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COURT OF APPEALS
STATE OF WASHINGTON

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No. 63699-5-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

TBF FINANCIAL, LLC

Appellees

v.

GREGG HENDERSON AND JULIE HENDERSON

Appellants

APPELLEE'S RESPONSE BRIEF

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ORIGINAL

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I. FACTS

The underlying case is a commercial collection action finance lease and personal guaranty entered into by the Appellants, Gregg Henderson and his marital community. CP 3. The lessee was Alternative Dental Solutions ("ADS"), a company owned by Henderson and another business partner. CP 123. The vendor of the copy machine that was subject of the lease was Copiers Northwest, and the financing entity was Wells Fargo Financial Leasing. CP 80.

On or about April 20, 2006, Gregg Henderson executed the Lease on behalf of ADS and also signed the lease as a personal guarantor of the lease obligations. CP 124. Shortly thereafter, the Lease was accepted and funded by Wells Fargo Financial Leasing, evidenced by the Lease itself and a Bill of Sale to Wells Fargo Financial Leasing. CP 86. Under the terms of the Lease, the obligations of ADS were owed to Wells Fargo Financial Leasing. CP 83.

The Lease was subsequently assigned by Wells Fargo Financial Leasing to the Appellee, TBF Financial, LLC ("TBF"). CP 87. TBF commenced collection action in King County Superior Court to enforce the default by ADS and Henderson's personal guaranty. Both parties filed cross motions for summary judgment. The Court denied both parties' motions, but held that TBF could reapply for summary judgment

after it digitally enlarged the Lease and provided further evidence showing that TBF was the proper party in interest. CP 35. TBF complied, and the Court granted TBF's renewed motion for summary judgment. CP 43.

At no point in the proceedings did Henderson provide any evidence in opposition to Plaintiff's motions for summary judgment. Henderson instead made the same legally baseless arguments he repeats on appeal.

II. ARGUMENT

A. Verbatim Report of Proceedings Is Not Part of the Appellate Record.

The Verbatim Report of Proceedings was never filed on the King County Superior Court docket, and a copy was never provided to counsel for Appellees. The Verbatim Report of Proceedings is not part of the record, and should not be considered.

B. Henderson Failed to Raise Genuine Issue of Material Fact in Opposition to Plaintiff's Motion for Summary Judgment, and Summary Judgment Was Properly Granted as a Matter of Law.

Orders granting summary judgment are subject to de novo review. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). The party opposing summary judgment, must "set forth specific facts showing there is a genuine issue for trial or have the summary

judgment, if appropriate, entered against them." *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wash.2d 1, 13 (1986); CR 56(e). "An affidavit does not raise a genuine issue of fact unless it sets forth facts evidentiary in nature, i.e. information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion." *Snohomish County v. Rugg*, 115 Wash.App. 218, 224, 61 P.3d 1184 (Div. 1, 2002). "[U]ltimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact." *Id.* "Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted." *White v. State*, 131 Wash.2d 1, 9, 929 P.2d 396 (1997).

The Superior Court properly found there was no genuine issue of fact as to Henderson's liability for the judgment amount. Henderson admits signing and defaulting on the Lease, and his legal defenses to contract formation and liability are meritless and were properly dismissed.

1. Suit Was Brought by Proper Party In Interest.

The record before the Court contains a copy of the Lease, which Henderson admits signing. CP 124. The Lease unambiguously provides that the obligations of ADS and Henderson are owed to Wells Fargo Financial Leasing (identified in the Lease as the "Owner"). CP 83.

Thus, Henderson's liability to Wells Fargo Financial Leasing is established as a matter of law. *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wash.App. 416, 420 (Div. 2, 1995) ("If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision."). Henderson's statement that he was "...aware that ADS made monthly payments to Copiers Northwest under the lease..." (CP 125) is evasive, unsupported and nonetheless irrelevant, as it would not change Henderson's contractual liability to Wells Fargo Financial Leasing based on the unambiguous contract.

The record before the Superior Court contained a declaration from TBF's records custodian regarding the assignment and transfer of the lease from Wells Fargo Financial Leasing to TBF, which was evidenced by a Bill of Sale. CP 87. Henderson failed to produce any evidence contradicting the transfer. TBF is, and was, the property party in interest, and this defense is not sustainable.

