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

BELLEVUE SQUARE MANAGERS, INC., a Washington
corporation,

Respondent

vs.

BARCELINO CONTINENTAL CORP, a California corporation,

Appellant

Case No. 63516-6-I

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE CHRISTOPHER WASHINGTON

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	Page
Table of Authorities	4
A. <u>INTRODUCTION.</u>	7
B. <u>ASSIGNMENTS OF ERROR.</u>	9
1. Assignments of Error.	9
2. Issues Pertaining to the Assignments of Error.	10
C. <u>STATEMENT OF THE CASE.</u>	11
1. The Lease Agreement for Space 143.	11
2. Barcelino Leases Space 110.	15
3. Barcelino's Inventory Sales.	15
4. BSM Files Suit and Moves the Court for a TRO.	17
5. BSM's Motion for Contempt.	19
6. BSM Denies Barcelino's Subsequent Requests to Advertise.	19
7. The Parties' Motions Concerning Preliminary Injunction.	20
8. BSM's First Motion for Summary Judgment.	23
9. BSM's Second Motion for Summary Judgment.	24
10. Barcelino's Appeal.	25

D. <u>ARGUMENT.</u>	26
1. Standards of Review.	26
2. Issues Pertaining to The Assignments of Error.	28
(1) Whether Barcelino conducted a distress sale subject to Section 26 of the Lease.	28
a) The trial court's adoption of BSM's "Plain Meaning Rule" analysis led to error.	30
b) Barcelino's sale was not a "distress sale" under the terms of the Lease.	32
c) Evidence extrinsic to the Lease supports that Section 26 was not intended to apply to Barcelino's sale.	35
(2) Whether the Lease required BSM to provide Barcelino with notice and opportunity to cure alleged breach of Section 26 of the lease.	38
(3) Whether the injunctive relief granted and affirmed by the trial court was otherwise improper where: a) the TRO, order of contempt, and order(s) for preliminary injunction violated Civil Rules 65 and 52. b) BSM failed to show that Barcelino's actions had or would result in actual or substantial harm to BSM. c) BSM had an adequate remedy at law detailed in Section 16.2 (b) of the Lease.	44
(4) Whether the trial court erred in granting summary judgment dismissing Barcelino's counter-claim against BSM for breach of contract.	50
(5) Whether the trial court abused its discretion in denying Barcelino's motion for reconsideration of the order granting BSM's motion for summary judgment.	51
(6) Whether the trial court erred in awarding BSM attorney's fees and costs.	51
E. <u>CONCLUSION.</u>	52

TABLE OF AUTHORITIES

<u>CASES</u>	Page
<u>Right-Price Recreation, LLC v. Connells Prairie Comm. Council</u> , 146 Wn.2d 370 (2002).	26
<u>Johnson v. Farmers Ins. Co. of Washington</u> , 117 Wn.2d 558 (1991).	26
<u>Mountain Park Homeowners Ass'n v. Tydings</u> , 125 Wn.2d 337 (1994).	27
<u>Rabon v. City of Seattle</u> , 135 Wn.2d 278, 284 (1998).	27,28,29,46
<u>Herron v. King Broad.Co.</u> , 112 Wn.2d 762, 767-68 (1989).	27
<u>Wash. Fed'n of State Employees v. State</u> , 99 Wn.2d 878 (2000).	27
<u>Kucera v. Dep't of Transp.</u> , 140 Wn.2d 200 (2000).	27,34,44,50
<u>Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life</u> , 106 Wn.2d 261 (1986).	27
<u>McGreevy v. Or. Mut. Ins. Co.</u> , 90 Wn.App. 283, 289 (1998).	28
<u>Progressive Animal Welfare Soc'y v. Univ. of Wash.</u> , 114 Wn.2d 677 (1990).	28
<u>Berg v. Hudesman</u> , 115 Wn.2d 657 (1990).	30, 31
<u>Ladum v. Utility Cartage, Inc.</u> , 68 Wn.2d 109 (1966).	35
<u>Brogan & Anensen v. Lamphiear</u> , 165 Wn.2d 773 (2009).	35, 38
<u>Kaiser Steel Corp v. U.S.</u> , 411 F.2d 335, 341 (9th Cir. 1969).	37
<u>Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc.</u> , 120 Wn.2d 573 (1993).	37

<u>Ross v. Bennett</u> , 148 Wn.App. 40 (2008).	38
<u>Kandra v. Higgins</u> , 46 Wn.2d 321 (1955).	38
<u>Gray v. Gregory</u> , 36 Wn.2d 416 (1950).	41, 42
<u>Byrnett v. Gardner</u> , 35 Wn. 668, 674-5 (1904).	41
<u>Deming v. Jones</u> , 173 Wn. 644, 647-49 (1933).	41
<u>Stevenson v. Parker</u> , 25 Wn.App. 639, 646 (1980).	43
<u>Ranier Nat'l Bank v. Inland Machine Co.</u> , 29 Wn.App. 725 (1981).	43
<u>Stuchell v. Mortland</u> , 8 Wn.App. 884, 893 (1973).	44
<u>Allied Stores Corp. v. North West Bank</u> , 2 Wn.App. 778, 784 (1970).	44
<u>Turner v. City of Walla Walla</u> , 10 Wn.App. 401 (1974).	45
<u>Cheney v. Montlake Terrace</u> , 20 Wn.App. 854 (1978).	47
<u>STATUTES</u>	
RCW 4.28.080 (10).	46, 47
RCW 4.84.330.	51
<u>COURT RULES</u>	
King County Superior Court Local Rule 7 (b) (7).	24
Civil Rule 59.	24
Rules of Appellate Procedure 2.4 (b).	26
Civil Rule 56.	26

Civil Rule 65.	45, 46, 47
Civil Rule 52.	46
RAP 18.1.	51
RAP 12.8.	51
<u>OTHER AUTHORITIES</u>	
<u>Restatement (Second) of Contracts</u> Section 200.	29
Patterson, <u>The Interpretation and Construction of Contracts</u> , 64 Colum.L.Rev. 833, 835 (1964).	29
<u>Restatement (Second) of Contracts</u> Section 212.	30, 31
<u>Restatement (Second) of Contracts</u> , Comment <i>b</i> , Section 212.	31
35 <u>Real Prop. Prob. & Tr.J.</u> 57.	32
<u>New Oxford American Dictionary</u> (2nd Ed. 2005).	33

A. INTRODUCTION.

Defendant Barcelino Continental Corp ("Barcelino") appeals from an order of summary judgment to Plaintiff Bellevue Square Managers, Inc. ("BSM"), Hon. Christopher Washington, Judge. The order of summary judgment dated April 17, 2009 affirmed the 'appropriateness' of prior orders of the trial court granting BSM preliminary injunctive relief, dismissed Barcelino's counter-claim against BSM for breach of contract and awarded BSM attorney's fees and costs pursuant to RCW 4.84.330. **(CP 1314-1315)** Barcelino's notice of appeal was timely filed and served on May 18, 2009. **(CP 1330-1337)**.

This case concerns a Bellevue Square Mall lease dispute between the landlord, BSM, and its tenant, Barcelino, arising from a inventory sale of fine men's clothing and accessories started by Barcelino on March 5, 2008 near the April 30, 2008 ending of its lease term. **(CP 1172-1181)**. On March 14, 2008, with less than one day's notice, BSM sued Barcelino and moved 'ex parte' to restrain Barcelino's inventory sale characterizing it as a "distress sale" prohibited by the parties' lease agreement¹ (hereafter

¹ A complete copy of the parties' Lease dated June 11, 1997 and First Lease Addendum dated July 1, 1997 can be found at **CP 880-927** and **CP 1478-1498**.

