

63912-9

63912-9

No. 63912-9-I

COURT OF APPEALS, DIVISION I OF THE STATE OF WASHINGTON

TERRY TERRACE APARTMENTS, LLC, a Washington limited liability company,

APPELLANT,

v.

TERRY TERRACE CONDOMINIUM OWNERS ASSOCIATION, a Washington non-profit corporation, VERA FELIX, JOY & GARRETT BENDER, PETER ONG LIM, JUSTIN R. IRISH, GEORGE M. ABEYTA, CARY R. PERRY, KURT KLINGMAN, VICTORIA DIAZ & MICHAEL EASTON, AARON J. MUNN, AAMER HYDRIE & HABIBUDDIN SALONE, LAWRENCE LADUKE, JAMES AND MADELINE HANDZLIK, ALAN BULLER, DEREK SWANSON, AMINEE SCHANTZ, TORGER OAAS, ROLDAN V. DIN, VINCENT LIPE, ROMAN LOPEZ JR. & SUMMAR GOTHARD-LOPEZ, ANN M. GOTHARD, REBECCA DEXTER, JEFFREY T. GILBERT, RHIANNON HOPKINS, HARVINDER & ARADH CHOWDHARY,

RESPONDENTS.

APPELLANT'S OPENING BRIEF

Jordan M. Hecker, WSBA #14374
Lindsey Truscott, WSBA #35610
Attorneys for Appellant
HECKER WAKEFIELD & FEILBERG, P.S.
321 First Avenue West
Seattle, WA 98119
(206) 447-1900

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 NOV 16 PM 2:40

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENT OF ERRORS.....3

III. ISSUES PERTAINING TO ASSIGNMENT
OF ERRORS.....6

 A. Issues Pertaining To Assignment Of
 Errors (1), (3), (4), (5), (7) &
 (9).....6

 B. Issues Pertaining To Assignment Of
 Errors (2), (6) & (9).....6

 C. Issues Pertaining To Assignment Of
 Errors (8) & (9).....7

 D. Issues Pertaining To Assignment Of
 Errors (10), (11), (12) & (13).....7

IV. STATEMENT OF THE CASE.....8

 A. Background Facts Regarding The
 Creation Of The
 Condominium.....8

 B. Background Facts Regarding The
 Purchase Of The Condominium
 Units.....11

 C. Procedural Facts.....13

V. ARGUMENT.....18

 A. Standard Of Review.....18

 B. Introduction.....20

C.	RCW 64.34.312 Does Not Apply To Valid Preexisting Encumbrances.....	23
D.	The Statute Does Not Support The Transfer Of The Verizon Lease Or Its Proceeds To The Association.....	25
E.	The Association's Claims Are Barred By The Doctrines Of Estoppel And Waiver.....	32
F.	The Association Is Not Entitled To The Verizon Lease And Lease Proceeds From July 10, 2002.....	38
G.	The Association Is Not Entitled To Its Attorney's Fees And Costs.....	39
	1. <u>The Instant Situation Is Not An "Appropriate Case" For An Award Of Attorney's Fees And Costs</u>	39
H.	The Dismissal Of Terry Apartments' Claims Against The Unit Owners Should Be Reversed.....	42
	1. <u>Introduction</u>	42
	2. <u>The Unit Owners Will Be Unjustly Enriched If Terry Apartments Does Not Keep The Verizon Lease And Lease Proceeds</u>	44
	3. <u>The PSA Contracts Should Be Reformed To Remedy Any Unjust Enrichment</u>	46
	4. <u>The Unit Owners' Award of Reasonable Attorney's Fees And Costs Is Unsupported</u>	47

I.	Terry Apartments Should Receive Its Attorney's Fees And Costs Incurred At Trial And On Appeal.....	49
VI.	CONCLUSION.....	51

TABLE OF AUTHORITIES

I. CASES

Akers v. Sinclair, 37 Wn.2d 693,
226 P.2d 225 (1951).....47

Bill McCurley Chevrolet, Inc. v. Rutz, 61 Wn.
App. 53, 80 P.2d 1167 (1991) rev. denied 117
Wn.2d 1015 (1991)33,38

Burkey v. Baker, 6 Wn. App. 243, 492 P.2d 563
(1971).....33

C-C Bottlers LTD v. J.M. Leasing, Inc.,
78 Wn. App. 384, 896 P.2d 1309
(1995).....20

CPL LLC v. Conley, 110 Wn. App. 786,
40 P.3d 679 (2002).....48

Davis v. State ex rel Dept. of Lic., 137 Wn.2d
957, 977 P.2d 554 (1999).....30

Del Rosairo v. Del Rosairo, 152 Wn.2d 375,
97 P.3d 11 (2004)35

Denaxas v. Sandstone Court of Bellevue,
148 Wn.2d 654, 63 P.3d 125 (2003)
reversing 107 Wn. App. 1055 (2001).....46

Dice v. City of Montesano, 131 Wn.
App. 675, 128 P.3d 1253 (2006)
rev. denied 158 Wn.2d 1017 (2006).....49

Dragt v. Dragt/DeTray, LLC, 139 Wn. App.
560, 161 P.3d 473 (2007).....44,45

Eagle Point Condo. Owners Ass'n v.
Coy, 102 Wn. App. 697, 9 P.3d 898
(2000).....41,49,50

<u>Esmieu v. Schrag</u> , 92 Wn.2d 535, 598 P.2d 1366 (1979).....	33
<u>Fay v. Best</u> , 137 Wn. 1, 241 P. 354 (1925).....	46
<u>Haggen v. Burns</u> , 48 Wn.2d 611, 295 P.2d 725 (1956).....	21
<u>Halbert v. Forney</u> , 88 Wn. App. 669, 945 P.2d 1137 (1997).....	19
<u>In re: Estate of Lindsay</u> , 91 Wn. App. 944, 957 P.2d 818 (1998) <u>rev. denied</u> 137 Wn.2d 1004 (1999).....	36
<u>Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co.</u> , 125 Wn. App. 227, 103 P.3d 1256 (2005).....	19,25,31
<u>Marina Cove Condominium Owners Ass'n v. Isabella Estates</u> , 109 Wn. App. 230, 34 P.3d 870 (2001).....	30
<u>Meyer v. Young</u> , 23 Wn.2d 109, 159 P.2d 908 (1945).....	46
<u>Port of Seattle v. State Dept. Of Rev.</u> , 101 Wn. App. 106, 1 P.3d 607 (2000) <u>rev. denied</u> 142 Wn.2d 1012 (2000).....	26,28,29
<u>Stone v. Sexsmith</u> , 28 Wn.2d 947, 184 P.2d 567 (1947).....	21,23
<u>Turner v. Wexler</u> , 14 Wn. App. 143, 538 P.2d 877 (1975) <u>rev. denied</u> 86 Wn.2d 1004 (1975).....	34

<u>W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.</u> , 102 Wn. App. 488, 7 P.3d 861 (2000) <u>rev. denied</u> 143 Wn.2d 1003 (2001).....	34
---	----

II. STATUTES

RCW 64.34 et seq.....	9
RCW 64.34.020.....	30
RCW 64.34.020(4).....	26
RCW 64.34.020(6).....	24
RCW 64.34.020(14).....	10
RCW 64.34.020(15).....	10
RCW 64.34.020(16).....	10
RCW 64.34.216.....	10, 24
RCW 64.34.224.....	24, 25
RCW 64.34.228.....	24
RCW 64.34.308(4).....	10, 26, 32
RCW 64.34.308(5).....	10, 32
RCW 64.34.312.....	2, 16, 21, 22, 23, 25, 26, 27, 31, 39
RCW 64.34.312(1).....	26, 32
RCW 64.34.312(1)(p).....	3, 4, 17, 18, 20, 21, 22, 24, 25, 28, 29, 30, 31, 32, 41
RCW 64.34.320.....	13, 14, 15, 27
RCW 64.34.348.....	14, 15, 27
RCW 64.34.348(6).....	21, 23

RCW 64.34.405 (1)10
RCW 64.34.455.....39, 40, 41, 43, 49, 50

III. OTHER AUTHORITIES

Gary N. Ackerman et al., Introducing the New
Washington Condominium Act
(WSBA 1990).....22, 26, 27, 28, 32

Restatement (Second) Of Contracts
§ 150 cmt. e (1981).....36

APPENDICES

- Appendix 1: Order Regarding (1) Plaintiff's Motion for Summary Judgment Regarding Lease Termination and Restitution of Lease Proceeds; and (2) Defendant/Third-Party Plaintiff's Cross-Motion for Summary Judgment dated October 18, 2007
- Appendix 2: Trial Court's May 7, 2007, written decision regarding Summary Judgment
- Appendix 3: Stipulated Motion and Order Re: Amount of Lease Proceeds dated April 10, 2009
- Appendix 4: Order Granting Plaintiff's Motion For Summary Judgment Re: Damages And Prejudgment Interest dated July 21, 2009
- Appendix 5: Judgment Against Terry Terrace Apartments, LLC dated July 21, 2009
- Appendix 6: Order Granting Third Party Defendants' Motion for Summary Judgment dated February 16, 2007
- Appendix 7: Order Granting Homeowners' Motion For Reasonable Fees And Expenses And For Entry Of Judgment dated March 17, 2008
- Appendix 8: Judgment For Homeowners' Reasonable Fees And Expenses dated March 17, 2008

Appendix 9: RCW 64.34.312

Appendix 10: Official Comments to RCW 64.34.312

I. INTRODUCTION

In June of 2002, the Appellant Terry Terrace Apartments, LLC (hereinafter "Terry Apartments") executed a lease (hereinafter "Verizon Lease") with Co-Defendant SMSA Limited Partnership d/b/a Verizon Wireless (hereinafter "Verizon Wireless"). The Verizon Lease allowed Verizon Wireless to put cell phone towers on the rooftop of an apartment building owned by Terry Apartments.

