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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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BELLEVUE SQUARE MANAGERS, INC., a Washington  
corporation,

Respondent

vs.

BARCELINO CONTINENTAL CORP, a California corporation,

Appellant

FILED  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
2010 JAN 26 AM 10:50

**Case No. 63516-6-I**

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
HONORABLE CHRISTOPHER WASHINGTON

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**BARCELINO'S REPLY BRIEF**

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**A. INTRODUCTION.**

In this Reply to Bellevue Square Managers, Inc.'s ("BSM") submission, Barcelino returns the focus to the relevant transaction(s); facts and arguments<sup>1</sup> which compel reversal of the trial court's grant of summary judgment<sup>2</sup> in favor of BSM.

However, Barcelino is first compelled to briefly respond to BSM's subterfuge, namely its assertions that Barcelino had a history of conducting illegal "going out of business" sales in the Pacific Northwest. The trial court struck these accusations as irrelevant and baseless. (CP 1121). BSM's counsel is also fully aware that his accusations are unsupported and, in any event, not pertinent to the contract issues before this Court.<sup>3</sup> BSM's persistence is therefore disturbing and must be

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<sup>1</sup> Barcelino incorporates herein by reference the facts and arguments set forth in its Opening Brief.

<sup>2</sup> On summary judgment, the moving party, BSM, has the burden of establishing the absence of an issue of material fact. SAS Am., Inc. v. Inada, 71 Wn.App. 261, 263 (1993). The facts and all reasonable inferences from those facts are viewed by the Court in the light most favorable to the nonmoving party, Barcelino. See Berrocal v. Fernandez, 155 Wn.2d 585, 590 (2005).

<sup>3</sup> For example, BSM has repeatedly accused Barcelino of conducting an illegal 'going out of business' sale when Barcelino left Bellevue Square for Redmond Town Center. BSM is fully aware that the statute in question did not apply to Barcelino's moving sale. (CP 1156). Further, a review of the pleadings in the Unico case show that BSM is fabricating its claims as the case involved nothing more than a rent dispute. (CP 1122-1138; 1155-1157).

construed as an attempt to distract this Court and create unfair prejudice against Barcelino.

**B. ARGUMENT IN REPLY.**

**1. Whether Barcelino violated Section 26 of the Lease entitling BSM to an immediate equitable remedy presents genuine issues of material fact.**

In moving for summary judgment, BSM offered no affidavits or other extrinsic evidence to illuminate the meaning and reach of Section 26 of the Lease including whether contractual notice or provision of an opportunity to cure alleged violations might be required. (CP 1314-1315; 997-1012; 928-996; 878-927; 1308-1313). Instead, BSM relied solely upon the argument of its counsel, David Nold, about what the critical terms of the Lease<sup>4</sup> might mean in the context of the parties' respective obligation(s) of performance:<sup>5</sup>

MR NOLD: Yes. Now, one of the remedies of default is we can terminate the lease. We can do this, we can do that, we can do a lot of things, but what they argue if you go up to the top of 16.1, the top of Page

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<sup>4</sup> Section 26 and related sections of the Lease (16.1 and 16.2) contain several words which have been the focus of interpretation issues including "immediately"; "distress"; "continuing business"; "going concern"; "express condition"; "material breach"; "default"; "notice" and "cure". (CP 910-911; 916).

<sup>5</sup> If a contract requires performance by both parties, the party claiming nonperformance of the other must establish as a matter of fact the party's own performance. Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co., 4 Wn. App. 695 (1971). Thus, the first issue to resolve is whether a plaintiff sufficiently performed under the agreement to be able to claim nonperformance of a defendant. The question of performance is a question of fact. Id.

30, their argument is under 16.1(c). It said tenant shall cure any default under this 16.1 (c) within 10 days except as provided in this lease. Do you see that?

THE COURT: I do.

MR. NOLD: Now, except as provided in this lease, the word immediately is an exception to that. Now, they further confuse the issue by going to the amendment of the lease -- again, I have a copy of it -- and the amendment simply says 16.1 (c) of the lease is amended to change 10 days to 20 days. So we can appropriately read 16.1 (c) to say tenant shall cure any default within 20 days except as provided in this lease. In this lease it says we are entitled to immediate relief, and that makes sense. Why in the world would we give them 20-days notice to cure something where the harm is already done?