A copy of certain sections of 2007 Rule & Regulations for the Mall which BSM claims were incorporated into the Lease by reference can be found at **CP 1053-1054**. See also Demand Letter of Counsel for BSM dated March 13,

the "Lease"). (**Motion for TRO, CP 6-44; CP 1106-1112**). Judge Helen Halpert, handling the court's ex parte calendar, entered a temporary restraining order ("TRO") prepared by BSM but which provided no specific reasons for the restraints imposed upon Barcelino. (**CP 6-12**). Further, the TRO contained no findings of fact and conclusions of law including, among other things, an explanation of injury and why BSM did not have an adequate remedy at law. [**CP 6-12. See also, Lease, Section 16.2 (b), CP 911; and CP 1035**]. The TRO was also unsecured by the amount of the bond mandated by its terms. (**CP 13-14**). In sum, the TRO provided a 'seed' of error which unfortunately grew as BSM's action proceeded through the trial court.²

In addition to the deficiencies noted above, there are several other reasons why the underlying order(s) for preliminary relief³ were

2008, **CP 1101-1105**. Barcelino contends that BSM never delivered the 2007 Rules & Regulations to it and therefore had no effect. (**CP 1187-1188; Lease, Section 13.5, CP 905**).

² Judge Douglas McBroom amending a second subsequent order concerning preliminary injunction lamented that the findings of fact and conclusions of law which BSM had embroidered on the TRO to create the original order were overreaching: "I looked at this order I signed, and there's a long list of findings here. I maybe made some sort of rush to judgment in signing these. I think what you said about it being a hurry-up deal is an accurate characterization." (5/14/08 RP at pg.11, lines 10-14).

³ A copy of all the trial court's orders granting preliminary relief are also attached as exhibits "1" through "4" to the Declaration of David Nold. (**CP 931-946**).

improper. A central tenant of Barcelino's case is that BSM failed to provide Barcelino with written notice and an opportunity to cure the alleged condition(s) of breach prior to bringing suit. (**Lease, Section 16.1 (c), CP 910**). These contractual obligations of BSM were required 'conditions precedent' to any lawful action by BSM. By prematurely and improperly pursuing litigation, BSM wrongfully prevented Barcelino from efficiently conducting an inventory sale near the end of the Lease causing hundreds of thousands of dollars in damage to Barcelino. (**CP 308-310; 1188-1189**).

B. ASSIGNMENTS OF ERROR.

(1) Assignments of Error.

1. The trial court erred in granting BSM's motion for summary judgment by misinterpreting Section 26 and related provisions of the Lease.
2. The trial court erred in granting BSM's motion for summary judgment by the manner it construed Section 26 and related provisions of the Lease.
3. The trial court erred by resolving lease interpretation and construction issues as a matter of law.
4. The trial court erred in granting BSM's motion for summary judgment by ruling that prior orders for preliminary relief were correctly and properly entered and that the relief granted by them was appropriate.
5. The trial court erred in granting BSM's motion for summary judgment dismissing Barcelino's counter-claim for breach of contract.

6. The trial court erred in denying Barcelino's motion for reconsideration of the court's order of summary judgment.

7. The trial court erred in awarding BSM attorney's fees and costs.

(2) Issues Pertaining to the Assignments of Error.

1. Whether Barcelino conducted a "distress sale" subject to prescription under Section 26 of the Lease.

2. Whether the Lease required BSM to provide Barcelino with written notice and an opportunity to cure alleged breach(es) of Section 26 of the Lease as conditions precedent to suit.

3. Whether material issues of fact concerning the interpretation and construction of Section 26 and related provisions of the Lease precludes summary judgment.

4. Whether the injunctive relief granted and affirmed by the trial court was otherwise improper where: a) The TRO, Order of Contempt, and Order(s) for Preliminary Injunction violated Civil Rules 65 and 52. b) BSM failed to show that Barcelino's actions had or would result in actual or substantial harm to BSM. c) BSM had an adequate remedy at law detailed in Section 16.2 (b) of the Lease.

5. Whether the trial court erred in granting summary judgment dismissing Barcelino's counter-claim against BSM for breach of contract.

6. Whether the trial court abused its discretion in denying Barcelino's motion for reconsideration of the order granting BSM's motion for summary judgment.

7. Whether the trial court erred in awarding BSM attorney's fees and costs.

C. STATEMENT OF THE CASE.

1. The Lease Agreement for Space 143.

Barcelino is a fine clothing retailer and California corporation headquartered in Corte Madera, California. (CP 1172-1181). In or about 1997, Barcelino expanded its business into Washington State entering into a ten-year lease with BSM for Space 143 at Bellevue Square Mall to sell men's suits, clothing and accessories. (CP 880-927 and CP 1478-1498).

The parties' Lease for Space 143 contained several provisions relating to the rights and remedies of BSM in the event Barcelino breached any of the "covenants, conditions or provisions" of the Lease. (CP 910-911). Section 16.1 under the heading "TENANT'S DEFAULT" provided in pertinent part that:

Default. The occurrence of any one or more of the following constitute a default and breach of this Lease by Tenant:

(a) Vacating the Premises. The vacating or abandonment of the Leased Premises by Tenant or the failure of Tenant to be open for business (except in the event of damage or destruction to the Leased Premises or when due to some other cause beyond Tenant's reasonable control, as set forth in Section 30.14, which prevents Tenant from conducting its business within the Leased Premises). An intent to vacate or abandon the Leased Premises shall be deemed to exist if Tenant's business in the Leased Premises remains closed to the public for more than five (5) days.

(b) Failure to Pay Rent. Tenant's failure to make any payment of Minimum Rent, Percentage Rent, Other Charges, or any other payment required to be made by Tenant hereunder, as and when due. Tenant shall cure any default under this Section 16.1(b) within three (3) days after written notice thereof by Landlord to Tenant.

*(c) Failure to Perform. Tenant's failure to observe or perform **any of the covenants, conditions or provisions of this Lease** to be observed or performed by Tenant (other than as described in Sections 16.1(a) and (b) above). Tenant shall cure any default under this Section 16.1(c) within ten (10) days (except as otherwise provided in this Lease) after written notice thereof by Landlord to Tenant; provided, however, that if the nature of Tenant's default is such that more than ten (10) days are reasonably required for its cure, then Tenant shall commence such cure as soon as reasonably possible, but in any event within said ten (10) day period, and thereafter Tenant shall diligently prosecute such cure to completion.*

(e) Repeated Defaults. Tenant's failure to perform or observe any of Tenant's obligations under the Lease after Tenant has failed to perform or observe any of Tenant's obligations under the Lease at least twice previously (despite the fact Tenant may have cured any such previous failures after notice from Landlord and within the notice period).

Lease, Section 16.1 (emphasis added) (CP 910).

The parties negotiated amendments to Section 16.1(c) requiring BSM to provide Barcelino written notice to Barcelino's corporate offices in Corte Madera of any breached conditions of the Lease (**First Lease Addendum, para. 42, CP 1497; CP 1027-1031 and para.1.1, CP 881**)

and extended the period to cure alleged breached conditions of the Lease from "ten" to "twenty" days. (**First Lease Addendum**, para. 31 (CP 1491; CP 1027-1031)).

One of the conditions of the Lease provided that Barcelino could not conduct or permit to be conducted an "auction" or a "distress sale" on the leased premises. Section 26 of the Lease provided:

NO AUCTIONS OR DISTRESS SALE. *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 the other tenants of the Shopping Center. Therefore, it is an **express condition** and part of the consideration of the Lease that Tenant shall not conduct or permit to be conducted any sale by auction upon or from the Leased Premises, whether the auction is voluntary, involuntary, pursuant to any assignment for the payment of creditors, or pursuant to any bankruptcy or other insolvency proceeding. No "auction," "fire," "bankruptcy," "going out of business," "lost our lease," "moving," "store closing," "smoke (or other casualty) damage," or other distress sales of any nature may be conducted on the Leased Premises. The violation of the Section shall be a material breach of this Lease and **shall immediately entitle Landlord to the rights and remedies set forth in Section 16.2.***

Lease, Section 26 (emphasis added) (CP 917).

Section 16.2 of the Lease set forth the "rights and remedies" referenced in Section 26 providing in pertinent part 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:

(a) Terminate The Lease. Terminate Tenant's right to possession of Leased Premises by any lawful means, in which case this Lease shall terminate and Tenant shall immediately surrender possession of the Leased Premises to Landlord. ***

(b) Continue The Lease. Maintain Tenant's right in possession, in which case this Lease shall continue in effect whether or not Tenant has vacated or abandoned the Leased Premises. In such event Landlord shall be entitled to enforce all Landlord's rights and remedies under this Lease, including the right to recover the Minimum Rent, Percentage Rent, additional rent, Other Charges, damages from Tenant's default or breach, and any other payments as they may become due hereunder, and to specifically enforce Tenant's obligations hereunder and obtain injunctive relief from further defaults and breaches; or,

(c) Other Remedies. Pursue any other remedy now or hereafter available to Landlord under the laws or judicial decisions of the State of Washington.