Sometime after the execution of the Verizon Lease, Terry Apartments converted the apartment building into a condominium. Shortly after Terry Apartments transferred control of the condominium to the Respondent Terry Terrace Condominium Owners Association (hereinafter "Association"), the Association began to complain about the Verizon Lease. In essence, the Association disputed Terry Apartments ability to encumber the rooftop of the condominium building.

This appeal arises from the trial court's erroneous decision to award the Verizon Lease and lease proceeds to the Association pursuant to the Washington Condominium Act (hereinafter "WCA"). In its simplest terms, the trial court misconstrued RCW 64.34.312 of the WCA to provide for the transfer of the Verizon Lease and lease proceeds to the Association.

The Respondents/Third Party Defendants (hereinafter "Unit Owners") originally accepted the Verizon Lease's terms and benefits without protest. Indeed, they voluntarily closed the purchase of their units knowing of the Verizon Lease as disclosed in their Purchase and Sale Agreements (hereinafter "PSA").

The Unit Owners, by entering into their PSA contracts, are estopped from attempting to invalidate the Verizon Lease. As will be seen, the Unit Owners were benefited with a lower purchase price as a result of the Verizon Lease.

Thus, it is unjust for them to assume or invalidate the Verizon Lease and lease proceeds without paying compensation to Terry Apartments.

II. ASSIGNMENT OF ERRORS

1. The trial court erred by granting the Association's Motion for Summary Judgment, awarding the Verizon Lease and lease proceeds to the Association pursuant to RCW 64.34.312(1)(p). CP 1030-1036 attached hereto as Appendix 1.

2. The trial court erred by ordering that Terry Apartments transfer any lease proceeds "received on or after July 10, 2002, to the Association" (appendix 1).

3. The trial court erred by ordering that "the Association shall be entitled to all rights, title, and interest in and to [Terry Apartments'] interest in the Lease" (appendix 1).

4. The trial court erred by ordering that "[v]erizon shall make all future lease payments to the Association" (appendix 1).

5. Terry Apartments assigns error to the trial court's written decision on Summary Judgment, dated May 7, 2007, which awarded the Verizon Lease and lease proceeds to the Association pursuant to RCW 64.34.312(1)(p). CP 1538-1540 attached hereto as Appendix 2.

6. The trial court erred by ordering that the Association be awarded \$144,285.00 in damages against Terry Apartments. CP 1522-1523; 1347-1366 attached hereto as Appendices 3 & 4.

7. The trial court erred by entering Judgment in the Association's favor for the Verizon Lease and lease proceeds. CP 1524-1526 attached hereto as Appendix 5.

8. The trial court erred by entering Judgment in the Association's favor for \$42,800.00 in attorney's fees and costs (appendix 5).

9. The trial court erred by entering Judgment in favor of the Association in the total

sum of \$238,618.84 (appendix 5).

10. The trial court erred by granting the Unit Owners' Motion for Summary Judgment, dismissing Terry Apartments' claims and awarding the Unit Owners their reasonable attorney's fees and costs. CP 884-888 attached hereto as Appendix 6.

11. The trial court erred by awarding the Unit Owners \$20,980.50 in attorney's fees and costs, and \$3,376.68 for reasonable expenses. CP 1140-1142 attached hereto as Appendix 7.

12. The trial court erred by ordering that final judgment shall be entered in favor of the Unit Owners and against Terry Apartments for attorney's fees and costs (appendix 7).

13. The trial court erred by entering Judgment for attorney's fees and costs in favor of the Unit Owners and against Terry Apartments in the amount \$24,357.18. CP 1143-1146 attached hereto as Appendix 8.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

A. Issues Pertaining To Assignment Of Errors (1), (3), (4), (5), (7) & (9):

1. Whether, as a matter of law, Terry Apartments is entitled to retain possession of the Verizon Lease and lease proceeds when the Association is not a party to the lease contract and the Verizon Lease is a valid real property encumbrance that preceded the creation of the condominium.

2. Whether, as a matter of law, the Association is estopped from bringing its claims to invalidate and/or assume control of the Verizon Lease when the Unit Owners accepted the Verizon Lease's terms and benefits as part of their PSA contracts.

B. Issues Pertaining To Assignment Of Errors (2), (6) & (9):

Whether, as a matter of law, the Association is entitled to the Verizon Lease proceeds starting from July 10, 2002, the date the

condominium was created, even though the Association did not take control of the condominium until April of 2005.

C. Issues Pertaining To Assignment of Errors (8) & (9):

Whether the Association is entitled to attorney's fees and costs given that Terry Apartments did not violate the WCA.

D. Issues Pertaining To Assignment of Errors (10), (11), (12) & (13):

1. Whether the dismissal of Terry Apartments' third party claims was improper when the dismissal and the attorney's fees and costs award were based on the trial court's decision that Terry Apartments would retain the Verizon Lease and lease proceeds.

2. Whether Terry Apartments' third party claims against the Unit Owners were improperly dismissed when the Unit Owners accepted the Verizon Lease's terms and benefits as part of their PSA contracts.

3. Whether the Unit Owners have been unjustly enriched given they received a reduced purchase price as a result of the income generated from the Verizon Lease.

4. Whether the Unit Owners' PSA contracts should be reformed when the purchase price took into account that Terry Apartments would continue to receive rental income from the Verizon Lease.

5. Whether, as a matter of law, the Unit Owners are entitled to an award of their reasonable attorney's fees and costs when Terry Apartments' third party indemnity claims do not pertain directly to the sale of the condominium units or to violations of the WCA.

IV. STATEMENT OF THE CASE

A. Background Facts Regarding The Creation Of The Condominium.

The Terry Terrace Condominium is a residential building consisting of 26 units located at 403 Terry Avenue in Seattle, Washington. CP 304-308. Tim Kennedy

(hereinafter "Kennedy") was a Member of Terry Terrace Apartments, LLC when the entity purchased the building. CP 304-308.

As noted, in June of 2002, before the building was converted into a condominium, Terry Apartments entered into the Verizon Lease with Verizon Wireless. CP 304-336. Again, the Verizon Lease allowed Verizon Wireless to place cell phone towers on the roof of the apartment building owned by Terry Apartments. CP 304-336. The Verizon Lease term was for a period of five years, with four extensions of five years each. CP 310-336. The annual rent for the Verizon lease was \$24,000.00 for the first year, increasing thereafter in accordance with the provisions of the Verizon Lease. CP 304-336.

On July 10, 2002, Terry Apartments recorded the Declaration, Public Offering Statement and other documents required by WCA (RCW 64.43 et

seq.).¹ CP 304-308; 337-394. At this point, the Terry Terrace building was converted into a condominium. As the "declarant," Terry Apartments did not reserve "declarant control."² CP 281-288; 304-308; 337-388.

Soon after the Declaration was recorded, Kennedy began to sell condominium units. CP 304-308. The first unit was sold in October of 2002. CP 304-308. In April of 2005, the Association took control of the condominium. CP 297-298.

¹"'Declaration' means the document, however denominated, that creates a condominium by setting forth the information required by RCW 64.34.216 and any amendments to that document." RCW 64.34.020(16).

"[A] declarant shall prepare a public offering statement conforming to the requirements of RCW 64.34.410 and 64.34.415..." RCW 64.34.405(1).

²"'Declarant' means (a) [a]ny person who executes as declarant a declaration as defined in subsection (16) of this section." RCW 64.34.020(14).

"'Declarant control' means the right of the declarant or person designated by the declarant to appoint and remove officers and members of the board of directors, or to veto or approve a proposed action of the board of association, pursuant to RCW 64.34.308(4) or (5)." RCW 64.34.020(15).

B. Background Facts Regarding The Purchase Of The Condominium Units.

As noted, Terry Apartments sold its first condominium unit in October of 2002. CP 304-308. The expected revenue from the Verizon Lease was factored into the asking price for the units. CP 304-397. In essence, Terry Apartments reduced the asking price because of the rental income it would receive from the Verizon Lease. CP 304-308.

The existence of the Verizon Lease was well known and disclosed in several documents related to sale of the condominium units. CP 304-397. Each Unit Owner had constructive, if not actual notice of the Verizon Lease and its terms.

Specifically, the Verizon Lease was disclosed in the Declaration, Public Offering Statement and the Operating Budget document, which essentially created the condominium. CP 304-397. Consistent with the WCA, the Public Offering Statement (in large bold font and

capital letters) emphasized to buyers that the condominium documents created legally binding obligations, including the right to rescind the transaction. CP 388-394.

The Public Offering Statement expressly provided that the buyer is to receive copies of the Declaration and the Association's proposed budget. CP 388-394. The Public Offering Statement also "includes any exhibits which are attached hereto and incorporated herein by reference." CP 388-394. Both Exhibit A of the Declaration and the Association's proposed budget disclosed the Verizon Lease and its terms. CP 337-397.

Moreover, the Verizon Lease was recorded in King County, Washington, before any unit was sold. CP 310-316. Also, the Verizon Lease was disclosed in the PSA contracts and in many of the Unit Owners' deeds. CP 289-303; 685-712. In fact, many of the Unit Owners testified that they

had knowledge of the Verizon Lease's terms and that Terry Apartments would receive most of the lease proceeds during the sales transaction. CP 685-712.

C. Procedural Facts.

In June of 2005, a couple months after the Association took control of the condominium, the Association's counsel sent a letter to Verizon Wireless and Terry Apartments seeking to terminate the Verizon Lease under section RCW 64.34.320 of the WCA. CP 289-303. Both Verizon Wireless and Terry Apartments refused to cancel the lease under the Association's terms. CP 289-303.

After Terry Apartments and Verizon Wireless refused to hand over the Verizon Lease to the Association, it filed a lawsuit against Terry Apartments and Verizon Wireless. CP 1-10. In its lawsuit, the Association sought to terminate the Verizon lease and obtain its revenue. CP 1-

10.