**(4/18/09 RP 4:12-25; 5:1-8). See also First Lease Addendum, CP 1027-1031.**

In briefing to this Court, BSM argues that "Section 26 is specific as to the default and the timing of available remedies" because of the "obvious injury<sup>6</sup> connected with store closing sales." (BSM Brief, pgs. 22 and 22). Once again, however, these argument(s) not only sound hollow, but they make little sense when the purpose of the Lease<sup>7</sup> and the parties'

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<sup>6</sup> At the same time counsel argues that "the harm is impossible to quantify with precision." (BSM Brief, pg. 31).

<sup>7</sup> In the instant case, the subject business is to advertise and sell "...high-quality European styled apparel...". (CP 883, 'permitted uses' and CP 919 'tenant's advertising requirement'). BSM collected Percentage Rent calculated from Barcelino's Gross Sales (See, Lease, para.4.2, CP 886).

course of dealing<sup>8</sup> is considered in light of the whole contract.

**(a) Barcelino operated a successful business continuing through the term of its lease without interruption or distress.**

BSM argues that Section 26 of the Lease "clearly" prohibits distress sales noting that the term 'distress' is a "term of art" (BSM Brief, pg. 20) to include "auction, fire, bankruptcy, going out of business, lost our lease, moving and store closing sales." (Id. and CP 917). It follows, BSM argues, that whether Barcelino was in "distress", financial or otherwise, is irrelevant because Barcelino employed the terms "store closing" on signage at the store and in other advertising. (BSM Brief, pgs. 20-23). BSM asserts that Section 26 "clearly states" that any violation of it "shall be a material breach of this Lease and shall immediately entitle Landlord to the rights and remedies set forth in Section 16.2." (BSM Brief, pg. 21).

BSM analyses are superficial. First, BSM omits critical contractual terms in raising the issue of whether a tenant's use of the terms 'store closing' in conjunction with a sale could *alone* constitute a "material

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<sup>8</sup> See Restatement (Second) of Contracts, Section 212, Comment *b*, cited in Berg v. Hudesman, 115 Wn.2d 657 (1990) ("Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.").

breach" of the Lease. Section 26 of the Lease provides in pertinent part that:

"Landlord and Tenant acknowledge that Tenant's use of the Leased Premises as a **continuing business** in compliance with the provisions of this Lease specifically including but not limited to the terms and provisions of Article 5 above is an essential part of the bargained-for consideration of this Lease. Tenant further acknowledges that its failure to comply with the terms of Article 5, including the **failure to maintain the business within the Leased Premises as a going concern**, will have a material adverse impact on Landlord and other tenants of the Shopping Center."

(CP 917, Section 26 of the Lease, emphasis added. See also Appendix "1" hereto).

As explained in Barcelino's Opening Brief, the terms of Section 26 of the Lease reveal the parties' intent to address and potentially sanction a "distress sale" only in the context of a violation of the duty of **continuous operation** or a loss or forfeiture of control over the leased premises as a **going concern**. (CP 917). BSM's remedies for perceived advertising violations in conjunction with a sale by a tenant who is in continuous operation during the lease term are contained elsewhere in the Lease. Notably, Sections 24 ("Signs"), 25 ("Displays"), 5.2 ("Uses Prohibited"), 13.5 ("Rules and Regulations") of the Lease and Section 5.1 of the Rules & Regulations promulgated for the Mall (CP 916-917; CP 895; CP 905; and CP 1053-1054) regulate signage/advertising of a tenant like Barcelino

who has demonstrated no financial distress or interruption/cessation of continuing operations during the lease term.

The words "distress", "continuing operations" and "going concern" as terms of art in commercial leasing transactions are supportive of Barcelino's position. The general rule under Washington law is that a 'term of art' in contract interpretation is to be given its technical meaning when used in a transaction within its technical field. See Berg v. Hudesman, 115 Wn.2d 657, (1990). See also, Keeton v. State, 34 Wn.App. 353, 360-361 (1983) (where a general provision precedes specific exceptions or qualifications to the general proposition, both are given effect). In commercial leasing, "distress" means actions necessitated by negative financial conditions including the possible forced seizure and sale of property. (See Barcelino's Opening Brief, pg. 33). See also Kaiser Steel Corp v. U.S., 411 F.2d 335, 341 (9th Cir. 1969) (successful mining business sales could not be defined as "distress sales" under the circumstances). The terms 'continuing business', 'continuous operations' and 'going concern' are similarly used as 'terms of art' in commercial leasing to indicate an intent that no interruption of the agreed business during the lease term will take place. See Capps v. Western Talc Co., 114 Wn. 94, 95-96 (1921).