Lease, Section 16.2 (emphasis added) (CP 910-911).

Finally, the parties amended the rights available to BSM under Section 16.1 (e) for any "repeated defaults" of Barcelino:

Tenant's failure to perform or observe any of Tenant's obligations under the Lease after Tenant has neglected or failed to perform or observe any of Tenant's obligations under the Lease (and for which Tenant was given notice) at least twice previously within any twenty-four month period (despite the fact Tenant may have cured any such previous failure(s) after notice from Landlord, and within the notice period).

First Lease Addendum, para. 32 (CP 1030).

2. Barcelino Leases Space 110.

In 2006, rented an additional space at Bellevue Square (Space 110) to sell women's clothing under the trade name 'Barcelino Per Donna.' (Browning Dec., para. 3, CP 1178). The Lease for the Barcelino Per Donna store was for a short term, initially scheduled to expire in January 2007 and then was extended to May 31, 2007. (CP 1178). After May 31, Barcelino continued to rent the space on a month-to-month basis until told by BSM to vacate by March 1, 2008. (Browning Dec., para. 3, CP 1178).

3. Barcelino's Inventory Sales.

On January 25, 2008, Barcelino commenced an inventory sale of women's clothing at Barcelino Per Donna (Space 110) posting signs at the store containing words and phrases such as "Store Closing"; "Entire Stock," and "Inventory Blowout." (Browning Dec., CP 1178). The Barcelino Per Donna sale was completed near the end of February 2008 with some discussion between the parties concerning signage, but in

general there were no objections by BSM to the sale. (CP 1178, CP 1039:11-20, CP 1426).

Barcelino's 10-year lease for its men's store (Space 143) was scheduled to expire in October 2007. (CP 1179). In or about September 2007, the parties' agreed to extend the lease to April 30, 2008 and then began negotiations for a long-term renewal. (CP 1179). In the course of negotiations, BSM informed Barcelino that it had other plans for Space 143 and wanted Barcelino to move to another less desirable location within the Mall known as Space 204. (Barcelino Answer, para. 20, CP 192-199; Browning Dec., CP 1179; CP 1184). By February 19, 2008, Barcelino decided it could not agree to the proposed move and informed BSM that it would relocate its store to another shopping center nearby at the end of its Lease on April 30, 2008. (Barcelino Answer, para. 20, CP 192-199; Browning Decs. CP 1171; CP 1173).

On March 5, 2008 Barcelino commenced the inventory sale for its men's store using signs and advertisements nearly identical to those used for the completed sale at Barcelino Per Donna. (Browning Dec., CP 1179).

4. **BSM Files Suit and Moves the Court for a Temporary Restraining Order.**

On Wednesday, March 12, 2008, an attorney representing BSM named David Nold entered Barcelino's store (Space 143) and confronted Barcelino's salesmen telling them that they appeared to be "liquidators" adding that he could "spot them a mile away." (Hanson Dec., **CP 1089-1090**; Dec. of Browning, **CP 1427**). Mr. Nold was informed that the salesmen were not "liquidators" but rather employees of Barcelino working the sales floor. (**CP 1090**). Thereafter, Mr. Nold approached Barcelino's store manager, Robert Browning, demanding that Mr. Browning cease the sale and remove all signage. (**CP 1174**) Mr. Browning replied that he had no authority to do so and requested that Mr. Nold put his demands in writing so that they could be forwarded to Barcelino's corporate offices in California. (**CP 1174**).

The next day, Thursday, March 13, 2008 in the late afternoon, an associate of Mr. Nold named Vanessa Schiodtz entered Barcelino, Space 143. Ms. Schiodtz handed a sales employee named Larry Hansen a copy of BSM's Motion for Temporary Restraining Order; Summons and a letter stating that BSM would move the court the next day to restrain the alleged "distress sale" in violation of Section 26 of the Lease. (Hanson Dec., **CP 1089-1090**; **CP 1101-1112**; **CP 1096**).

When Barcelino's management learned of BSM's lawsuit it was perplexed and was uncertain how to respond. (Browning Dec., CP 1180). BSM had not complained about the sale conducted at Barcelino Per Donna and Barcelino was in no distress, financial or otherwise. (Browning Dec., CP 1185). Further, BSM had not contacted Barcelino to explain what condition(s) of the sale BSM considered objectionable. (CP 1174-1175). Barcelino wondered whether BSM's action was retaliatory in nature motivated by Barcelino's decision to relocate its business in the area. (CP 1185).

On March 14, 2008, BSM moved ex parte for a temporary restraining order (hereafter "TRO"). (CP 15-43). Counsel for BSM informed Judge Helen Halpert, who was handling a busy ex parte calendar that day, that Barcelino's alleged violation of Section 26 (and use of the words "store closing" in store signage for the sale) authorized BSM to move for injunctive relief without providing Barcelino written notice concerning the nature of the alleged breach or any opportunity to cure it. (CP 19:13-16). At the same time, BSM objected to terms employed on Barcelino's store signage (words such as "storewide" and "inventory blowout" and "30-50% off) alleging they violated Rules & Regulations promulgated for the Mall. (CP 15-43).

Judge Halpert granted a TRO upon terms proposed by BSM; ordered counsel to post bond of \$50,000 for the security of Barcelino and scheduled a March 25, 2008 hearing for BSM's Motion for Preliminary Injunction. (CP 6-14).

5. BSM's Motion for Contempt.

On March 15, 2008, Barcelino removed the words "store closing" from its sale signs believing that by deleting these terms that their signage would comply with the TRO. (Browning Dec., para. 10, CP 1185). However, on the following Monday, March 17, 2008, BSM moved the court for an Order of Contempt arguing that Barcelino had violated the TRO by continuing to use signage for the sale. (CP 45-60). The court, Judge Douglas McBroom presiding, entered an Order of Contempt (CP 63-64) based upon the photographic exhibits attached to the TRO which BSM represented equated to the scope of the restraining order. (Dallain Dec., CP 47-51; Nold Dec., CP 52-60).

6. BSM Denies Barcelino's Subsequent Requests to Advertise.

On or about March 18, 2008, Barcelino was finally able to retain counsel, G. Michael Zeno, Jr. Mr. Zeno sent a request to Mr. Nold requesting that BSM allow Barcelino to use sale sign(s) which did not contain the words "store closing" or any of the words/phrases stated in

Section 26 pending the hearing on BSM's motion for preliminary injunction. (CP 65-69). BSM refused the request. (CP 66:1-5). As a result, Barcelino's losses mounted as it was not able to efficiently advertise a sale given the broad restrictions imposed by the injunction. (CP 1172-1196).

7. **The Parties' Motion(s) Concerning Preliminary Injunction.**

On March 25, 2008, Judge Douglas McBroom heard BSM's motion for preliminary injunction. (CP 65-137; CP 158-191). Judge McBroom's courtroom was busy and the proceedings were rushed. (5/14/08 RP 4:8-16). Nonetheless, Judge McBroom entered an Order for Preliminary Injunction. (CP 188-191).

On May 14, 2008, Barcelino moved the court for an order dissolving the preliminary injunction and for other relief. (CP 311-326; CP 298-307). BSM filed opposition. (CP 327-346). Mr. Zeno had discovered that BSM had posted bond for the TRO of \$10,000 rather than the \$50,000 ordered by Judge Halpert (CP 1057-1064) and that BSM's counsel had tried to remedy the insufficient face amount by crossing out the number "10" and handwriting "50" in. (CP 325-326; CP 1057-1064). The bond by its terms also applied only to the temporary restraining order which meant that Judge McBroom's order of preliminary injunction was

unsecured. (5/14/08 RP 25:3-11; CP 325-326, CP 1057-1064). Barcelino's motion also called into question findings of fact and conclusions of law entered by Judge McBroom. (CP 311-326).

