach, (2) notice to the tenant of the existence of a breach with an opportunity to correct, and (3) failure by the tenant to correct the breach. *DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 317 P.3d 543, 552 (Div. 3 2014), RCW 59.12.030(4). Any noncompliance with the statutory method of process precludes the superior court from exercising subject

matter jurisdiction over the unlawful detainer proceeding. *Christensen v. Ellsworth* 162 Wn.2d 365, 372 (Wash. 2007) quoting *Hous. Auth. v. Terry*, 114 Wash.2d at 560. A party filing an action after improper notice may not maintain such action or avail itself of the superior court's jurisdiction. *Hall v. Feigenbaum*, 178 Wn.App. 811, 819 (Div. 1 2014). In an unlawful detainer action, the trial court is limited to either (1) entering a judgment in favor of the defendant by dismissing the action with prejudice, or (2) rendering a judgment in favor of the plaintiff. *Sundholm v. Patch*, 62 Wash.2d 244, 246 (1963).

Here the trial court should have found that the landlord did not follow the prescribed statutory notice and cure procedure, and should have dismissed the case with prejudice. Appellants implore this Court of Appeals to correct that error.

Appellants respectfully request that this Court grant the following relief:

1. To reverse the orders of the trial court issuing writ of restitution, and granting judgment in favor of FPA;
2. To dismiss the FPA's Unlawful Detainer action with prejudice;
3. To award all costs, including attorney fees, and all damages that Pendleton sustained, or may sustained, by reason of the writ of restitution pursuant to RCW 59.12.090, and the lease agreement; and,
4. To provide such other relief as the Court deems just and proper.

Respectfully Re-Submitted this 8th Day of January, 2015

By:_____

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CERTIFICATE

I certify that a copy of the foregoing was delivered by the method below, and addressed to the following:

Todd Reuter K&L Gates LLP Attorneys for Plaintiff 618 W. Riverside Ave., Ste. 300 Spokane, WA 99201	[✓] First Class Mail, Postage Pre-paid [ ] Hand Delivered [ ] Overnight Mail [ ] Telecopy (Fax) [ ] Email: <todd.reuter@klgates.com>

Dated this 9th day of January, 2015.

By: _____
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