In the present case, there is no dispute that Barcelino at all times fulfilled its duties of continued operation maintaining a beautiful and successful store for over 10 years through to the very end of its extended lease term.<sup>9</sup> Under these circumstances, the Lease does not disclose an intent that Barcelino's allegedly improper advertising (e.g., use of the term 'store closing' in some advertising) and sale would equate to a "material" breach and per se injury under Section 26. This is especially true given the vibrant business and long term 'continuous operations' of Barcelino.<sup>10</sup> Notably, one of the considerations on the factual issue of 'materiality' of an alleged breach is the extent to which the allegedly *injured* party will be

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<sup>9</sup> Barcelino was also not "going out of business" but simply moving to another premium location at the end of its lease term, facts that BSM does not dispute. (CP 1169-1170; CP 133). BSM also does not dispute that its own decision to lease Barcelino's space to another party forced Barcelino to leave. (CP 1171; CP 1173).

<sup>10</sup> A breach of contract is not material if substantial performance has been rendered. See J. Calmari & J. Perillo, The Law of Contracts, Section 11-22 (2d ed. 1977). Substantial performance is an elusive standard which is always a question of fact. Id.

deprived of a benefit which he *reasonably expected*.<sup>11</sup> See Baille Communications Ltd. v. Trend Business Sys., 53 Wn.App. 77, 83 (1988) (quoting Restatement (Second) of Contracts, Section 241 (a) (1981). In the present case, BSM fails miserably when it tries to identify any injury resulting from Barcelino's sale activities. When moving for a temporary restraining order ("TRO"), BSM argued that Barcelino's use of the words "store closing" on some store signage was "embarrassing" thereby causing "immediate and irreparable harm". (CP 337:6-9). By the time of the hearing(s) on preliminary injunction, BSM characterized the injury as "a cheapening of the entire shopping experience." (5/14/08 RP 20:1-2). The trial court understandably had a problem with BSM's offers of proof. Judge McBroom following his review of the alleged evidence of actual

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<sup>11</sup> Other factors in determining whether conduct amount to a 'material breach' are:

- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts, Section 241 (b)-(e).

and irreparable harm necessary to support a order of preliminary injunction stated:

"I have now reviewed and refreshed my memory on the declarations of Mr. Dallain, and Mr. Schreck and Mr. Bachman. I still think that finding damages and whether they are substantial or not is an issue of fact even based on those. I would clean up this order to say that allowing the tenant to violate the lease and conduct a store closing sale potentially could result in actual injury to the plaintiff.  
**(5/14/08 RP 24:16-25).**

The truth and the primary reason for Barcelino's appeal is that Barcelino's sale activities of which BSM complains did not injure anyone.<sup>12</sup> When the critical terms of the Lease are properly analyzed in light of available extrinsic evidence it becomes apparent that Barcelino's alleged advertising and sale did not constitute a 'material' breach or a violation of Section 26.

**(b) The Lease required BSM to provide contractual notice and an opportunity to cure Barcelino's advertising and sale activities at issue.**

BSM also offers only conclusory argument for its position that Section 26 of the Lease did not contemplate any performance on the part

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<sup>12</sup> Barcelino's inventory sale stood to benefit all parties (including other tenants) by increasing foot traffic in the Mall by Barcelino's typically well-heeled customers, by increasing BSM's Percentage Rent calculated from Barcelino's Gross Sales (See, Lease, para.4.2, **CP 886**) and by assisting the efficient and timely removal of Barcelino's property from the leased premises to accommodate the new tenancy BSM created to move Barcelino out. (See, Lease, para.21.2, **CP 916**).

of BSM because of Barcelino's activities. BSM argues that "[f]or obvious reasons, there was no cure period for a breach of Section 26." (BSM Brief, pg. 21). However, BSM offers no reasons whatsoever and any 'obvious' ones are no apparent.