In the course of reviewing his prior order for preliminary injunction, Judge McBroom quickly realized there was something wrong questioning whether he had read the order before signing it. (5/14/08 RP, 11:4-6). In particular, Judge McBroom recalled that he had received no testimony that BSM may have sustained damages by Barcelino's sale activities. (5/14/08 RP 10:22-24). Judge McBroom opined that BSM would not be harmed by the alleged offensive sale activities of Barcelino. (5/14/08 RP 19:6-9).

Consequently, Judge McBroom amended the order of preliminary injunction to read: "Allowing a tenant to violate the Lease and conduct a store closing sale potentially could result in actual and substantial injury to plaintiff." (CP 946). Judge McBroom also deleted a finding in his prior order that Barcelino had violated state law by its sale activities. (CP 945). Finally, Judge McBroom acknowledged that neither the underlying TRO nor his initial order for preliminary injunction was secured by a bond ordered by the court. (5/14/08 RP, 15:10-25; 25:3-22; 31:12-25; 32:1-11). However, Judge McBroom tried to remedy the failed security by entering an order 'retroactively recognizing' a \$50,000 bond for the TRO

and ordering BSM to post bond for the order of \$300,000. (5/14/08 RP, 15:10-25; 25:3-22; 31:12-25; 32:1-11. CP 945).

In the course of making his new order(s), Judge McBroom also questioned the scope of the orders of injunction he had entered (concerning contempt and preliminary injunction) asking Mr. Zeno: "I ordered you to take the "store closing" off your signs. I ordered what I considered at the time to be fairly minimal. I authorized you to advertise a store wide sale of 30 to 50 percent off, didn't I?" (5/14/08 RP, 27:13-17). Despite all of problems and uncertainties surrounding the orders for preliminary relief, Judge McBroom denied Barcelino's motion to dissolve them. (5/14/08 RP, 32:22-25; CP 944-946).

Judge McBroom expression of uncertainty about what restrictions might be justified for signage and advertising, however, was later echoed by the deposition testimony of BSM's management. (CP 1070; CP 1084-1085; CP 1145-1146; CP 1139-1144). BSM's Vice President of Operations, Glen Bachman, responding to questions of whether signage for a particular sale might support an alleged breach of Section 26 or violation of BSM's Rules & Regulations stated that: "The signage allowed for each store varies depending on the circumstances." (CP 105:1-17). As a result, BSM had internal policies and a regular procedure to notify tenant(s) and make request(s) to cure signage and other forms of

advertisement(s) consistent with the 'notice' and 'cure' terms of the lease. (Dep. of C. Freeman, CP 1070; Dep. of R. Dallain, CP 1084-1085, CP 1145-1146; Dep. of J. Melby, CP 1139-1144; Dep. of D. Nold, CP 1075-1077).

8. BSM's First Motion for Summary Judgment.

On May 18, 2008, Judge McBroom heard BSM's first motion for summary judgment which focused upon the parties' competing breach of contract claims and the operation of Section 26 in light of the notice and cure provisions of the lease. (CP 419-431; 609-626; 627-633). Subsequent to lengthy arguments of counsel, Judge McBroom denied BSM's motion for summary judgment.⁴ (10/17/08 RP, CP 769-771; CP 863-864; CP 1091-1093).

⁴ In connection with the motion, Judge McBroom also struck BSM's unsupported accusations that Barcelino had a history of conducting illegal **going-out-of business sale(s)**; that the sale(s) at issue violated state law; and that the terms of the lease entitled BSM to seek an immediate remedy in court. (CP 1113-1121). There is no evidence that Barcelino ever used the terms "going out of business" in connection with the subject sale or that Barcelino violated state law concerning store sales. (CP 1113-1121). In any event, Barcelino would not have employed those terms because it was not going out of business but rather moving to another shopping center. (CP 1169-1171).

In response to Judge McBroom's denial of summary judgment, BSM filed a tardy motion for relief⁵ from the order to no avail. (CP 812-862).

9. **BSM's Second Motion for Summary Judgment.**

On March 20, 2009, BSM filed in substance the identical motion for summary judgment previously denied by Judge McBroom. (CP 997-1012) BSM's introductory paragraphs once again trumpeted unsupported and inflammatory claims that Barcelino had allegedly conducted illegal 'going-out-of-business' sales in other locations, claims which had previously been stricken by the court. (CP 997-1012). BSM made no attempt to justify the renewal of its motion for summary judgment in compliance with the trial court's local rules.⁶

Nonetheless, on April 17, 2009, Judge Christopher Washington heard BSM's second motion for summary judgment over Barcelino's opposition (CP 1147-1168; CP 1169-1206; CP 1013-1146) and granted the motion. (CP 1314-1315). Judge Washington specifically ruled that the

⁵ Civil Rule 59 calls for any motion for reconsideration of an order to be filed within 10 days after the order is entered. BSM motion for relief was filed on January 21, 2009, nineteen days after the order denying summary judgment was entered. (CP 812-862).

⁶ King County Local Rule 7(b)(7) provides: "**Reopening Motions.** No party shall remake the same motion to a different judge without showing by affidavit what motion was previously made, when and to which judge, what the order or decision was, and any new facts or other circumstances that would justify seeking a different ruling from another judge." KCLCR 7(b)(7).

prior orders of the court granting preliminary relief were "correctly and properly entered" and that his Order affirmed the appropriateness of that [preliminary] relief. (CP 1315). Judge Washington's Order also dismissed Barcelino's counter-claim for breach of contract; released the surety bond securing BSM's preliminary relief and awarded BSM its attorney's fees and costs under RCW 4.84.330. (CP 1314-1315)

Barcelino's subsequent motion for reconsideration (CP 1317-1324) was denied and BSM's motions determining an award of fees and costs of \$126,757.58 were granted. (CP 1325-1326, 1644-1646, 1562-1639).

10. Barcelino's Appeal.

On or about May 18, 2009, Barcelino filed its appeal seeking review of the trial court's rulings in the order granting BSM's second motion for summary judgment; the order denying Barcelino's motion for reconsideration and the order(s) determining the amount of attorney's fees and costs awarded BSM. (CP 1330-1337, 1338-1346, 1414-1424). Barcelino also requests review of the four prior orders of the trial court granting preliminary relief⁷ as well as the order denying BSM's first

⁷ The four 'preliminary relief' orders are as follows: (1) Temporary Restraining Order (CP 6-14) (2) Order of Contempt (CP 63-64) (3) Order of Injunction. (CP 188-191) (4) Order Re: Motion to Dissolve Preliminary Injunction.(CP 363-365). See also Dec. of Nold, Exs. 1-4, CP 931-946.

motion for summary judgment⁸ pursuant to Rules of Appellate Procedure 2.4 (b).⁹

D. ARGUMENT.

1. Standards of Review.

The review of an order granting or denying summary judgment is de novo and this court engages in the same inquiry as the trial court. Johnson v. Farmers Ins. Co. of Washington, 117 Wn.2d 558, 565 (1991). The trial court's authority to grant summary judgment is governed by Civil Rule 56 (c)¹⁰ and is proper only when "there is no genuine issue as to any material fact and ...the moving party is entitled to judgment as a matter of law." A material fact is one on which the outcome of the litigation depends, in whole or in part. The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable

⁸ Order Denying Plaintiff's Motion for Summary Judgment (CP 1091-1093).

⁹ See also Right-Price Recreation, LLC v. Connells Prairie Comm. Council, 146 Wn.2d 370 (2002).