Terry Apartments also filed a Third Party Complaint against the Unit Owners. CP 152-167. Terry Apartments sued the Unit Owners as a result of the Association's lawsuit. Again, the purchase price of the units took into account the fact that Terry Apartments would continue to receive rental income from the Verizon Lease. CP 152-167; 304-308. Specifically, Terry Apartments brought indemnity claims against the Unit Owners to recoup the reduction in the purchase price, in the event the Association prevailed. CP 152-167.

Soon after the lawsuit was filed, the Association filed a Motion for Summary Judgment against Terry Apartments (hereinafter "Association's Motion"). CP 131-148. The Association's Motion sought to invalidate the Verizon Lease and collect the lease proceeds paid by Verizon Wireless to Terry Apartments pursuant to RCW 64.34.320 & RCW 64.34.348 of the WCA. CP

131-148. The Unit Owners also joined in the Association's Motion and brought their own Summary Judgment Motion against Terry Apartments. CP 398-414.

Similarly, Terry Apartments brought a Cross-Motion for Summary Judgment (hereinafter "Terry Apartments' Motion") against the Association. CP 571-585. In short, Terry Apartments' claimed that the WCA provided no basis to terminate or void the Verizon Lease. CP 571-585. Verizon Wireless joined in Terry Apartments' Motion. CP 729-740.

At oral argument, the trial court preliminarily held that the Verizon Lease was not void and could not be terminated by the Association pursuant to RCW 64.34.320 and RCW 64.34.348. CP 889-890; 902-924. As a result, the Association's claims would be dismissed and Terry Apartments would retain the Verizon Lease and lease proceeds. CP 889-890; 917-924.

The trial court also granted the Unit Owners' Motion for Summary Judgment. Specifically, the trial court dismissed Terry Apartments' claims and awarded the Unit Owners their reasonable attorney's fees and costs, based on the fact that Terry Apartments would retain possession of the Verizon Lease and lease proceeds. CP 884-888; 889-890.³

However, at the end of the hearing and after the judge's oral ruling, the Association's counsel asserted a new legal theory that the Association should obtain the Verizon Lease under RCW 64.34.312. CP 917-924; 1090-1120. The new theory had not been briefed by the Association prior to oral argument. CP 917-924; 1090-1120.

The trial court asked the parties to file supplemental memoranda based on the Association's new theory; the parties complied. CP 891-959.

³ On March 17, 2009, Judgment for the Unit Owners attorney's fees and costs was entered by the trial court. CP 1140-1142; 1143-1146.

Several months later, the trial court reversed its prior oral decision and ruled in the Association's favor. CP 889-890; appendix 2.

Contrary to its preliminary ruling, the trial court ordered that the Verizon Lease and lease proceeds be transferred to the Association pursuant to RCW 64.34.312(1)(p) (appendices 1 & 2). Also, the trial court ordered that all lease proceeds paid by Verizon Wireless, starting from July 10, 2002, should be transferred to the Association. CP 1030-1036; appendix 1.

Terry Apartments took this matter up on appeal. The appeal was dismissed without prejudice because the issue of prejudgment interest remained unresolved. After the matter was sent back to the trial court, the parties stipulated to the accounting regarding the lease proceeds at issue. CP 1347-1366. However, Terry Apartments did not stipulate that it was liable for the damages. CP 1347-1366. Terry Apartments.

has always maintained that the Association was not entitled to any proceeds.

The Association brought motions for attorney's fees and costs, and prejudgment interest. CP 1371-1377; 1378-1388. The trial court entered Judgment in favor of the Association for the Verizon Lease, lease proceeds, prejudgment interest and attorney's fees and costs, on July 21, 2009. CP 1522-1523; 1524-1526; appendices 4 & 5.

V. ARGUMENT

A. Standard Of Review.

Terry Apartments appeals the trial court's February 16, 2007, October 18, 2007, and July 21, 2009, decisions on Summary Judgment, and the Judgment entered on July 21, 2009 (appendices 1 & 3-6). Also, Terry Apartments assigns error to the trial court's accompanying written Summary Judgment decision which found that the Association was entitled to the Verizon Lease and

lease proceeds pursuant to RCW 64.34.312(1)(p) (appendix 2).

When a summary judgment order is reviewed, the Court of Appeals undertakes the same analysis as the trial court, considering only the issues raised on summary judgment. See Halbert v. Forney, 88 Wn. App. 669, 673, 945 P.2d 1137 (1997) (citing CR 56(c)). In short, the trial court's ruling should be reversed if there are issues of material fact, precluding judgment as a matter of law. See Halbert, 88 Wn. App. at 673.

Similarly, "[t]he interpretation of a statute and its implementing regulations is a question of law that [the appellate court] reviews de novo." See Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., 125 Wn. App. 227, 239-240, 103 P.3d 1256 (2005) (citations omitted). Accordingly, the standard of review is de novo because the issue involved interpreting the provisions of the WCA.

Lastly, Terry Apartments appeals the trial court's decision to award attorney's fees and costs to the Association and the Unit Owners (appendices 5-8). The determination of whether an award of attorney's fees is authorized "is a question of law, not an exercise of judicial discretion." See C-C Bottlers LTD v. J.M. Leasing, Inc., 78 Wn. App. 384, 387, 896 P.2d 1309 (1995) (citation omitted). Accordingly, the standard of review regarding the award of the Association's and Unit Owners' reasonable attorney's fees and costs is de novo. Id.

B. Introduction.

The trial court erroneously relied on RCW 64.34.312(1)(p) to support its decision requiring the transfer of the Verizon Lease and lease proceeds to the Association. Again, the trial court did not provide its analysis of the applicability of RCW 64.34.312(1)(p).

Upon scrutiny, RCW 64.34.312(1)(p) clearly does not support the trial court's decision. See RCW 64.34.312. First, it must be emphasized that the WCA and its provisions, such as RCW 64.34.312, do not apply to valid and enforceable real property interests that precede the creation of the condominium. See Middlebrooks Declaration at CP 281-288; see also RCW 64.34.348(6).⁴ The Verizon Lease is such an interest. See Stone v. Sexsmith, 28 Wn.2d 947, 951, 184 P.2d 567 (1947); see, e.g., Haggen v. Burns, 48 Wn.2d 611, 613-614, 295 P.2d 725 (1956).

Moreover, the trial court's reliance on RCW 64.34.312 is misplaced because the statute only provides for the transfer of leases to which the Association is a party. Since the Association is not a party to the Verizon Lease, RCW 64.34.312(1)(p) does not apply to it. CP 310-336.

⁴ RCW 64.34.348(6) more fully states: "A conveyance or encumbrance of common elements pursuant to this section shall not affect the priority or validity of preexisting encumbrances."

In fact, RCW 64.34.312 is an administrative statute that serves only to help facilitate the Association's control over the condominium, not to determine who rightfully owns the Verizon Lease and lease proceeds. See Supplemental Middlebrooks Declaration at CP 887-891. Nothing in RCW 64.34.312 creates any new substantive ownership right or establishes that the Association is entitled to benefits beyond the terms of the actual document to be transferred.

The purpose of RCW 64.34.312 is to ensure that the condominium was properly managed during a period of "declarant control." See Gary N. Ackerman et al., Introducing the New Washington Condominium Act 230 (WSBA 1990) attached hereto as Appendix 9.⁵ However, Terry Apartments did not reserve "declarant control" and, as a result, the purpose of RCW 64.34.312 does not align with the instant situation. See Middlebrooks Declaration at CP 281-288; CP 304-387.

⁵ The cited secondary source contains the official comments to the WCA, including comments for RCW 64.34.312.

C. RCW 64.34.312 Does Not Apply To Valid Preexisting Encumbrances.

As noted, the trial court overlooked that the WCA does not terminate a valid encumbrance which precedes the creation of the condominium. Indeed, according to James C. Middlebrooks, an attorney who assisted in drafting the WCA and its Legislative comments, there is no support for the proposition that the WCA invalidates an owner's interest in real property created before the condominium existed. CP 281-288.

Again, the WCA expressly contemplates the "priority or validity of preexisting encumbrances." See RCW 64.34.348(6).⁶

An encumbrance is defined as:

[A]ny right to, or interest in, land which may subsist in third persons to the diminution of the value of the estate of the tenant but consistently with the passing of the fee...**familiar illustrations are...leases.**

See Stone, 28 Wn.2d at 951 (emphasis added).

⁶ Again, RCW 64.34.348(6) more fully states: "A conveyance or encumbrance of common elements pursuant to this section shall not affect the priority or validity of preexisting encumbrances."

Here, the Verizon Lease was executed in June of 2002. CP 304-336. The Declaration, which created the condominium, was recorded in July of 2002. CP 304-397.

Interestingly, the trial court determined that the Verizon Lease is valid and enforceable (appendix 1). Accordingly, the Verizon Lease is a valid encumbrance created before the condominium to which RCW 64.34.312(1)(p) does not apply.

Also, for the same reason, the trial court's reliance on RCW 64.34.216, .224 and .228 is misplaced (appendix 2). The Verizon Lease is not a "common element" "limited common element" or "development right," as governed by the WCA.⁷ See RCW 64.34.216, .224 & .228. It is a valid preexisting encumbrance rightfully owned by and a benefit to Terry Apartments.

⁷ "'Common elements' means all portions of a condominium other than the units." RCW 64.34.020(6).

The trial court relied on these provisions, especially RCW 64.34.224, to show that the WCA did not intend to partition or otherwise prevent the Unit Owners from receiving all the "common elements" of the condominium (appendix 2). However, the trial court did not analyze the applicability of RCW 64.34.312 or explain how a lease prevented the Unit Owners from receiving the "common elements" (appendix 2).