BSM cites Coast to Coast Stores v. Gruschus, 100 Wn.2d 147 (1983) apparently for the proposition that Washington courts have terminated contract(s) even when they do not contain notice or opportunity to cure provisions. (BSM Brief, pg. 22). However, the Gruschus case involved termination of a franchise and the particular application of Section 19.100.180(2)(j) of Washington's 'Franchise Investment Protection Act'. The Act contained a proviso that under some circumstances a franchisor need not provide a franchisee notice and opportunity to cure before terminating a franchise. The "circumstances" under the Act included:

where the franchisee (i) is adjudicated a bankrupt or insolvent; (ii) makes an assignment for the benefit of creditors or similar disposition of the assets of the franchise business; (iii) voluntarily abandons the franchise business; or (iv) is convicted of or pleads guilty or no contest to a charge of violating any law relating to the franchise business.

Id. at 153.

To the extent the Gruschus case and the statute it interprets has any application to our case, it appears to support the logic of Barcelino's position concerning contract interpretation. The statute in Gruschus like Section 26 in the present case seems to be designed to provide control over actors that have lost control because of financial circumstance or an abandonment of their business.

In the trial court, BSM argued that Section 26 of the Lease provides an "exception" to the 'notice' and 'cure' provisions of Section 16.1 (c) by making the remedies of Section 16.2 "immediately" available. (4/18/09 RP 4:12-25; 5:1-8). However, in advancing this argument counsel once again omitted critical terms of the Lease in an effort to fit his purpose. As the drafter of the Lease, BSM was in a position to expressly 'except' a Section 26 breach from the 'notice' and 'cure' obligations of Section 16.1 [as it did for the breaches of abandonment and failure to pay rent found in 16.1 (a) and (b)].

Contrary to BSM's interpretation of the Lease, Section 26 provides that circumstances described therein "shall immediately entitle Landlord to the **rights and remedies** set forth in Section 16.2." (CP 917, Lease, Section 26). Both Section 26 and Section 16.2, however, qualify the landlord's right to "remedies" when read in context. The first sentence of

Section 16.2 of the Lease provides that:

**"Remedies in Default. In the event of any such default or breach by Tenant, Landlord may at any time after any applicable cure period, with or without notice or demand and without limiting Landlord in the exercise of a right or remedy which Landlord may have by reason of such default or breach:  
\*\*\* "**

(CP 910, Lease, Section 16.2, emphasis added).

Importantly, Section 16.1 (c) expressly provides that the landlord has an obligation to provide notice and an opportunity to cure after a tenant's failure to perform *any* of the covenants, conditions, or provisions to be observed or performed by the tenant (except for vacating the premises and failure to pay rent. [CP 910, Sections 16.1 (a) - (c)]. There is no doubt that Section 26 is included because by its plain terms it is an **"express condition"** of the Lease. (CP 917, Lease, Section 26). The cure period commencing from the tenant's receipt of written notice is 10 days unless otherwise provided in the Lease. In the instant case, the parties negotiated a longer cure period of 20 days.

BSM's interpretation that the word "immediately" in Section 26 creates an 'exception' to the foregoing terms would require that additional terms be read into the contract and would render others meaningless.<sup>13</sup>

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<sup>13</sup> See Wagner v. Wagner, 95 Wn.2d 94, 102 (1980) ("Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it."); Spectrum Glass Co. v. Pub.Util.Dist.

Further, there is ample extrinsic evidence that supports a contrary interpretation. In fact, BSM's own managers and owner seem to support Barcelino's interpretation of how the Lease should work.

In deposition, Kemper Freeman, the owner of Bellevue Square, explained that when BSM thought that a tenant was violating its lease including the conduct of any improper sale that BSM would take the following steps in order:

"Yeah, if we see something that we've agreed isn't to happen, you know, usually the first thing we'll do is stop in, talk to them, see what they are doing. And if that doesn't, then the second thing, we'll send a letter, and the third thing, we'll have the legal, it usually goes one, two, three."

(CP 1070, Excerpts from page 8 of Dep. of Kemper Freeman.

See also, CP 1013-1018).