¹⁰ Civil Rule 56 (c) provides that: [J]udgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. CR 56 (c).

to the nonmoving party. Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337 (1994).¹¹

A trial court's decision to grant injunctive relief is reviewed for an abuse of discretion. Rabon v. City of Seattle, 135 Wn.2d 278, 284 (1998). A trial court abuses its discretion when its decision is based on untenable grounds, is manifestly unreasonable, or is arbitrary. *Id.* A party seeking preliminary injunctive relief must establish (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of either have or will result in actual and substantial injury. Wash. Fed'n of State Employees v. State, 99 Wn.2d 878, 888 (2000). The failure to establish any of these criteria requires the denial of injunctive relief. Kucera v. Dep't of Transp., 140 Wn.2d 200, 210 (2000). A preliminary injunction should not issue in a doubtful case. Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life, 106 Wn.2d 261, 265 (1986). To facilitate appellate review, a trial court must, among other things, enter findings of fact and conclusions of law and set forth its reasons for issuing a preliminary injunction. CR 52(a)(2)(A); CR 65(d). Where a purely legal issue is involved, the court must necessarily

¹¹ [C]onstruing the evidence in the light most favorable to the nonmoving party, the court asks whether a reasonable jury could find in favor of that party. If the answer is yes, the motion for summary judgment should be denied and the question should go to the jury. See Herron v. King Broad.Co., 112 Wn.2d 762, 767-68 (1989).

reach the merits of the issue in order to decide whether to grant or deny the preliminary injunction.¹² See Rabon supra, 135 Wn.2d at 286.

A party's entitlement to attorney's fees is an issue of law reviewed de novo. See McGreevy v. Or. Mut. Ins. Co., 90 Wn.App. 283, 289 (1998). The reasonableness of an award of attorney fees is reviewed under an abuse of discretion standard.¹³ See Progressive Animal Welfare Soc'y v. Univ. of Wash., 114 Wn.2d 677 (1990).

2. Issues Pertaining To The Assignments Of Error.

(1) WHETHER BARCELINO CONDUCTED A "DISTRESS SALE" SUBJECT TO SECTION 26 OF THE LEASE.

BSM's lawsuit for "breach of lease"¹⁴ sought an order enjoining Barcelino from using signs (not approved by BSM) and from holding an alleged "distress sale" in violation of Section 26 of the Lease. (CP 3-5). BSM's complaint predicated most, if not all, of the relief it sought upon Barcelino's alleged violation of Section 26 and alleged remedies available

¹² The reviewing court must similarly evaluate purely legal issues in assessing the propriety of a decision to grant or deny a preliminary injunction. Rabon supra, 135 Wn.2d at 287.

¹³ An award of attorney's fees has been overturned on appeal when the reviewing court disapproved of the basis or method used to determine the amount awarded or when the record fails to state a basis supporting the award. Id.

¹⁴ BSM's complaint alleged that because Barcelino had allegedly breached Section 26 of the Lease that BSM was entitled to immediate possession of the premises, damages and attorney's fees and costs; however, BSM prayed for injunctive relief only. (CP 5:3-11).

under Section 16.2 of the Lease. (CP 3-5). Barcelino countered that Section 26 should not apply to the parties' dispute. (4/17/09 RP 11:8-11). Consequently, the trial court had to both interpret¹⁵ and construe¹⁶ Sections 26 and 16.2 of the Lease in order to test BSM's theories of liability and alleged entitlement to injunctive relief.¹⁷

Neither Section 26 nor any other provision of the Lease defines "distress" or "distress sale". (CP 917; CP 878-927). Consequently, in moving ex parte for a TRO and much later for summary judgment, BSM argued that Barcelino's isolated use of the words "store closing" on store signage and in other ads amounted to a "distress sale" prohibited by Section 26.¹⁸ (CP 4:7, 4:19, 5:1, CP 999-1001). It followed, BSM argued,

¹⁵ 'Interpretation' of a promise or agreement or a term thereof is the ascertainment of its meaning. Restatement (Second) of Contracts Section 200 (1981).

¹⁶ 'Construction' of a contract determines its legal effect. Construction is a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context, and from a legal policy or policies that are applicable to the situation. Patterson, The Interpretation and Construction of Contracts, 64 Colum.L.Rev. 833, 835 (1964).

¹⁷ In deciding whether to grant or deny a preliminary injunction, "the trial court must reach the merits of purely legal issues" and the "reviewing court must similarly evaluate purely legal issues in assessing the propriety of a decision to grant or deny a preliminary injunction." Rabon v. City of Seattle, 135 Wn.2d 278, 286.

¹⁸ BSM also repeatedly argued that Barcelino had conducted an illegal 'going-out-of-business' sale both at the Mall and in other locations. (4/17/09 RP, 3:6-19; 5:8-10; 5:14-18; CP 999). These accusations were unsupported and

that Section 26 authorized BSM to *immediately* enjoin Barcelino's sale without providing Barcelino notice or any opportunity to 'cure' the lease 'conditions' allegedly breached. (**Motion for TRO, CP 17:3-4; 19:13-16; Second MSJ, CR 999:19-20**). BSM's method of contract interpretation in this regard is flawed for several reasons.

a) The trial court's adoption of BSM's "Plain Meaning Rule" analysis led to error.

First, BSM relied upon questionable law in advocating a 'plain meaning rule' ¹⁹ analysis for interpreting the Lease. (**CP 1005:5-11**). In Berg v. Hudesman, 115 Wn.2d 657 (1990), the Washington Supreme Court rejected the faulty 'plain meaning rule' in favor of the 'context rule' for interpreting contracts. The Berg Court recognizing that: "seldom will any word or phrase carry only a single meaning which is discernible by any reader..." held that evidence extrinsic ²⁰ to a writing is always

were stricken by the trial court. Nonetheless, BSM introduced its second motion for summary judgment with them. (**CP 999:1-25**). BSM's accusations in this regard were made only to distract the court and to try and create unfair prejudice against Barcelino.

¹⁹ The 'Plain Meaning Rule' states that if a writing, or the term in question, appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature. See Berg v. Hudesman, 115 Wn.2d 657, 666 (1990).

²⁰ In Berg, the Court adopted Section 212 of the Restatement (Second) of Contracts which provides that:

(1) *The interpretation of an integrated agreement is directed to the meaning of*

admissible for discerning the intent of the contracting parties and even when a term or terms at issue might appear unambiguous.²¹ (Id. at 666). Consequently, Washington courts today properly look at the words, as well as behind the words of a contract by analyzing: (1) the contract as a whole; (2) the subject matter and objective of the contract; (3) evidence extrinsic to the writing; and, (4) facts that bear upon the reasonableness of the respective interpretations advocated by the parties. Berg, 115 Wn.2d at 668-669.

the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.

(2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

Restatement (Second) of Contracts, Section 212.

²¹ As explained in comment *b* to Section 212 of the Restatement:

*It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. 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.***

Restatement (Second) of Contracts, Comment *b*, Section 212 (emphasis added).

In the present case, BSM was able to build unchallenged momentum early on (e.g., ex parte TRO hearing) by defining Section 26 terms "distress sale"²² and "immediately" narrowly literally ignoring all other pertinent clauses of the Lease. (CP 18:21-23, 19:13-16; 4/17/09 RP, 8:16). BSM's approach in this regard was strategic and was also seemingly attractive to the trial court in its simplicity. (4/17/09 ROP 14:22-25, 15:1-2, 16:5-9, 25:5-14, 28:5-21, 30:4-15). However, when the critical terms of the Lease are properly analyzed in light of the whole contract as well as relevant extrinsic evidence, the error of the trial court in accepting BSM self-serving definition(s) of contract terms becomes apparent.

b) Barcelino's sale was not a "distress sale" under the terms of the Lease.

Section 26 of the Lease provides that a tenant cannot conduct or allow the conduct of a "distress sale" as part of the tenant's obligation to remain open (and active) for business through the end of the applicable lease term.²³ (Lease, Section 5.3, CP 896). It follows therefore that a

²² Notably, BSM has never tried to define "distress sale" but appears to equate the terms to the use by a tenant of the words "store closing" on store signage or in advertisements. (CP 18:20-23, 19:9-25, 20:1-11, 999: 6-18).

²³ Many shopping centers contain a "continuous operation" covenant, requiring a tenant to actively operate its business at all times during the term of the lease to maximize percentage rent. See 35 Real Prop. Prob. & Tr.J. 57. See also, CP 886 and 896.

"distress sale" under Section 26 must be accompanied by evidence that the tenant is not honoring or will not honor the term of its lease either because of insolvency or financial "distress". (See Lease, Article 5 and Section 5.3; **CP 895-897**; Section 26, **CP 917**; **4/17/09 RP 11:8-11**). This interpretation of "distress sale" is supported by the common dictionary meaning of "distress" as: the "seizure and detention of the goods of another as pledge or to obtain satisfaction of a claim by the sale of goods seized" or of "distress sale" as: "a sale of goods or assets at reduced prices to raise much needed funds." ²⁴ See New Oxford American Dictionary (2nd Ed. 2005).