D. The Statute Does Not Support The Transfer Of The Verizon Lease Or Its Proceeds To The Association.

In applying the principles of statutory interpretation, RCW 64.34.312(1)(p) clearly does not apply to the Verizon Lease. When interpreting a statute, the Court must "effectuate the Legislature's intent and purpose as it is expressed in the act." See Kelsey Lane Homeowners Ass'n, 125 Wn. App. at 240 (citations omitted). Also, in ascertaining the statute's language, "the court must consider both the statute's subject matter and the context in which

particular words are used." See Port of Seattle v. State Dept. Of Rev., 101 Wn. App. 106, 113, 1 P.3d 607 (2000) rev. denied 142 Wn.2d 1012 (2000).

Here, the purpose of RCW 64.34.312 is to provide for the transfer of control of the condominium from the "declarant" (i.e. Terry Apartments) to the Association within a certain time frame. RCW 64.34.312(1) provides:

Control of association - transfer.

(1)[W]ithin sixty days after the termination of the period of declarant control provided in RCW 64.34.308(4) or, in the absence of such period, within sixty days after the first conveyance of a unit in the condominium, the declarant shall deliver to the association all property of the unit owners and of the association held or controlled by the declarant, including...⁸

See Appendix 10.

Consistent with its administrative purpose, the statute lists a multitude of documents that Terry Apartments must physically transfer to the

⁸ "'Association'. . . means the unit owners' association organized under RCW 64.34.300." RCW 64.34.020(4).

Association, including a copy of the Declaration, the Association's Bylaws and Minutes books of the Association (appendix 10).

RCW 64.34.312 cannot be utilized to create substantive ownership rights. It is nothing more than an administrative statute. See Supplemental Middlebrooks Declaration at CP 887-891. RCW 64.34.312 does not provide any mechanism whatsoever for determining the ownership of the underlying documents to be turned over to the Association. See Supplemental Middlebrooks Declaration at CP 887-891.

Instead, RCW 64.34.320 & RCW 64.34.348 govern these issues. However, the trial court correctly determined that RCW 64.34.320 and RCW 64.34.348 did not apply to the instant situation.⁹

Ultimately, ownership of the documents/property to be transferred must be established through other means before Terry

⁹ It is undisputed that the trial court determined that neither RCW 64.34.320 nor RCW 64.34.348 applied to the Verizon Lease. CP 902-916; 917-924.

Apartments is required to turn them over. In fact, the use of the language "to which the association is a party" in RCW 64.34.312(1)(p) exemplifies this point (appendix 10). In short, the Association must be a party to the lease contract.

When interpreting a statute's words, "the meaning of words may be indicated or controlled by those with which they are associated." See Port of Seattle, 101 Wn. App. at 113 (citations omitted)(quotations omitted). Also, "specific words or terms modify and restrict the interpretation of general words or terms where both are used in a sequence." Id.

RCW 64.34.312(1)(p) provides:

(1)[W]ithin sixty days after the first conveyance of a unit in the condominium, the declarant shall deliver to the association all property of the unit owners and of the association held or controlled by the declarant, including... (p) [a]ny leases of the common elements or areas and other leases to which the association is a party . . .

See Appendix 10.

Applying the principles of interpretation to the statute, the use of "and" in the sentence "any leases of the common elements or areas and other leases to which the association is a party..." is inclusive. As a result, the first and the second parts of the sentence must be read together.

Furthermore, the use of the operative "and" followed by the specific designation of the "association" modifies the words that precede the "and." See, e.g., Port of Seattle, 101 Wn. App. at 113 (citation omitted). Thus, the correct interpretation of RCW 64.34.312(1)(p) is that the Association must be a party to a lease contract pertaining to "common elements" or "areas" and "other leases" for the statute to apply.

Here, the Verizon Lease is not subject to RCW 64.34.312(1)(p) because the Association is not a party to the contract. Again, Terry Apartments and Verizon Wireless are the only parties to the Verizon Lease. CP 304-336.

Interestingly, by requiring that the Association be a party to the lease contract, the statute contemplates that there will be leases to which the Association is not a party. Since the statute does not address those leases, they must not be subject to the statute. In fact, the Court must assume that the Legislature means exactly what is stated in a statute. See Marina Cove Condominium Owners Ass'n v. Isabella Estates, 109 Wn. App. 230, 236, 34 P.3d 870 (2001) (citing Davis v. State ex rel Dept. of Lic., 137 Wn.2d 957, 963-964, 977 P.2d 554 (1999)).

In this case, the WCA is an extremely detailed statute that sets forth numerous precise definitions. See RCW 64.34.020. For instance, if the Legislature had intended 64.34.312(1)(p) to apply to a lease of "common elements" to which the "declarant" is a party, then it would have used those words... Instead, RCW 64.34.312(1)(p) only names the Association as a party. Thus,

RCW 64.34.312(1)(p) does not apply to the Verizon Lease.

Additionally, even if one assumes that RCW 64.34.312 is ambiguous, the same outcome should result. When a statute is ambiguous, the trial court may also rely on the official comments to aid in the interpretation of the statute. See Kelsey Lane Homeowners Ass'n, 125 Wn. App. at 239-240.

Here, the official comments to RCW 64.34.312 compliment the interpretation of RCW 64.34.312(1)(p) set forth above. The official comments provide, in part:

[RCW 64.34.312] is designed to ensure that the property and funds **belonging to the association** as well as the information and documents needed for assuming control of the association and the management of the condominium are in fact transferred to the association.

See Appendix 9 (emphasis added).

The official comments to RCW 64.34.312 further reveal that the statute seeks to "ensure" that the Association's financial affairs were properly

managed "during a period of declarant control" (appendix 9).

The language of RCW 64.34.312(1) also contemplates a period of "declarant control" stating, "the declarant shall deliver to the association all property of the unit owners and of the association held or controlled by the declarant" (appendix 10). Significantly however, "declarant control" never existed in the instant situation. See Middlebrooks Declaration at CP 281-288; CP 304-397.

Instead, the Association's board of directors was formed after the conveyance of a certain percentage of the condominium's units. CP 337-387. The WCA allows the board of directors to be fully formed this way when "declarant control" is not reserved. See RCW 64.34.308(4)-(5).

E. The Association's Claims Are Barred By The Doctrines Of Estoppel And Waiver.

The Association is estopped from seeking termination of the Verizon Lease. The

Association seeks to invalidate an enforceable transaction accepted by the Unit Owners at the time they purchased their condominiums. For similar reasons, the Association has also waived its right to terminate or take possession of the Verizon Lease.

To establish an equitable estoppel claim there must be:

(1) [A]n admission, statement, or act, inconsistent with the claims afterward asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party arising from permitting the first party to contradict or repudiate such admission, statement, or act.

See Esmieu v. Schrag, 92 Wn.2d 535, 540, 598 P.2d 1366 (1979) (citation omitted); see also Burkey v. Baker, 6 Wn. App. 243, 247-248, 492 P.2d 563 (1971) (citations omitted).

In the instant situation, the Unit Owners accepted the terms of their PSA contracts which incorporated the Verizon Lease by reference. The principle of "incorporation by reference"

provides that "[w]here a writing refers to a separate agreement, an agreement or so much of it as referred to should be considered as part of the writing." See Turner v. Wexler, 14 Wn. App. 143, 148-49, 538 P.2d 877 (1975) rev. denied 86 Wn.2d 1004 (1975). Also, the incorporated terms are enforceable even if the parties did not sign them. See W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 494, 7 P.3d 861 (2000) rev. denied 143 Wn.2d 1003 (2001).

Specifically, Paragraph "v" of the PSA contract provides:

v. Public Offering Statement.

Buyer shall be conclusively deemed to have approved the Public Offering Statement [which includes the Declaration, Survey Map and Plans, Association Articles of Incorporation, etc] unless, within 7 days following receipt, Buyer gives notice of disapproval of the same. If Buyer disapproves the Public Offering Statement, this Agreement shall terminate and the Earnest Money shall be refunded to the Buyer.

CP 685-712.

As noted, the condominium documents that are referenced in Paragraph "v" disclose the Verizon Lease. CP 304-397. Again, Exhibit A of the Declaration, the Association's proposed budget and the Public Offering Statement all disclose the Verizon Lease and its terms. CP 304-397.

The Unit Owners through the Association are now attempting to invalidate the Verizon Lease. CP 1-10; CP 131-148. At the time each Unit Owner purchased their unit, Terry Apartments had the right to rely on the Unit Owners' acceptance of the terms of the original transaction.

In fact, the Unit Owners are presumed to understand the terms of their PSA contracts. See Del Rosairo v. Del Rosairo, 152 Wn.2d 375, 380, 97 P.3d 11 (2004) (citation omitted). Certainly, "parties have a duty to read the contracts they sign." See Del Rosario, 152 Wn. 2d at 380 (citation omitted).

Moreover, Terry Apartments will be injured if it cannot collect rent from the Verizon Lease.

Terry Apartments will lose tens of thousands of dollars in rental income. CP 304-397; 741-744. Thus, the Association should be estopped from seeking to take possession of the Verizon Lease and lease proceeds.

Likewise, the Association has waived its right to object to the Verizon Lease. A waiver is the voluntary relinquishment of a known right. See Bill McCurley Chevrolet, Inc. v. Rutz, 61 Wn. App. 53, 57-58, 80 P.2d 1167 (1991) rev. denied 117 Wn.2d 1015 (1991)(citations omitted); see also In re: Estate of Lindsay, 91 Wn. App. 944, 951, 957 P.2d 818 (1998) rev. denied 137 Wn.2d 1004 (1999). A party can waive its contractual rights through performance of the contract. See Restatement (Second) Of Contracts § 150 cmt. e (1981).

Here, again, the Unit Owners accepted the terms of the condominium transaction, which included the Verizon Lease. In fact, many of the Unit Owners had reservations about the Verizon

Lease but did not follow through with their concerns. CP 685-712.

For instance, Aimee Shantz testified as follows:

Question: Was there any provision within the POS [Public Offering Statement] that you happened to notice other than other provisions in the POS?

Answer: I noticed the warranty and I noticed the Verizon lease.

Question: So prior to purchasing you noticed the Verizon lease?

Answer: Yes.