Similarly, Robert Dallain, BSM's Vice-President and General Manager, explained what he considered 'standard operating procedure' in the event BSM thought a tenant's advertising was improper:

"A step-by-step would be either myself or Glen Bachman would meet with whoever, the manager of the store or the

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No. 1 of Snohomish Co., 129 Wn.App. 303, 312 (2005) ("A court must examine the contract as a whole and not adopt an interpretation that renders a term absurd or meaningless.").

owner, depending on what it is, who it is, and explain to them the lease language and rules and regulation.\*\*\* 99.9 percent we don't even get to the attorney conversation. It's usually dealt between myself or Glen Bachman to the manager of the store. Now, that is if a store is closing for, closing. That does not talk about bankruptcy or anything like that. \*\*\* Just a simple store closing."

(CP 1084-1085, Excerpts from pages 35-36 of Dep. of Robert Dallain. See also, CP 1013-1015).

In deposition, Mr. Dallain also expressed apparent regret that a tenant in bankruptcy may prompt a sale that BSM opposed:

"Q: Okay. Is it your position that Bellevue Square has the right to control signage on the street?

A: No.

Q: Okay. Then how does it violate?

A: You asked me if it violated - I hate it, but I know where it's coming from becomes it comes from the bankruptcy court and I can't do shit about it."

(CP 1145, Excerpts from page 28 of Dep. of Robert Dallain. See also, CP 1013-15).

The circumstances surrounding Barcelino's closing sale at its women's store, Barcelino Per Donna, also calls into question whether the parties intended for Section 26 to apply, in any event, to a 'store closing sale' or related advertising without notice/cure and without evidence of distress or a premature end to a lease term. BSM did not prohibit the use of the terms 'store closing' on signage for the Barcelino Per Donna sale. (CP 1178). Instead, BSM negotiated directly with Barcelino concerning placement of the sign(s) to ensure the sale went smoothly and in a fashion that benefitted both tenant and landlord. (CP 1178, CP 1039:11-20, CP 1426). The conduct of BSM in this regard is consistent with evidence that a number of other tenants employed similar advertising for closing sales of which BSM apparently made no objection. (CP 1182-1196).

Barcelino also contends that BSM's interpretation of the Lease is unreasonable because it could work a potential forfeiture under circumstances where the alleged infraction (e.g., advertising violations in conjunction with a sale) could easily be cured. BSM as the drafter of the Lease was in the best position to resolve any doubt about the timing and nature of any available remedies for Section 26 violations and any ambiguity in this regard should be construed against BSM. See Stevenson v. Parker, 25 Wn.App. 639, 646 (1980). See also, Anvui, LLC v. G.L. Dragon, LLC, 163 P.3d 405 (Nev. 2007); Continental Ins. Co. v.

PACCAR, Inc., 96 Wn.2d 160 (1981); Maxwell v. Maxwell, 12 Wn.2d 589 (1942) (course of dealing can create latent ambiguity in a contract that might otherwise appear to contain no patent ambiguity).

Barcelino does not dispute that BSM has remedies for improper signage and advertising of a tenant; but rather that under the facts of this case they did not include remedies potentially available under Section 26 and in any event not without provision of formal notice and an opportunity to cure.

In its Brief, BSM employing an almost self-excusatory tone argues that the Lease "did not require Bellevue Square to sit idly for ten days"<sup>14</sup> while Barcelino conducted a distress sale...". (BSM Brief, pg. 23). Barcelino agrees that if it had actually violated Section 26 that 'idleness' would not be required of BSM. BSM's required performance would be the provision of written notice to Barcelino at its corporate office in California detailing the specific facts of instances where Barcelino had allegedly breached the Lease and setting forth what Barcelino must do to cure the breach. See Byrkett v. Gardner, 35 Wn. 668, 674-5 (1904); Deming v. Jones, 173 Wn. 644 (1933). Thereafter, BSM would have been obligated

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<sup>14</sup> It should be noted that the parties negotiated an amendment to the Lease which provided that BSM would provide **20 days** to cure breach of condition(s) of the Lease such as those contained in Section 26. (First Lease Addendum, para. 31, **CP 1491; CP 1027-1031**).

to provide Barcelino up to 20 days to cure the alleged condition(s) of breach before any suit could validly be prosecuted. See Gray v. Gregory, 36 Wn.2d 416 (1950).

**2. BSM's failure to satisfy notice requirements of the Lease and of state law in pursuing a remedy resulted in deficiencies in the temporary restraining order which rendered it void.**

Even if it was determined that BSM could rightfully initiate suit without providing Barcelino an opportunity to 'cure', it does not follow that the prosecution of the action for injunction could proceed without notice required by the Lease,<sup>15</sup> as well as that required by statute. In Washington, parties are deemed to contract in reliance upon existing law so that any statute affecting the subject matter of a contract is incorporated therein. See Wagner v. Wagner, 95 Wn.2d 94, 98 (1980).