BSM's interpretation of Section 26 is also inconsistent with the subject matter and objective of the parties' Lease; namely, to advertise and sell "...high-quality European styled apparel...". (See **CP 883**, 'permitted uses' and **CP 919** 'tenant's advertising requirement'). Section 26 was designed to provide BSM rights and remedies in the case of tenant who has lost control due to 'distress' and who could cause a sudden vacancy not

²⁴ There is no evidence that Barcelino needed funds or was compelled to sell its goods below market prices because of any distress. In fact, just before the subject sale Barcelino agreed help BSM fill a gap between Barcelino's end of lease term (April 30, 2008) and the arrival of the tenant BSM had chosen for the site by agreeing to extend the Lease through May 31, 2008 at a cost of \$30,000 in additional rent. (**CP 1184:10-16**).

to suddenly smother a tenant like Barcelino who is engaged in a vibrant retail business and is spending money on advertising the Lease requires.²⁵

Even if Section 26 could be employed as BSM contends, its remedy against a solvent and active tenant would not be the slow death perpetrated by court monitored equitable relief but rather the relatively plain, speedy and adequate remedy at law potentially available to BSM under Section 16.2 (b).²⁶ (See Lease, Section 16.2(b), CP 911). Cf. Kucera v. Dept. of Trans., 140 Wn.2d 200 (2000).

In this regard, Barcelino's position is also supported by what the clause at issue (Section 26) does not say. Section 26 does not explain or state that the mere usage of the terms 'store closing' on signage or ads unaccompanied by actual "distress" or the threat or actual closing of a store would be enough to trigger the clause. The kinds of

²⁵ There is an important factual distinction between a tenant who is forced to sell its inventory because of financial distress (e.g., by auction or bankruptcy sale) and a tenant who is conducting a sale simply because he is moving and closing shop at the end of its lease term. A tenant who is in distress may not be able to pay rent or control a forced sale or seizure of its merchandise during the lease term. In these situations, Section 26 was apparently intended to provide the landlord an element of control over conditions caused by a tenant's inability to continually operate during the lease term and whose distress may result in a sudden vacancy.

²⁶ 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 had created. (See, Lease, para.21.2, CP 916).

signage/advertising violations of which BSM complained about are regulated by other terms of the Lease and specifically 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 BSM promulgated for the Mall. (CP 916-917; CP 895; CP 905; and CP 1053-1054). BSM does not claim entitlement to seek equitable relief without 'notice' or 'cure' to a tenant for a tenant's breach of any of these provisions. (CP 1106-1112, 6-44).

Consequently, although Barcelino believes that what "distress sale" means may be discerned by an understanding of the Lease as a whole, it concedes that the terms "distress sale" could be "capable of being understood in either of two or more possible senses" therefore rendering Section 26 of the Lease ambiguous. Ladum v. Utility Cartage, Inc., 68 Wn.2d 109, 116 (1966). Extrinsic evidence should therefore be admitted to help define the terms "distress sale" and aid in the construction of Section 26 of the Lease. See also Brogan & Anensen v. Lamphiear, 165 Wn.2d 773 (2009).

c) Evidence extrinsic supports the conclusion that Section 26 was not intended to apply to Barcelino's end of Lease sale.

Barcelino's opposition to BSM's second summary judgment focused in large part upon evidence extrinsic to the Lease which supports

that the parties' did not intend for Section 26 to apply to the circumstances of Barcelino's sale. (4/17/09 RP 11:8-11; CP 1147-1168). For example, evidence of BSM's standard procedures for addressing objections to signage demonstrated that BSM's treatment of Barcelino was an abnormality and a departure from BSM's lease-guided behavior. (CP 1160:6-24; 1161; Dep. of C. Freeman, CP 1070; Dep. of R. Dallain, CP 1084-1085, CP 1145-1146; Dep. of J. Melby, CP 1139-1144; Dep. of D. Nold, CP 1075-1077). This conclusion is reinforced by the many examples of often oversize and garish signage used by other successful tenants who drew no objection from BSM. (CP 1182-1196). BSM's passivity toward Barcelino's sale in Space 110 (Barcelino Per Donna) is another example. (CP 1169-1203).

Further, Barcelino's business and financial status counters any notion that BSM invoked Section 26 because it perceived that Barcelino was in "distress". It is undisputed that Barcelino had the wherewithal to pay rent, maintain a beautiful store and move to another location at the conclusion (or any extension) of its lease term. (CP 1169-1206). Barcelino had operated successfully and profitably at the Mall for over 10 years and

was not compelled to sell its merchandise at less than market price(s) or at a loss.²⁷ (CP 1169-1190).

The terms of the Lease including the common definitions of "distress" and "distress sale", the subject matter and objective of the Lease and the relevant extrinsic evidence (e.g., history and dealings of the parties) all support Barcelino's contention that Section 26 was not intended as a provision applicable to the activities of Barcelino at issue.

In any event, although the meaning of "distress sale" and the construction of Section 26 may depend upon extrinsic evidence, Barcelino contends that such evidence cannot support a reasonable inference²⁸ in

²⁷ Cf. Kaiser Steel Corp v. U.S., 411 F.2d 335, 341 (9th Cir. 1969) (sales could not be defined as "distress sales" under the circumstances).

²⁸ Under the Berg factors for contract interpretation, the meaning BSM attributes to "distress sale" and Section 26 is not reasonable either. BSM essentially argues that it can enjoin a tenant in the midst of a sale and vibrant/beautiful business operations merely because it also used the words 'store closing' on a few signs at the store. (CP 23:5-18). BSM argued that Barcelino's signs caused actual and substantial harm to BSM. However, BSM has never produced an iota of evidence in this regard and has relied upon speculation and unsupported conclusion. (CP 23:20-23). Further, the trial court discounted the claim of any injury. (5/14/08 RP 20:8-16; 24:16-25).

Another reason why Barcelino's alleged signage violations cannot be defined as a "distress sale" is because the alleged basis of the violation (alleged advertising violations) would allow BSM to characterize almost any signage/ads as indicative of "distress" at its whim. This is exactly what happened at the TRO hearing as the court, following BSM's lead, unwittingly barred Barcelino from using the kind of sale terminology ("storewide", "inventory blow-out", and "30-50% off") routinely used by many tenants in the Mall. (CP 1182-1202). At the same time, Barcelino was without adequate guidance of what might constitute a violation under Section 26 or precisely why Barcelino had been penalized. (CP

favor of the definition BSM has created for this case. Interpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence. See Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc., 120 Wn.2d 573, 582 (1993) citing Berg, 115 Wn.2d at 668 and Restatement (Second) of Contracts, Section 212 (2) (1981). A determination of what was intended by the terms "distress sale" is seemingly dependent upon extrinsic evidence and such evidence does not support BSM. As a result, either Barcelino is entitled to judgment or any remaining issue concerning whether Section 26 applies to the parties' dispute is for the trier of fact. See e.g., Brogan & Anensen v. Lamphiear, 165 Wn.2d 773 (2009).

2. WHETHER THE LEASE REQUIRED BSM TO PROVIDE BARCELINO WITH WRITTEN NOTICE AND AN OPPORTUNITY TO CURE.

It appears that the trial court also accepted BSM's interpretation and construction of the word "immediately" found in Section 26 without a sufficient review or understanding of the complete Lease. (4/17/09 ROP 14:22-25, 15:1-2, 16:5-9, 25:5-14, 28:5-21, 30:4-15).

6-14). BSM's abuse of Section 26 is a classic example of a restrictive covenant that has been applied without good reason by the drafter and in an overly restrictive and unlawful manner. See Ross v. Bennett, 148 Wn.App. 40 (2008). See also Kandra v. Higgins, 46 Wn.2d 321 (1955).

The word "immediately" has little meaning without reading it in context with Section 16.2 to which Section 26 expressly refers, as well as in relation to Section 16.1 concerning Barcelino's rights of 'notice' and 'opportunity to cure' allegations of breach. (CP 910-911). Barcelino contends that even if the subject sale could be defined as a "distress sale", that application of Section 26 would not support summary judgment in favor of BSM. Rather, the terms of the Lease (and relevant extrinsic evidence) again support that judgment should be entered in favor of Barcelino.