Question: And what was your reaction to noticing the Verizon lease?

Answer: I wasn't --- I did not totally understand what was --- what the details were, but I viewed it as a disclosure that the owner held a lease, had a lease with Verizon.

Question: Did you do any additional investigation regarding the Verizon lease prior to making the offer?

Answer: No.

CP 701-702.

Aimee Shantz apparently believed that she could merely ignore her contractual obligations

and the Verizon Lease. CP 701-702. Likewise, several other Unit Owners also testified that they knew about the Verizon Lease and chose to purchase their units. CP 685-712. In short, by choosing to complete the transaction, the Unit Owner waived their right to protest the Verizon Lease. See Bill McCurley Chevrolet, Inc., 61 Wn. App. at 57-58.

F. The Association Is Not Entitled To The Verizon Lease And Lease Proceeds From July 10, 2002.

If the Court affirms the transfer of the Verizon Lease to the Association, it should reverse the trial court's decision regarding the timing of the transfer of the lease proceeds. In short, the Association was not entitled to the Verizon Lease and lease proceeds the day the condominium was created.

Ultimately, the trial court ordered that the Association was entitled to the lease proceeds starting July 10, 2002, the day the condominium was created. See Appendix 1; CP 307-397. The

basis for the trial court's decision is not clear. See Appendices 1 & 2.

Assuming the Association is entitled to the proceeds, it presumably had no right to them prior to assuming control over the condominium. To the extent that RCW 64.34.312 governs the matter, the Association could not be entitled to the lease proceeds until it took over control in April of 2005. CP 289-303.

Thus, even if Terry Apartments' rights are terminated, the Court should reverse, in part, the decision to award the Verizon Lease and lease proceeds to the Association. The Court should instruct the trial court to enter an order that the Association is entitled to the lease proceeds no earlier than April of 2005.

G. The Association Is Not Entitled To Its Attorney's Fees And Costs.

1. The Instant Situation Is Not An "Appropriate Case" For An Award Of Attorney's Fees And Costs.

The Association is not entitled to attorney's fees or costs pursuant to RCW

64.34.455. The instant situation is not "an appropriate case" for an award of attorney's fees. In short, the lawsuit dealt with statutory interpretation rather than violations of the WCA.

Pursuant to the Act, the court may award attorney's fees in "an appropriate case."

Specifically, RCW 64.34.455 provides:

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

Here, the decision of the trial court to award the Verizon Lease and lease proceeds to the Association was not easily made. Indeed, the trial court stated that the issue of whether the Act provided for the transfer was difficult to decide. See Appendix 2.

Ultimately, there was no clear legal authority which provided for the transfer pursuant to the Act. The trial court engaged in

a difficult statutory interpretation analysis to determine that the Association was entitled to the lease pursuant to RCW 64.34.312(1)(p). See Appendix 2.

Most of the cases that award attorney's fees pursuant to RCW 64.34.455 involve construction defects disputes. See, e.g., Eagle Point Condominium Owners Association v. Coy, 102 Wn. App. 697, 713, 9 P.3d 898 (2000). These disputes violate the WCA warranties regarding construction quality and are designed to protect consumer safety. See Eagle Point Condominium Owners Association, 102 Wn. App. at 697.

The courts justify such instances as "an appropriate case" given the Act's "strong consumer protection component." See Eagle Point Condominium Owners Association, 102 Wn. App. at 697. Apparently, if a builder fails to honor the statutory warranties promulgated for the safety of consumers, the conduct rises to "an appropriate case" for an award of fees.

Obviously here, there is no allegation that Terry Apartments built a defective condominium or violated a statutory warranty. In fact, Terry Apartments made every attempt to comply with the WCA. For instance, Terry Apartments hired James Middlebrooks, a condominium attorney, to advise in the creation of the condominium project. Ultimately, Terry Apartments did not willfully defy guarantees which were designed to ensure that condominiums are safe.

H. The Dismissal Of Terry Apartments' Claims Against The Unit Owners Should Be Reversed.

1. Introduction.

As noted, Terry Apartments' claims against the Unit Owners were dismissed based on the original ruling that Terry Apartments would retain possession of the Verizon Lease and lease proceeds. CP 889-890; 1170-1200. Since the Association was awarded the Verizon Lease and lease proceeds, the premise for the dismissal of the third party claims and the attorney's fees

award was eliminated. For this reason alone, the February 17, 2007, decision to dismiss Terry Apartments' claims against the Unit Owners and award the Unit Owners their attorney's fees and costs should be reversed.

There are genuine issues of material fact regarding the issue of unjust enrichment. As noted, the Verizon Lease was disclosed to the Unit Owners during the purchase transaction and accepted by them. The Unit Owners not only accepted the deal, but also benefited by receiving a lower purchase price.

If Terry Apartments ultimately loses the Verizon Lease, the Unit Owners will be unjustly enriched. Accordingly, the Court should reverse the trial court's February 16, 2007, decision and allow Terry Apartments the opportunity to recoup the purchase price reduction given to the Unit Owners.

The trial court also erroneously awarded the Unit Owners their reasonable attorney's fees and costs. In short, the Unit Owners are not entitled to the award; Terry Apartments indemnity claims are not "on the contract" and do not pertain to violations of the WCA.

2. The Unit Owners Will Be Unjustly Enriched If Terry Apartments Does Not Keep The Verizon Lease And Lease Proceeds.

There is a genuine issue of material fact whether the Unit Owners, by breaching their acceptance of the Verizon Lease as part of the transaction, will be unjustly enriched as a result. "A person has been unjustly enriched when he has profited or enriched himself at the expense of another contrary to equity." See Dragt v. Dragt/DeTray, LLC, 139 Wn. App. 560, 576, 161 P.3d 473 (2007) (citation omitted). Unjust enrichment is established if three elements are met:

(1) [T]here must be a benefit conferred on one party by another; (2) the party receiving the benefit must have an appreciation or knowledge of the benefit; and (3) the receiving party must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value.

See Dragt, 130 Wn. App. at 576 (citation omitted).

Here again, the Unit Owners knew about and accepted the Verizon Lease. CP 304-397; 685-712; see also Subsection E above.¹⁰ It was also incorporated by reference into the PSA contracts and clearly disclosed in the condominium documents. See Subsection E above.

Terry Apartments also factored in the rental income it would make from the Verizon Lease when determining each unit's purchase price. CP 304-397. As a result, the Unit Owners will be unjustly enriched if they are allowed to retain the difference in the purchase price.

¹⁰ Arguments regarding the Unit Owners acceptance of the Verizon Lease as part of the PSA contracts is fully outlined in Subsection E. The arguments will not be repeated for purposes of brevity.

3. The PSA Contracts Should Be Reformed To Remedy Any Unjust Enrichment.

If the Association is allowed to keep the Verizon Lease and Lease proceeds, then the PSA contracts should be reformed. The reformed purchase price should reflect the purchase price of the units, minus the reduction given as a result of Terry Apartments' expected income from the Verizon Lease. In short, reformation is warranted to remedy the resulting unjust enrichment.

Generally, a reformation claim seeks to adjust the parties' agreement to prevent an injustice. See Meyer v. Young, 23 Wn.2d 109, 115, 159 P.2d 908 (1945). Also, a reformation claim is an equitable remedy that enforces the parties' intent. See Fay v. Best, 137 Wn. 1, 6 241 P. 354 (1925); see also Denaxas v. Sandstone Court of Bellevue, 148 Wn.2d 654, 667, 63 P.3d 125 (2003) rev'd 107 Wn. App. 1055 (2001). The Court may "look into the surrounding

circumstances" and review "all of the facts" in determining the parties intent in a contract. See Akers v. Sinclair, 37 Wn.2d 693, 704, 226 P.2d 225 (1951).

Here, as previously discussed, the Unit Owners had notice of the terms of the Verizon Lease. CP 304-397; 685-712. The Unit Owners accepted a reduced purchase price based on the fact that Terry Apartments would receive rental income from the Verizon Lease. CP 304-397.

Also, there is no dispute that the Unit Owners sought to own their respective units. Thus, if the Association retains the Verizon Lease and lease proceeds, the PSA contracts should be reformed to avoid unjustly enriching the Unit Owners.

4. The Unit Owners' Award of Reasonable Attorney's Fees And Costs Is Unsupported.

As a matter of law, the Unit Owners' are not entitled to an award of their reasonable

attorney's fees or costs. First, the PSA contracts do not support an award of attorney's fees in the instant situation. In short, Terry Apartments claims are not "on the contract." See CPL LLC v. Conley, 110 Wn. App. 786, 787, 40 P.3d 679 (2002) (citation omitted).

Paragraph "q" of the PSA contracts provides that "[I]f Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorney's fees and expenses." CP 685-712. Attorney's fees are awarded based "on a contract... if the action arose out of the contract and if the contract is central to the dispute." See CPL LLC, 110 Wn. App. at 787 (citations omitted).

Here, Terry Apartments' third party claims are for indemnity, stemming from the Association's WCA claims. CP 152-167. Accordingly, Terry Apartments third party claims

do not directly concern the PSA or the sales transaction.

Likewise, the Unit Owners are not entitled to their reasonable attorney's fees pursuant to the WCA. As was the case with the Association, this is not an "appropriate case" for an award of attorney's fees and costs to the Unit Owners. See RCW 64.34.455. In short, there are no claims for violations of the WCA between Terry Apartments and the Unit Owners. See, e.g., Eagle Point Condominium Owners Ass'n v. Coy, 102 Wn. App. 697, 706, 9 P.3d 898 (2000).

I. Terry Apartments Should Receive Its Attorney's Fees And Costs Incurred At Trial And On Appeal.

An award of fees on appeal is allowed if authorized by law. See RAP 18.1. A statutory provision that allows for attorney's fees and costs is authority to grant such fees and costs on appeal to the prevailing party. See Dice v. City of Montesano, 131 Wn. App. 675, 693, 128

P.3d 1253 (2006) rev. denied 158 Wn.2d 1017 (2006); see also Eagle Point, 102 Wn. App. at 706.