BSM claims that it provided Barcelino notice of its application for temporary restraining order on March 14, 2008 when an attorney for BSM named Vanessa R. Schiodtz handed a letter and several pleadings to "Larry, an employee at Barcelino." (See Dec. of Service, **CR 43-44; 1104-1105**). Under Washington law service on a foreign corporation such as Barcelino is accomplished where made upon "any agent, cashier or

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<sup>15</sup> BSM's chosen 'contractual remedy' of injunctive relief required it to provide Barcelino with written notice of the action at its corporate offices in Corte Madera, California. (First Lease Addendum, paragraph 42, **CP 1031** and 'Bellevue Square Lease' pg. 1, paragraph 1.1, **CP 881**). BSM failed to do so.

secretary thereof." RCW 4.28.080 (10). However, Washington courts have limited the rule to mean that:

"[s]ervice of process on an agent of a foreign corporation doing business within the state must be on an agent representing the corporation with respect to such business. It must be made on an authorized agent of the corporation who is truly and thoroughly a representative of it, rather than a mere servant or employee, or a person whose authority and duties are limited to a particular transaction."

See Reiner v. Pittsburgh Des Moines Corp., 101 Wn.2d 475 (1984).

Whether a person is an 'agent' of a foreign corporation for the purposes of accepting service of process under RCW 4.28.080 (10) is determined from a review of all the surrounding facts and proper inferences to be drawn therefrom. See Fox v. Sunmaster Products, Inc., 63 Wn.App. 561 (1991). In the present case, BSM offered no evidence concerning the status of "Larry", or anyone else for that matter, in order for the trial court to make a determination whether service of notice was accomplished as required by law or in accordance with the terms of the parties' Lease.<sup>16</sup> Barcelino established that Mr. Hansen was not authorized to accept service of notice on behalf of Barcelino. (CP 1089-1090).

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<sup>16</sup> BSM argues to this Court that "adequate" notice was provided to Barcelino prior to the [TRO] hearing." (BSM Brief, pg. 25); but it makes no attempt to identify the kind of alleged notice/service it provided or how it might have satisfied either the terms of the Lease or applicable law. When applying for a temporary restraining order, counsel for BSM citing Section 26 of the Lease informed the court that no notice was required. (CP 19:13-16)

BSM apparently disputes that notice was required under the Lease or by state law incorporated into the Lease [e.g., CR 65(b); RCW 4.28.080 (10)]. (CP 1311:12-18). BSM's counsel informed the trial court that none was required. (CP 19:13-16). BSM also provided nothing to try and prove service of notice except the Declaration of Service of Ms. Schiodtz.(CR 43-44. See also CP 1153; CP 1311:12-18; CP 38-39).

Under Civil Rule 65 (b), when a temporary restraining order is entered without notice it must define the injury and state why it is irreparable and why the order was granted without notice. See CR 65(b). Plainly, the TRO entered by Judge Halpern on March 14, 2008 does not contain this required information. (CP 6-12). Civil Rule 65 (d) entitled "Form and Scope" also provides that every restraining order "shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail; and not by reference to the complaint or other document, the act or acts sought to be restrained." [CR 65 (d)]. The TRO at issue provided some information about acts to be restrained, but it provides few, if any, discernable reasons for the issuance of the Order. Further, the TRO describes the acts to be restrained by reference to attached photographs/documents in violation of Civil Rule 65 (d).

The above-described deficiencies in the TRO caused by BSM's premature and ill-founded application violated Barcelino's due process

rights and rendered the order void. See generally, Todd v. Moen, 151 Wn.App. 356 (2009).