First, Section 16.1 (c) mandates that a tenant must receive written notice of breach and an opportunity to cure **any of the covenants, conditions or provisions of this Lease** to be observed or performed by Tenant [other than the covenants described in Section 16.1 (a) and (b)]. (CP 910).

BSM contends that Section 16.1 (c) has no application because of the following language of Section 26:

**** The violation of the Section shall be a material breach of this Lease and shall immediately entitle Landlord to the rights and remedies set forth in Section 16.2.*

Lease, Section 26 (emphasis added) (CP 917).

Barcelino counters that "remedies" provided by Section 26, would be qualified by the terms of Section 16.2, as well as by the terms of Section 16.1 (c) of the Lease. Section 16.2 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...***

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

Section 16.2 expressly recognizes that a landlord's right to pursue any remedies therein comes after "any applicable cure period". BSM contends that Section 26 does not provide for a "cure period"; however, neither Section 26 nor Section 16.2 expressly dispel one either. (**CP 917; CP 910-911**). Contrary to BSM's position, Section 16.1 (c) of the Lease provides the tenant the right of written notice and a period of time to cure *any* failure to observe *any* of the covenants, conditions or provisions of the Lease [except those identified in 16.1(a) and (b)]. (**CP 910**). Section 26 by its terms concerns an express "condition" of the Lease. (**CP 917**). The Lease therefore expressly obligated BSM to provide Barcelino with written notice of any alleged breach of Section 26 at Barcelino's corporate office in Corte Madera, California and up to 20 days to cure the alleged

condition(s) in breach before it could bring suit.²⁹ (CP 910, 1497, 881, 1019-1033).

This result is further supported by the Washington Supreme Court decision in Gray v. Gregory, 36 Wn.2d 416 (1950). In Gray, a plaintiff-landlord provided summary notice of lease termination to a tenant and filed suit after learning the tenant had made alternations to remodel the leased premises (i.e., removal of a wall partition) without providing notice and security per 'Clause V' of the lease. The Washington Supreme Court held, however, that the landlord could not state an action or bring suit because she had not satisfied contractual conditions precedent to suit. Specifically, the Court found that 'Clause X' of the lease required specific written notice of default and provision of sixty days thereafter to allow the tenant an opportunity to cure the breach before the landlord could assert any valid cause of action.³⁰ Id.

²⁹ In Washington, such notice must set forth specific facts identifying the breach and what the tenant must do to cure them. See Byrnett v. Gardner, 35 Wn. 668, 674-5 (1904). See also, Deming v. Jones, 173 Wn. 644, 647-49 (1933).

³⁰ In Gray, the Court determined that the landlord deliberately chose not to provide 'notice' and an 'opportunity to cure' as provided in the lease because to do so would have defeated the purpose of her suit (i.e., lease termination). See 36 Wn.2d at 418. In holding for the tenant, the Court in Gray stated that it is elementary that the parts of a contract must be construed together and effect be given to each part. Id. at 418.

In the present case, BSM, similar to the landlord in Gray, BSM contended that provision of 'notice' and 'cure' to Barcelino would have been a futile act since Barcelino had already installed the objectionable 'store closing' sign and could then conceivably take 20 days to remove or alter them. (4/17/09 RP, 4:12-25; 5:1-18). However, as in Gray, a landlord's belief or speculation that any default may not be promptly or timely cured should not excuse the landlord's burden under the lease.

BSM has also argued that had it provided Barcelino 'notice' and an 'opportunity to cure' that Barcelino would have been free to violate the Lease with impunity after every cure period. BSM had no reason to believe this given the fine working relationship of the parties over the ten-year lease period. But, BSM also appears to have included Section 16.1 (e) in the Lease to be able to argue that "repeated default(s)" under certain circumstances would not be curable. (CP 910, 1030).

In sum, BSM arguments that Section 26 and 16.2 provide for an "immediate" equitable remedy do not make sense and appear contrary to the plain terms of the Lease. However, if BSM's theories about how Sections 26 and 16.2 should operate were given any credence, it would create an intrinsic conflict or ambiguity between these clauses and Barcelino's

rights under Section 16.1 (c).³¹ Any conflict or ambiguity created by the provisions in this regard would properly be resolved in favor of Barcelino. See Stevenson v. Parker, 25 Wn.App. 639, 646 (1980); Ranier Nat'l Bank v. Inland Machine Co., 29 Wn.App. 725 (1981).

In Stevenson, *supra*, the Washington Court of Appeals, considered a lease containing two separate, but inconsistent, provisions regarding written notice of lease termination. One of the provisions called for 30 days' written notice to terminate and the second gave the tenant 15 days to cure the default after which termination was immediate. The tenant, one Mrs. Cobray, complained that the landlord, Dr. Stevenson, had not provided her notice of her right to cure. The Court holding in favor of Mrs. Cobray found that based upon the inconsistent provisions that receipt of notice of her right to remedy alleged delinquent rent was a condition precedent to forfeiture of the lease. 25 Wn.App. at 646. The Court in Stevenson supported its decision with the rule that if conflicting provisions of a lease create ambiguity concerning rights and remedies of the parties to the contract, a court will adopt the interpretation more favorable to the lessee, particularly when the lease was drafted by the lessor. *Id.* at 646.

³¹ Section 16.1 (c) alone (or in combination with Section 16.2) obligated BSM to provide Barcelino with written notice and an opportunity to cure the alleged condition(s) of breach prior to any suit.

See also Stuchell v. Mortland, 8 Wn.App. 884, 893 (1973); Allied Stores Corp. v. North West Bank, 2 Wn.App. 778, 784 (1970).

Similarly, in the present case, the trial court should have dismissed BSM's suit as a matter of contract interpretation and construction because BSM failed to provide written notice and opportunity to cure in the manner prescribed by Section 16.1 (c) and related provisions of the Lease. (CR 910, 1497, 881, 1019-1033). To the extent that Sections 26 and 16.2 present any conflicting advice, the conflict must be resolved in favor of Barcelino.

3. WHETHER THE INJUNCTIVE RELIEF GRANTED AND AFFIRMED BY THE TRIAL COURT WAS OTHERWISE IMPROPER WHERE: a) The TRO, Order of Contempt, and Order(s) for Preliminary Injunction violated Civil Rules 65 and 52. b) BSM failed to show that Barcelino's actions had or would result in actual or substantial harm to BSM. c) BSM had an adequate remedy at law detailed in Section 16.2 (b) of the Lease.

An injunction is an equitable remedy that should be used sparingly. See Kucera v. Dept. of Transp., 140 Wn.2d 200, 209 (2000). Therefore, injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law. Id. One who seeks relief by temporary or permanent injunctions must show: (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. Id.

a) **The TRO, Order of Contempt, and Order(s) for Preliminary Injunction violated Civil Rules 65 and 52.**

The trial court's error(s) in granting summary judgment appear to be largely the result of its own mistakes in interpreting and construing the Lease at issue (and as a matter of law). But, the trial court also erred by ruling that the order(s) granting BSM preliminary relief were "correctly and properly entered" and that the relief was "appropriate". (CP 1314-1315). The trial court seems to have been persuaded by BSM's urging that two prior jurists and four prior orders could not all be wrong. (CP 1308:19-21). However, it is difficult to understand how the trial court could have even completed a review of the underlying order(s) granting relief because of the deficiencies on their face. See Turner v. City of Walla Walla, 10 Wn.App. 401 (1974).

Civil Rule 65 (b) provides, among other things, that every temporary restraining order granted without notice "shall define the injury and state why it is irreparable". [CR 65(b)]. In the present case, Barcelino did not receive notice in Corte Madera, California as required by Section 16.1(c) and related notice provisions of the Lease (**First Lease Addendum, para. 42, CP 1497 and para. 1.1, CP 881. CP 1019-1033**). Further, Barcelino's floor salesman, Larry Hansen, was not authorized to accept service on behalf of Barcelino (CP 1089-1090) and BSM's attempt

to serve the Summons & Complaint and the Motion for Temporary Restraining Order by handing them to Mr. Hansen was ineffective. (See RCW 4.28.080(10) and Dec. of Service, **CP 1104-1105**). As a consequence, there was no notice to Barcelino under Civil Rule 65 (a) (1) let alone under Civil Rule 65 (b) and jurisdictional prerequisite(s) of notice had not been satisfied. (**CR 931-937, CR 15-44, 1162-1163**). The TRO obtained by BSM ex parte and entered by Judge Halpert failed to define the injury of BSM and any reason why it was allegedly irreparable in violation of Civil Rule 65 (b). (**CR 931-937**).