Here, the WCA contains a fee shifting provision for attorney's fees. See RCW 64.34.455. Also, again, "[t]he court, in an appropriate case, may award reasonable attorney's fees to the prevailing party." See RCW 64.34.455.

"A prevailing party is one against whom no affirmative judgment is entered." See Eagle Point, 102 Wn. App. at 706. Accordingly, if the trial court's February 16, 2007, October 18, 2007, and July 21, 2009, decisions are reversed, then Terry Apartments will be the prevailing party on appeal.

Moreover, if the decisions are reversed and the Association's claims are dismissed, then Terry Apartments would be the prevailing party at the trial court level. Thus, Terry Apartments

should also be awarded its reasonable attorney's fees and costs incurred at trial to defend against the Association's case.

VI. CONCLUSION

As shown above, the trial court's decision to award the Verizon Lease and lease proceeds to the Association is unsupported by the WCA and the common law. Likewise, the award of the Association's attorney's and costs is also not supported by the WCA.

Accordingly, the trial court's decision should be reversed and remanded with instructions to the trial court to enter an order dismissing the Association's claims and its attorney's fees and costs award. Terry Apartments should also be awarded its reasonable attorney's fees and costs incurred at trial and on appeal.

In the alternative, if the Court decides to affirm the trial court's decision, it should only do so in part. Again, the decision to award the

Association the lease proceeds from the date the condominium was created on July 10, 2002, is unsupported. Also, the decision to award the Association its attorney's fees and costs is unsupported.

As a result, the decision regarding lease proceeds should be reversed and remanded with instructions that the trial court should enter an order stating that the Association is entitled to lease proceeds from April of 2005. The decision regarding attorney's fees and costs should be reversed and dismissed.

Additionally, if the trial court's decision to award the Verizon Lease, lease proceeds and attorney's fees and costs to the Association is reversed and the Association's claims are dismissed, the decision to dismiss Terry Apartment's claims against the Unit Owners, and to award the Unit Owners their attorney's fees and costs, should only be affirmed in part.

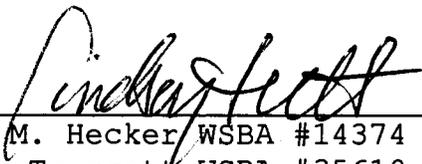
Again, an award of attorney's fees to the Unit Owners is not supported by the PSA contracts or the WCA. Accordingly, the dismissal of Terry Apartments' third party claims should be affirmed, but the award of the Unit Owners' reasonable attorney's fees and costs should be reversed and dismissed.

Lastly, if the Court affirms the trial court's decision to award the Verizon Lease, lease proceeds and attorney's fees and costs to the Association, then the decision to dismiss Terry Apartments' claims against the Unit Owners, and to award the Unit Owners their attorney's fees and costs, should be reversed and remanded with instructions to the trial court to determine Terry Apartments' rights against the Unit Owners.

Alternatively, if the Court affirms the trial court's decision to award the Verizon Lease, lease proceeds and attorney's fees and costs to the Association, then the decision to

dismiss Terry Apartments' claims against the Unit Owners, and to award the Unit Owners their attorney's fees and costs, should be reversed in part. Again, the decision to award the Unit Owners their attorney's fees and costs is unsupported and, as a result, should be reversed and dismissed.

RESPECTFULLY SUBMITTED this 16th day of November, 2009.


Jordan M. Hecker WSBA #14374
Lindsey Truscott WSBA #35610
Attorneys for Appellant
HECKER WAKEFIELD & FEILBERG, P.S.
321 First Avenue West
Seattle, WA 98119
(206) 447-1900

Appendix 1

FILED
KING COUNTY, WASHINGTON

OCT 19 2007

SUPERIOR COURT CLERK
BY ANDREW T. HALLS
DEPUTY

The Honorable Chris Washington
Hearing: October 18, 2007
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TERRY TERRACE CONDOMINIUM
OWNERS ASSOCIATION, a Washington non-
profit corporation,

Plaintiff,

vs.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company and
SEATTLE SMSA LIMITED PARTNERSHIP, a
Delaware limited partnership, d/b/a Verizon
Wireless,

Defendant.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company,

Third Party Plaintiff,

vs.

VERA FELIX, JOY & GARRETT BENDER,
PETER ONG LIM, JUSTIN R. IRISH,
GEORGE M. ABAYTA, CARY R. PETTY,
KURT KLINGMAN, VICTORIA DIAZ &
MICHAEL EASTON, AARON J. MUNN,
AAMER HYDRIE & HABIBUDDIN SALONE,
LAWRENCE LADUKE, JAMES AND

No. 06-2-14221-7SEA

ORDER REGARDING

**(1) PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT
REGARDING LEASE
TERMINATION AND
RESTITUTION OF LEASE
PROCEEDS, AND**

**(2) DEFENDANT/THIRD-
PARTY PLAINTIFF'S CROSS
MOTION FOR SUMMARY
JUDGMENT**

~~PROPOSED~~

ORIGINAL

ORDER ON SUMMARY JUDGMENT MOTIONS - 1

cj171203

BARKER · MARTIN, P. S.
719 2ND AVENUE, SUITE 1200 • SEATTLE, WA 98104
P: (206) 381-9806 • F: (206) 381-9807

1 MADELINE HANDZLIK, ALAN BULLER,
2 DEREK SWANSON, AIMEE SCHANTZ,
3 TORGER OAAS, ROLDAN V. DIN,
4 VINCENT LIPE, ROMAN LOPEZ JR. &
5 SUMMER GOTHARD-LOPEZ,
6 ANN M. GOTHARD, REBECCA DEXTER,
7 JEFFREY T. GILBERT,
8 RHIANNON HOPKINS, HARVINDER &
9 ARADH CHOWDHARY,

10 Third Party Defendants.

11 This matter came on regularly for hearing before the Court on Plaintiff's Motion for
12 Summary Judgment Regarding Lease Termination and Restitution of Lease Proceeds and
13 Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Cross-Motion for
14 Summary Judgment.

15 The Court having heard oral argument on February 16, 2007, from counsel for
16 Plaintiff Terry Terrace Condominium Owners' Association, Defendant/Third-Party Plaintiff
17 Terry Terrace Apartments, LLC, Seattle SMSA Limited Partnership d/b/a Verizon Wireless,
18 and Third-Party Defendants, and reviewed the following pleadings and materials, together
19 with any related exhibits:

- 20 1. Plaintiff's Motion for Summary Judgment Regarding Lease Termination and
21 Restitution of Lease Proceeds;
- 22 2. Declaration of Rhiannon Hopkins in Support of Plaintiff's Motion for
23 Summary Judgment Regarding Lease Termination and Restitution of Lease
24 Proceeds;
- 25 3. Declaration of Dean Martin in Support of Plaintiff's Motion for Summary
26 Judgment Regarding Lease Termination and Restitution of Lease Proceeds,
and exhibits attached thereto;
4. Certain Third-Party Defendants' Joinder in Association's Motion for Summary
Judgment and Motion for Summary Judgment Dismissing Third-Party
Complaint;
5. Declaration of Jo M. Flannery in Support of Motions for Summary Judgment
and exhibits attached thereto;
6. Declaration of Aimee Schantz in Support of Motions for Summary Judgment;

- 1 7. Declaration of Rebecca Dexter in Support of Motions for Summary Judgment;
- 2 8. Declaration of Vincent Lipe in Support of Motions for Summary Judgment;
- 3 9. Declaration of Cary Petty in Support of Motions for Summary Judgment;
- 4 10. Declaration of Joy Bender in Support of Motions for Summary Judgment;
- 5 11. Declaration of Peter Ong Lim in Support of Motions for Summary Judgment;
- 6 12. Declaration of Jeffrey Scott in Support of Motions for Summary Judgment;
- 7 13. Declaration of Salone Habbibudin in Support of Motions for Summary
- 8 Judgment;
- 9 14. Declaration of Derek Swanson in Support of Motions for Summary Judgment;
- 10 15. Declaration of Harvinder Chowdhary in Support of Motions for Summary
- 11 Judgment;
- 12 16. Declaration of Jeffrey Gilbert in Support of Motions for Summary Judgment;
- 13 17. Declaration of Roldan Din in Support of Motions for Summary Judgment;
- 14 18. Third-Party Defendants Handzlik's Joinder in Association's Motion for
- 15 Summary Judgment and Motion for Summary Judgment Dismissing Third-
- 16 Party Complaint;
- 17 19. Declaration of James and Madeline Handzlik in Support of Motions for
- 18 Summary Judgment;
- 19 20. Defendant/Third-Party Plaintiff's Cross-Motion for Summary Judgment;
- 20 21. Declaration of Andrew C. Rapp in Support of Defendant/Third-Party
- 21 Plaintiff's Cross-Motion for Summary Judgment and exhibits attached thereto;
- 22 22. Declaration of Tim Kennedy in Support of Defendant/Third-Party Plaintiff's
- 23 Cross-Motion for Summary Judgment and exhibits attached thereto;
- 24 23. Declaration of James C. Middlebrooks in Support of Defendant/Third-Party
- 25 Plaintiff's Cross-Motion for Summary Judgment and exhibits attached thereto;
- 26 24. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Response to
- Plaintiff's and Third-Party Defendants' Summary Judgment Motions;