**3. The temporary restraining order and order for preliminary injunction were void because they were unsecured by the bond ordered by the court.**

Civil Rule 65 (c) entitled "Security" provides that no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper...". CR 65 (c). Similarly, Revised Code of Washington 7.40.080 provides in pertinent part that: "No injunction or restraining order shall be granted until the party asking it shall enter into a bond, in a sum as shall be fixed by the court...". RCW 7.40.080. Presumptively, the use of the word "shall" in a statute is imperative and operates to create a duty rather than to confer discretion. See Crown Cascade, Inc. v. O'Neal, 100 Wn.2d 256 (1983). A court cannot dispense with the bond requirements of the RCW 7.40.080 or Civil Rule 65 (c) and an order of injunction granted without the giving of security as ordered by the court is void. See Evar, Inc. v. Kurbitz, 77 Wn.2d 948 (1970) (posting of a bond is a condition precedent to the obtaining of a temporary restraining order or preliminary injunction).

In the present case, it is undisputed that Judge Halpern ordered BSM to secure the TRO with a bond in the amount of \$50,000 but that

BSM failed to give security in that amount. (CP 13). Rather, BSM provided a bond in the amount of \$10,000 and the bond amount fixed by the court was not corrected until on or about May 14, 2008.<sup>17</sup> At that time, Judge McBroom recognized that neither the underlying TRO nor his initial order for preliminary injunction was properly secured as ordered. (5/14/08 RP, 15:10-25; 25:3-22; 31:12-25; 32:1-11).

In the trial court, BSM argued that "technical deficiencies" in the bond were "corrected retroactively" (CP 1311-1312; CP 1083). However, BSM did not provide any legal precedent in support of these assertions. (CP 1311-1312). In briefing to this Court, BSM employs a new argument, namely, that its attorneys and the bonding company that issued the bond made a "mutual mistake" concerning the amount of the bond that was issued and that the bond contract should therefore be reformed. (BSM Brief, pg.30) BSM argues that "the record is clear that there was a mutual mistake regarding the amount of the bond." (BSM Brief, pg. 30).

To the contrary, however, proof of a 'mutual mistake' in a contract must be shown by clear and convincing evidence and BSM has offered none. See McConnell v. Gordon Constr. Co., 133 Wn. 405 (1925). In

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<sup>17</sup> Counsel for BSM apparently learned that that the bond was insufficient on or about March 14, 2008 at which time counsel apparently tried to alter it by hand. (BSM Brief, pg. 10-11; CP 13). Thereafter, however, BSM did not try to increase the amount of the bond until on or about April 15, 2008. (CP 298-305).

particular, there is no evidence of record concerning the intentions of the bonding company at the time of the alleged transaction or mistake. Reformation based upon an alleged mutual mistake is justified only if the parties' intentions were identical at the time of the transaction [See Denaxas v. Sandstone Court of Bellevue, LLC, 148 Wn.2d 654, 669 (2003)] and the party seeking reformation must prove the facts supporting it by clear, cogent and convincing evidence. Id. In the present case, BSM has never offered any evidence supportive of mutual mistake or reformation and in fact raises these issues for the first time in this court.

Counsel for BSM apparently learned that that the bond was insufficient on or about March 14, 2008 at which time he tried to alter it by hand. (BSM Brief, pg. 10-11; CP 13). Thereafter, however, BSM did not effect an increase the amount of the bond until on or about April 15, 2008.<sup>18</sup> (CP 1057-1064; CP 211-213). BSM can try to employ any fiction it wishes, but the unalterable truth is that BSM gave no security/bond as ordered by court until well after the first three orders of injunctive relief were entered (i.e., the TRO dated 3/14/08; the Order of Contempt dated 3/17/08 and the Order of Preliminary Injunction dated 3/25/08). As a result none of these orders were secured in compliance with Civil Rule 65

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<sup>18</sup> At that time, the type of bond procured and labeled as such was still a "temporary restraining order bond". (CP 298-305).

(c) and Revised Code of Washington 7.40.080 and were therefore were void ab initio.

**4. This Court should reverse the dismissal of Barcelino's counter-claim for breach of contract.**

Consistent with the economic loss rule as it applied in Washington, Barcelino's counter-claim for breach of lease (CP 281-287) includes proper notice and a cause of action for damages arising from BSM's breaches of contract including all consequential wrongs and damages occasioned by the issuance of the injunctive relief at issue. For the reasons stated in Barcelino's Opening Brief and in this Reply, the trial court erred in dismissing Barcelino's counter-claim for breach of lease on summary judgment. Barcelino requests that this Court reverse the dismissal of Barcelino's action against BSM and order reinstatement of any bond posted as security by BSM.