2. Mutual Assent Between Parties to Lease.

Henderson admits signing the Lease at the Copiers Northwest office in Seattle. CP 124. Under Washington law, absent fraud or misrepresentation, a party who signs a written contract assents to the terms therein. *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 506 P.2d 20 (1973) (parties have a duty to read the contracts they sign); *Tjart*

v. Smith Barney, Inc., 107 Wn.App. 885, 897, 28 P.3d 823 (2001) ("[o]ne who accepts a written contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another contracting party.").

The case law cited by Henderson from other jurisdictions are not governing in this jurisdiction, and are contrary to Washington law, and are factually distinguishable. In the unreported case of *American Building Supply Corp. v. Frazier Builders Corp.*, 2002 WL 31507029 (NY City Civ. Ct. 2002) and in the case of *McCarthy Well Company, Inc. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312 (Minn. 1987), the portions of the contracts in question (a personal guaranty and an exculpatory clause) were determined to be illegible at the time they were signed. Henderson has never claimed the lease and guaranty were illegible at the time he signed it, and there is no basis for that conclusion; the reality is that copies on record are low quality scanned images of a contract, as is apparent from the outlines of the image. In any event, Henderson admits to knowing he was signing a lease and personally guaranteeing it. CP 124. Furthermore, under Washington law, parties are presumed to know what they are signing. *Tjart v. Smith Barney, Inc.*, 107 Wn.App. 885, 897, 28 P.3d 823 (2001). The fact that Henderson signed the first page, which specifically

cautioned of terms on the "REVERSE SIDE," is conclusive on the issue of assent.

Henderson did not, and does not now, allege fraud or misrepresentation by Copiers Northwest. Henderson also does not allege the Lease print was too small to read, and even if he did, his failure to read or understand the terms of an agreement he signed does not excuse him from liability under Washington law. *Tjart v. Smith Barney, Inc.*, 107 Wn.App. 885, 897, 28 P.3d 823 (2001). Summary judgment was appropriate on the issue of mutual assent and contract formation.

3. Damages Resulting From Breach Were Established.

Henderson admits defaulting on the Lease by nonpayment. CP 125. The language of the Lease sets forth the remedies for default. CP 82. TBF provided an accounting of the damage amount claimed, supported by specific provisions in the Lease. CP 82. Henderson failed to produce any evidence to contradict TBF's accounting. The objections raised by Henderson for the first time in his appellate brief (pg. 20, ¶ F) are untimely and cannot be considered on appeal. *Smith v. Shannon, M.D.*, 100 Wash.2d 26, 37, 666 P.2d 351 (1983).

4. No Basis For Unconscionability Defense.

No legal or factual basis for this defense exists. The test for procedural unconscionability is whether a the party "lacked meaningful choice." *Alder v. Fred Lind Manor*, 153 Wash.2d 331, 345 (2005).

Nowhere in the record does Henderson claim he lacked meaningful choice in entering into the Lease. Rather, Henderson admits personally guaranteeing the Lease obligations as part of a voluntary business venture. CP 123-24. Furthermore, Henderson does not allege that the Lease print was too small to read, and even if that were true, it is not a defense under Washington law.

Substantive unconscionability exists where a contract is "overly harsh" or "shocking to the conscience". *Alder v. Fred Lind Manor*, 153 Wash.2d 331, 344-45 (2005). Henderson fails to identify any case law suggesting that provisions in the Lease are substantively unconscionable, nor can he. Leases, guaranties and penalties for default like those in this case are very common and enforceable, and comport with commercial reality.

C. Attorney Fees on Appeal Are Not Appropriate.

Henderson's claim for attorney fees is based the "prevailing party" statute, RCW 4.84.330. If the judgment is reversed and case remanded, further proceedings at the trial court would be necessary to

determine the "prevailing party". Therefore, any consideration of an award of attorney fees is premature.

III. CONCLUSION

Nothing on the record creates a genuine issue of fact as to Henderson's liability, and the legal arguments raised by Henderson are meritless. This is a borderline frivolous appeal; the order for summary judgment should be affirmed without oral argument.

DATED this December 17, 2009.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following true and correct:

That on December 18, 2009, I arranged for service of TBF Financial, LLC's Appellee's Response Brief, to the court and counsel for the parties to this action as follows:

Office of the Clerk Court of Appeals, Division 1 One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED AT Mercer Island, Washington this 18th day of December, 2009.


Katie A. Axtell