- 1 25. Second Declaration of Tim Kennedy in Support of Defendant/Third-Party
2 Plaintiff's Response to Plaintiff's and Third-Party Defendants' Summary
3 Judgment Motions;
- 4 26. Second Declaration of Andrew C. Rapp in Support of Defendant/Third-Party
5 Plaintiff's Response to Plaintiff's and Third-Party Defendants' Summary
6 Judgment Motions and exhibits attached thereto;
- 7 27. Defendant Verizon Wireless's Response to Motions for Summary Judgment;
- 8 28. Declaration of Tina Lewis in Support of Defendant Verizon Wireless's
9 Response to Motions for Summary Judgment and exhibits attached thereto;
- 10 29. Plaintiff's Reply in Support of Motion for Summary Judgment Regarding
11 Lease Termination and Restitution of Lease Proceeds;
- 12 30. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Supplemental
13 Brief Regarding Its Response to Plaintiff's and Third-Party Defendants'
14 Summary Judgment Motions;
- 15 31. Declaration of Felix Vera in Support of Defendant/Third-Party Plaintiff Terry
16 Terrace Apartment, LLC's Supplemental Brief Regarding Its Response to
17 Plaintiff's and Third-Party Defendants' Summary Judgment Motions;
- 18 32. Certain Third Party Defendants' Objection to Terry Terrace Apartment, LLC's
19 Supplemental Brief;
- 20 33. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Reply to
21 Certain Unit Owners' Opposition to Joinder of Verizon's Motion to Strike and
22 Supplemental Brief;
- 23 34. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Supplemental
24 Brief Regarding RCW 64.34.312 and Attorney's Fees;
- 25 35. Plaintiff's Supplemental Brief Regarding Duty to Transfer Lease to
26 Association Pursuant to RCW 64.34.312;
36. Declaration of Dean Martin in Support of Plaintiff's Supplemental Brief;
37. Plaintiff's Reply to Defendant's Supplemental Brief Regarding RCW
64.34.312;
38. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Response to
Plaintiff's Supplemental Brief Regarding RCW 64.34.312;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

39. Motion for Entry of Order Regarding: (1) Plaintiff's Motion for Summary Judgment Regarding Lease Termination and Restitution of Lease Proceeds; and (2) Defendant/Third-Party Plaintiff's Cross Motion for Summary Judgment; and

40. Declaration of Dean Martin in Support of Motion for Entry of Order Regarding: (1) Plaintiff's Motion for Summary Judgment Regarding Lease Termination and Restitution of Lease Proceeds; and (2) Defendant/Third-Party Plaintiff's Cross Motion for Summary Judgment.

41. Defendant/Third-Party Plaintiff Terry Terrace Apartment LLC's Response to Plaintiff's Motion for Entry of Order Regarding: 1) Plaintiff's Motion for Summary Judgment Regarding Lease Termination and Restitution of Lease Proceeds; and (2) Defendant/Third-Party Plaintiff's Cross Motion for Summary Judgment.

42. Plaintiff's Reply to Defendant/Third-Party Plaintiff Terry Terrace Apartment LLC's Response to Plaintiff's Motion for Entry of Order Regarding: (1) Plaintiff's Motion for Summary Judgment Regarding Lease Termination and Restitution of Lease Proceeds; and (2) Defendant/Third-Party Plaintiff's Cross Motion for Summary Judgment;

43. _____
_____ ;

44. _____
_____ ; and

45. _____

_____ .

The Court deeming itself fully advised, NOW, THEREFORE,

IT IS HEREBY ORDERED that:

1. Partial Summary Judgment is GRANTED in favor of Seattle SMSA Limited Partnership d/b/a Verizon Wireless, LLC ("Verizon") as follows:

a. The Verizon Wireless Building and Rooftop Lease Agreement, dated June 26, 2002, amended by the Lease Addendum, dated June 28, 2002, and any and

1 all other amendments, modifications and extensions (hereinafter the "Verizon Lease") was
2 valid, binding, and enforceable when entered into between Verizon and Terry Terrace
3 Apartments, LLC ("Declarant"). Verizon's right, title, and interest in the Verizon Lease
4 remains valid, binding, and enforceable.

5 b. The Verizon Lease is not void under the Washington Condominium
6 Act, RCW Ch. 64.34.

7 c. The Verizon Lease was not terminated by the Association.

8 d. Provided that all prior payments were fully and timely made as
9 called for in the Verizon Lease, Verizon shall have no liability to the Association or
10 Declarant for any lease payments due under the Verizon Lease prior to the date of this
11 Order.
12

13 e. Other than as set forth in this Order, the Verizon Lease shall remain
14 in full force and effect, and the Association shall be entitled to all rights, title, and interest
15 in and to the Declarant's interest in the Lease.

16 f. Aside from the foregoing provisions, the Verizon Lease shall be
17 unaffected by this Order.

18 g. The Association shall notify Verizon of the new payee account
19 information at least fifteen (15) days prior to the first direct lease payment by Verizon to
20 the Association.
21

22 2. IT IS FURTHER ORDERED that Verizon's Motion to Strike Evidence as
23 Inadmissible is hereby deemed to be MOOT as a result of the decision set forth herein.
24
25
26

1 3. IT IS FURTHER ORDERED that Partial Summary Judgment is
2 GRANTED in favor of Plaintiff Terry Terrace Owners' Association ("Association") as
3 follows:

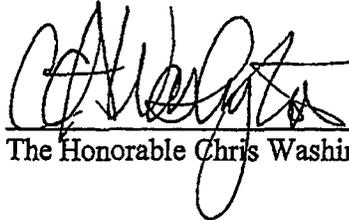
OPW
Defendant Terry Terrace Apartments LLC

4 a. Pursuant to RCW 64.34.312(p), ~~the Declarant~~ must transfer the
5 Verizon Lease, and any proceeds from the Verizon Lease received on or after
6 July 10, 2002, to the Association.

7 b. Verizon shall make all future lease payments to the Association.

8
9 3. IT IS FURTHER ORDERED that the remainder of the Association's, the
10 Declarant's, and Verizon's summary judgment motions are denied.

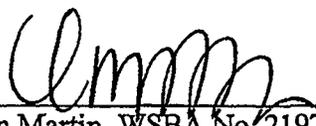
11 DONE IN OPEN COURT this 18th day of October, 2007.



The Honorable Chris Washington

12
13
14
15 Presented by:

16 BARKER • MARTIN, P.S.



17
18
19 Dean Martin, WSBA No. 21970
20 Inge Fordham, WSBA No. 38256
21 Attorneys for Plaintiff

Appendix 2

From: Radley, Mary [mailto:Mary.Radley@METROK.C.GOV]
Sent: Monday, May 21, 2007 3:44 PM
To: Ayrian Hastings
Subject: FW: Terry Terrace-Decision

Judge Washington sent this on 5/7/07 at 5:16 pm according to his e-mail records. He's now forwarded his e-mail to me to send from my computer....hopefully, this will work.
Please let me know if you receive this.

Thanks,
Mary
Bailiff to Judge Washington

From: Washington, Chris
Sent: Monday, May 21, 2007 3:33 PM
To: Radley, Mary
Subject: Terry Terrace-Decision

Counsel

I realize how long it has been since you appeared and argued this case. I can attribute my delay in making my decision to the quality of the briefing and the dearth of case law on the issues involved. I will give you my decision and my thoughts on the issue. I would appreciate if you would see that an order is drafted which reflects my decision. If you cannot agree on the language of the decision please note the matter for hearing.

Prior to the formation of Terry Terrace Condominium Owners Association (the Association) Terry Terrace Apartments, LLC (the Company) leased a portion of the condominium common area, specifically a portion of the building's roof area, to Verizon Wireless. I have previously ruled that the lease was not void under the provisions of RCW 64.34.320. The parties agree that pursuant to RCW 64.34.312 the lease should be transferred to the Association. The issue that remains is whether the proceeds of the lease agreement are to be transferred Association as well.

I find that RCW 64.34.312(p) requires the Company to transfer the rooftop lease at issue in this case, including the payments from Verizon for the lease, to the Association. Here are my thoughts.

Initially I observe that RCW 64.34.020 (16), which defines "development rights" does not include the lease of common elements as a development

right. As a result the lease of the rooftop could not be retained or reserved by the Company as a development right under RCW 64.34.216(j).

The provisions of RCW 64.34.224, which set out the manner in which the common elements are to be allocated in the declaration, make no mention of any common element not subject to the designated method of allocation.

It is not disputed that the lease in question conveys the use of common elements of the condominium. Because the lease was executed prior to the filing of the condominium declaration, RCW 64.34.224 and RCW 64.34.228 are not directly applicable to this case. However, these provisions are useful to discern the legislature's intent.

Pursuant to RCW 64.34.224, the declaration is to allocate either a percentage or fraction of the undivided interest in the common elements and the common expenses to each unit. This statute does not anticipate that any portion of the common elements will not be available for allocation. Additionally, the statute prohibits discriminatory allocation of common elements to a unit owned by the declarant. RCW 64.34.224(5) specifies that the common elements are not subject to partition and conveyance of an undivided interest in the common elements without the unit to which the interest is allocated to be void. That statute's intent is to ensure that common elements remain intact and are shared by each of the units. That would not be the result if the Company were allowed to convey the common elements, without benefit to the individual units, prior to the declaration's allocation of that area.

RCW 64.34.320 provides that certain contracts or leases entered into before the board of directors was elected may be terminated by the Association. One of the bases for termination is unconscionability. While an argument could be made that the loss of roof area for the installation of equipment, with an ongoing obligation of the Association to maintain that same roof area, with no benefit to the Association is unconscionable and that the lease is subject to termination. My decision to transfer the lease and the lease proceeds to the Association avoids this result.

Finally, in making my decision I considered the result of the Company's position if it were taken to its logical extreme. The Company's position, if extended, would allow any declarant to lease all common elements other than parking and recreation areas or facilities and receive and retain payment

for those areas while the Association would remain responsible for the maintenance of those same areas. This would not be a reasonable result.

I have not determined the date at which the lease benefits in this case should have been or should be transferred to the Association. I would appreciate if the parties would attempt to resolve that issue, if possible. I will expect further argument if such an agreement cannot be reached.

Chris Washington
King County Superior Court

Appendix 3

Hon. Christopher Washington

FILED
KING COUNTY, WASHINGTON

APR 10 2009

SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TERRY TERRACE CONDOMINIUM OWNERS)
ASSOCIATION, a Washington)
non-profit corporation,)

Plaintiff,)

vs.)