**5. Barcelino is entitled to its attorneys' fees.**

If this Court reverses the trial court's order of summary judgment either in whole or in part or directs that judgment be entered in favor of Barcelino, Barcelino requests reimbursement of fees and/or an award of fee pursuant to the parties' Lease and RCW 4.84.330 for all fees incurred in both the trial court and in the proceeding on appeal.

6. **CONCLUSION.**

Both the plain provisions of the Lease and those that raise issues of interpretation and material issues of fact support the conclusion that the trial court's grant of summary judgment for BSM was inappropriate.

BSM's claim that it properly invoked Section 26 of the Lease because of some advertising in conjunction with a sale near the end of Barcelino's long and successful lease is doubtful. The contract terms alone do not compel such a conclusion. The key terms of the clause (e.g., 'distress'; 'continuing business') support that the parties intended that additional evidence such as business interruption, loss of control due to bankruptcy or some other negative financial circumstances would also be necessary before Section 26 might be triggered. The extrinsic evidence of BSM's course of dealing and standard practices is also supportive of Barcelino's position. (Reply, pgs 16-18). Mr. Dallain in particular appears to distinguish available action based upon circumstances of financial distress (e.g., bankruptcy) versus a "simple store closing sale". The testimony of Mr. Freeman and Mr. Dallain reveals that BSM also thought that 'notice' and opportunity to 'cure' were intended for the alleged breaches at issue even if Section 26 could be invoked. Because of Barcelino's indisputably high performance throughout its lease term it is also doubtful that anyone would infer that the breaches in question could

constitute a "material" breach supportive of immediate action for rescission/forfeiture.

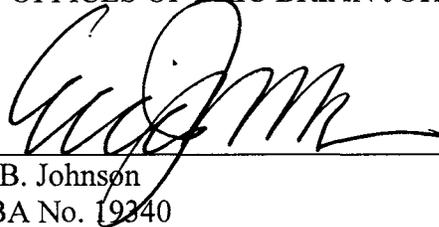
The only reasonable reading of the Lease and result (especially when rules for contract construction are applied) supports that 'notice' and opportunity to 'cure' were contractual conditions precedent to any available remedies for Section 26 violations. There is no dispute that BSM failed to so perform. Consequently, BSM's action should have been dismissed by the trial court.

Finally, the facts of this case reveal that BSM's actions in pursuing relief were hasty, legally and procedurally flawed both in terms of contract administration and in dealing with processes in the trial court. BSM's breaches of contract and mistakes resulted in the issuance of injunctive relief that cheated due process and other requirements of law at every turn. The trial court's order for summary judgment determining that "the preliminary relief was correctly and properly entered" and affirming the "appropriateness of that relief" must not be sustained for all of the reasons advanced by Barcelino.

Barcelino respectfully requests that this Court reverse the trial court in all respects and remand to the trial court for further proceedings consistent with the Court's rulings.

Respectfully submitted this 22nd day of January, 2010.

LAW OFFICES OF ERIC BRIAN JOHNSON

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Eric B. Johnson  
WSBA No. 19340  
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Continental Corp

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

BELLEVUE SQUARE MANAGERS, INC.,  
a Washington corporation,  
Respondent

vs.

**CERTIFICATE OF SERVICE**  
Court of Appeals No. 63516-6-I

BARCELINO CONTINENTAL CORP,  
a California corporation,  
Appellant

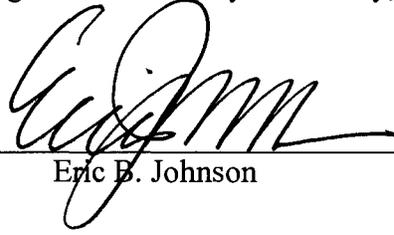
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I, Eric B. Johnson, certify under penalty of perjury under the laws of the State of Washington that on January 22, 2010, I served by U.S. Mail upon the person(s) listed below the following documents: 1) **Barcelino's Reply Brief** 2) **Certificate of Service.**

David A. Nold  
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**Counsel for Respondent Bellevue Square Managers, Inc.**

Clerk of Court, Court of Appeals Division I  
600 University Street  
Seattle, WA 98101-1176

Dated at Bainbridge Island, Washington this 22nd day of January, 2010.

A handwritten signature in black ink, appearing to read 'Eric B. Johnson', written over a horizontal line. The signature is stylized and cursive.

Eric B. Johnson