Further, the TRO was deficient in "form and scope" because it did not provide the reasons for its issuance nor does it describe in reasonable detail the "act or acts sought to be restrained". See CR 65 (d). The TRO entered by the trial court addresses the "acts to be restrained" by improperly referencing a series of photographs attached to the TRO in violation of Civil Rule 65 (d). (**CR 931-937**).

The TRO also contains no findings of fact and conclusions of law in violation of Civil Rule 52(a)(2)(A) and Civil Rule 65(d). (**CR 931-937**). This at least suggests that the trial court might have been issuing the restraining order as a matter of law, but there is also no apparent indication that the merits of any purely legal issues were reached. See Rabon v. City of Seattle, 135 Wn.2d 278, 284 (1998). Further, there is no

reference to the Lease or any of its provisions upon which BSM's alleged "rights" or any "invasion(s)" thereof might be predicated. (CR 931-937).

Finally, neither the TRO nor the Order for Preliminary Injunction was supported by a mandatory bond ordered by the court in compliance with Civil Rule 65 (c). (CP 214-254; CP 258-262; 5/14/08 RP, 15:10-25). See also Cheney v. Montlake Terrace, 20 Wn.App. 854 (1978).

On May 14, 2008, at the second hearing concerning preliminary injunction, Judge McBroom acknowledged that neither the underlying TRO nor his initial order for preliminary injunction was secured by a bond ordered by the court. (5/14/08 RP, 15:10-25; 25:3-22; 31:12-25; 32:1-11). The initial order(s) for preliminary relief should have been dissolved and BSM's action dismissed for all of these reasons.

The error(s) of the trial court in entering the TRO were only compounded by the subsequent Order of Contempt (which essentially mirrored the deficiencies of the TRO) as well as by the subsequent order(s) for preliminary injunction. (CR 938-946). For instance, on March 25, 2008, when BSM moved for preliminary injunction, it still had not properly noticed and served Barcelino in compliance with the Lease, Civil Rule 65(a) and RCW 4.28.080(10). (CP 15-44, 188-181, 1089-1090, 1104-1105, 65-72). But, there were other failures of proof as well.

b) BSM failed to show that Barcelino's alleged acts had or would result in actual or substantial harm to BSM.

BSM had numerous opportunities to try and support "actual or substantial harm", however never a shred of such evidence was ever produced. After hearing two motions about whether a preliminary injunction may be justified, the most the trial court could conclude was that: "Allowing a tenant to violate the Lease and conduct a store closing sale **potentially could** result in actual and substantial injury to Plaintiff." (CP 946; 5/14/2008 RP 24:16-25). Further, Judge McBroom, reviewing the alleged evidence of injury in the form of declarations of BSM's management, expressed doubt that Barcelino's sale activities would have, in any event, caused injury to BSM: "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 for trial even based on those." (5/14/2008 RP 24:16-25).

In hearings on preliminary relief and on motions for summary judgment, BSM offered no evidence of injury and the trial court made no findings of fact or conclusions of law on the issue of whether BSM sustained any actual injury; substantial, theoretical or otherwise. (CP 997-1012). At no time did BSM factually or legally support the equitable

relief it obtained with proof or evidence of harm. BSM's applications for preliminary relief and for summary judgment should have been denied.

c) BSM had an adequate remedy at law detailed in Section 16.2 (b) of the Lease.

BSM's case for preliminary relief and for summary judgment was characterized by repeatedly making groundless claims that Barcelino had conducted "illegal going-out-of-business sales". (CP 997-999). Even though these accusations were repeatedly dismissed and stricken by the trial court, BSM continued to introduce almost every pleading with them. (CP 1113-1121; CP 1383). The tactic was designed to distract and prejudice the trial court against Barcelino, as well as to hide the inherent weaknesses in BSM's case.

From the outset, BSM's other repeated refrain was that it was entitled to "immediately" enjoin Barcelino from conducting a "store closing sale" or "an illegal going-out-of-business sale" emphasizing the words and leaving out any substance, context or supporting facts or law. But, while BSM was heavy-handed in offering up things it could not prove it was equally diligent in hiding things. From its initial demand letter to Barcelino, BSM omitted any reference to Section 16.2(b), a subparagraph in the clause which BSM claims its available remedies are derived. (CP 1101; CP 910-911). BSM repeatedly omitted reference to Section 16.2

(b) because it knew the clause would serve to defeat BSM's case all by itself. Section 16.2 (b)³² provides a remedy at law when the landlord opts to continue the lease of a tenant. (CP 910-911; CP 895-896). This is exactly the choice of BSM in pursuing the action against Barcelino. An injunction is an equitable remedy that should be used sparingly. See Kucera v. Dept. of Transp., 140 Wn.2d 200, 209 (2000). Therefore, injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law. Id. In the present case, the trial court certainly abused its discretion in granting the preliminary relief at issue without considering and/or revealing whether BSM had an adequate remedy at law and specifically whether Section 16.2(b) provided one. Id. The trial court in granting summary judgment also erred in this manner.

4. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING BARCELINO'S COUNTER-CLAIM AGAINST BSM FOR BREACH OF CONTRACT.

For all of the foregoing reasons, the trial court erred in summarily dismissing Barcelino's counter-claim for breach of contract. (CP 863-864; CP 281-292).

³² Counsel for BSM conveniently omitted Section 16 (b) from his March 13, 2008 letter to Barcelino demanding that Barcelino take down their signs and also omitted any reference to Section 16.2 (b) in BSM application for a TRO. (CP 40-42; CP15-44; CP 1034-1036).

5. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING BARCELINO'S MOTION FOR RECONSIDERATION OF THE ORDER GRANTING BSM'S MOTION FOR SUMMARY JUDGMENT.

For all of the foregoing reasons, the trial court erred and abused its discretion in denying Barcelino's motion for reconsideration of the grant of BSM's second motion for summary judgment. (CP 1317-1326).

6. WHETHER THE TRIAL COURT ERRED IN AWARDING BSM ATTORNEY'S FEES AND COSTS.

Section 16.3 of the Lease provides that the prevailing party in an action is entitled to attorney fees. (CP 911). The trial court awarded attorney's fees and costs to BSM in the amount of \$126,757.58 and Barcelino has paid them. (CP 1575-1576; 1644-1647). The trial court's award to BSM should be reversed along with the grant of summary judgment or, alternatively, if there is no reversal, reduced in amount for the reasons stated in Barcelino's opposition to BSM's motion for fees and costs submitted in the trial court. (CP 1395-1404).

Pursuant to RAP 18.1, if Barcelino prevails on appeal, Barcelino requests an award of its attorney's fees incurred during this appeal based upon the lease provision and RCW 4.84.330. This Court should remand to the trial court to determine the fee award, and to determine, pursuant to RAP 12.8, the appropriate amount to be repaid to Barcelino.

E. CONCLUSION.

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

Respectfully submitted this 21st day of October, 2009.

LAW OFFICES OF ERIC BRIAN JOHNSON

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

Eric B. Johnson
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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

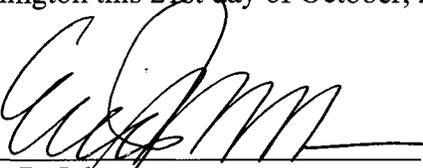
I, Eric B. Johnson, certify under penalty of perjury under the laws of the State of Washington that on October 21, 2009, I served by U.S. Mail upon the person(s) listed below the following documents: 1) **Appellant's Opening Brief dated October 21, 2009.**
2) **Certificate of Service.**

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Dated at Bainbridge Island, Washington this 21st day of October, 2009.



Eric B. Johnson