TERRY TERRACE APARTMENTS, LLC, a)
Washington limited liability)
company and SEATTLE SMSA LIMITED)
PARTNERSHIP, a Delaware limited)
partnership, d/b/a Verizon)
Wireless,)

Defendants.)

TERRY TERRACE APARTMENTS, LLC, a)
Washington limited liability)
company,)

Third Party Plaintiff,)

vs.)

VERA FELIX, JOY & GARRETT BENDER,)
PETER ONG LIM, JUSTIN R. IRISH,)
GEORGE M. ABEYTA, CARY R. PETTY,)
KURT KLINGMAN, VICTORIA DIAZ &)
MICHAEL EASTON, AARON J. MUNN,)
AAMER HYDRIE & HABIBUDDIN SALONE,)
LAWRENCE LADUKE, JAMES AND MADELINE)
HANDZLIK, ALAN BULLER, DEREK)
SWANSON, AIMEE SCHANTZ, TORGER)

NO. 06-2-14221-7 SEA

STIPULATED MOTION AND
ORDER RE: AMOUNT OF
LEASE PROCEEDS

STIPULATED MOTION AND ORDER
RE: AMOUNT OF LEASE PROCEEDS - 1

ORIGINAL

LAW OFFICE OF
HECKER WAKEFIELD & FEILBERG, P.S.
321 FIRST AVENUE WEST
SEATTLE, WA 98119
(206) 447-1900
FACSIMILE: (206) 447-9075

1 OAAS, ROLDAN V. DIN, VINCENT LIPE,)
2 ROMAN LOPEZ JR & SUMMER GOTHARD-)
3 LOPEZ, ANN M. GOTHARD, REBECCA)
4 DEXTER, JEFFREY T. GILBERT,)
5 RHIANNON HOPKINS, HARVINDER)
6 & ARADH CHOWDHARY,)
7 Third Party Defendants.)
8

9 **I. STIPULATION**

10 In accordance with the Court's October 18, 2007, Order
11 Regarding 1) Plaintiff's Motion for Summary Judgment Regarding
12 Lease Termination and Restitution of Lease Proceeds; and 2)
13 Defendant/Third-Party Plaintiff's Cross Motion for Summary
14 Judgment, the undersigned attorneys and parties hereby stipulate
15 that the amount of the lease proceeds paid to Defendant Terry
16 Terrace Apartments, LLC, by Defendant Seattle SMSA Limited
17 Partnership d/b/a Verizon Wireless, from July 10, 2002, is
18 \$144,285.00. See Court's Order attached hereto as Exhibit 1;
19 see also spreadsheet attached hereto as Exhibit 2.

20 By entering into this Stipulation, the parties do not admit
21 liability or waive their right to contest and/or appeal the
22 Court's ruling on Summary Judgment with regard to any issue,
23 including but not limited to, liability.

24 This Stipulation does not address and Plaintiff Terry
25 Terrace Condominium Owners Association reserves the right to
26 assert claims for pre-judgment interest, costs and attorney's
fees. Defendant/Third-Party Plaintiff Terry Terrace Apartments,

1 LLC, reserves the right to contest any claims for pre-judgment
2 interest, costs and attorney's fees.

3
4 **STIPULATED TO this** 9th **day of April, 2009.**

5 
6 Jordan M. Hecker WSBA #14374
7 Lindsey Truscott WSBA #35610
8 HECKER WAKEFIELD & FEILBERG, P.S.
9 Attorneys for Defendant/
10 Third-Party Plaintiff Terry
11 Terrace Apartments, LLC

See Attached Signature Page

Dean Martin WSBA #21970
Inge Fordham WSBA #38256
BARKER MARTIN, P.S.
Attorneys for Plaintiff

12 See Attached Signature Page

13 Rhys Farren WSBA #19398
14 DAVIS WRIGHT TREMAINE, LLP
15 Attorneys for Defendant Seattle
16 SMSA Limited Partnership d/b/a
17 Verizon Wireless

18 **II. ORDER**

19 Based on the foregoing Stipulation and after otherwise being
20 duly informed, the Honorable Christopher Washington of the King
21 County Superior Court hereby,

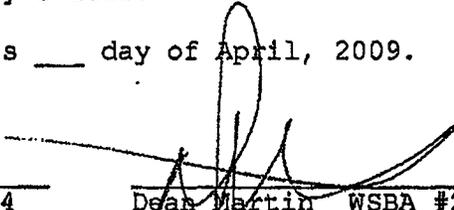
22 **ORDERS, ADJUDGES AND DECREES AS FOLLOWS:**

23 In accordance with the Court's October 18, 2007, Order
24 Regarding 1) Plaintiff's Motion for Summary Judgment Regarding
25 Lease Termination and Restitution of Lease Proceeds; and 2)
26 Defendant/Third-Party Plaintiff's Cross Motion for Summary
Judgment, the undersigned attorneys and parties hereby stipulate
that the amount of the lease proceeds paid to Defendant Terry

1 LLC, reserves the right to contest any claims for pre-judgment
2 interest, costs and attorney's fees.

3 STIPULATED TO this ___ day of April, 2009.
4

5 Jordan M. Hecker WSBA #14374
6 Lindsey Truscott WSBA #35610
7 HECKER WAKEFIELD & FEILBERG, P.S.
8 Attorneys for Defendant/
9 Third-Party Plaintiff Terry
10 Terrace Apartments, LLC


11 Dean Martin WSBA #21970
12 Inge Fordham WSBA #38256
13 BARKER MARTIN, P.S.
14 Attorneys for Plaintiff

15 Rhys Farren WSBA #19398
16 DAVIS WRIGHT TREMAINE, LLP
17 Attorneys for Defendant Seattle
18 SMSA Limited Partnership d/b/a
19 Verizon Wireless

20 **II. ORDER**

21 Based on the foregoing Stipulation and after otherwise being
22 duly informed, the Honorable Christopher Washington of the King
23 County Superior Court hereby,

24 **ORDERS, ADJUDGES AND DECREES AS FOLLOWS:**

25 In accordance with the Court's October 18, 2007, Order
26 Regarding 1) Plaintiff's Motion for Summary Judgment Regarding
Lease Termination and Restitution of Lease Proceeds; and 2)
Defendant/Third-Party Plaintiff's Cross Motion for Summary
Judgment, the undersigned attorneys and parties hereby stipulate
that the amount of the lease proceeds paid to Defendant Terry

STIPULATED MOTION AND ORDER
RE: AMOUNT OF LEASE PROCEEDS - 3

LAW OFFICE OF
HECKER WAKEFIELD & FEILBERG, P.S.
321 FIRST AVENUE WEST
SEATTLE, WA 98119
(206) 447-1900
FACSIMILE: (206) 447-9075

1 LLC, reserves the right to contest any claims for pre-judgment
2 interest, costs and attorney's fees.

3 STIPULATED TO this ___ day of April, 2009.
4

5 Jordan M. Hecker WSB#14374
6 Lindsey Truscott WSB#35610
7 HECKER WAKEFIELD & FEILBERG, P.S.
8 Attorneys for Defendant/
9 Third-Party Plaintiff Terry
10 Terrace Apartments, LLC

Dean Martin WSB#21970
Inge Fordham WSB#38256
BARKER MARTIN, P.S.
Attorneys for Plaintiff

11 Rhys Farren WSB#19398
12 DAVIS WRIGHT TREMAINE, LLP
13 Attorneys for Defendant Seattle
14 SMSA Limited Partnership d/b/a
15 Verizon Wireless

16 **II. ORDER**

17 Based on the foregoing Stipulation and after otherwise being
18 duly informed, the Honorable Christopher Washington of the King
19 County Superior Court hereby,

20 **ORDERS, ADJUDGES AND DECREES AS FOLLOWS:**

21 In accordance with the Court's October 18, 2007, Order
22 Regarding 1) Plaintiff's Motion for Summary Judgment Regarding
23 Lease Termination and Restitution of Lease Proceeds; and 2)
24 Defendant/Third-Party Plaintiff's Cross Motion for Summary
25 Judgment, the undersigned attorneys and parties hereby stipulate
26 that the amount of the lease proceeds paid to Defendant Terry

STIPULATED MOTION AND ORDER
RE: AMOUNT OF LEASE PROCEEDS - 3

LAW OFFICE OF
HECKER WAKEFIELD & FEILBERG, P.S.
321 FIRST AVENUE WEST
SEATTLE, WA 98119
(206) 447-1900
FACSIMILE: (206) 447-9075

1 Terrace Apartments, LLC, by Defendant Seattle SMSA Limited
2 Partnership d/b/a Verizon Wireless, from July 10, 2002, is
3 \$144,285.00. See Court's Order attached hereto as Exhibit 1;
4 see also spreadsheet attached hereto as Exhibit 2.

5 By entering into this Stipulation, the parties do not admit
6 liability or waive their right to contest and/or appeal the
7 Court's ruling on Summary Judgment with regard to any issue,
8 including but not limited to, liability.

9 This Stipulation does not address and Plaintiff Terry
10 Terrace Condominium Owners Association reserves the right to
11 assert claims for pre-judgment interest, costs and attorney's
12 fees. Defendant/Third-Party Plaintiff Terry Terrace Apartments,
13 LLC, reserves the right to contest any claims for pre-judgment
14 interest, costs and attorney's fees.

15 DATED this 10th day of April, 2009.

16
17 
18 Honorable Christopher Washington
19 King County Superior Court Judge

DONALD P. HERRING
Comm

20 Presented by:

21
22 See Attached Signature Page
23 Dean Martin WSBA #14374
24 Inge Fordham WSBA #38256
25 BARKER MARTIN, P.S.
26 Attorneys for Plaintiff

1 Terrace Apartments, LLC, by Defendant Seattle SMSA Limited
2 Partnership d/b/a Verizon Wireless, from July 10, 2002, is
3 \$144,285.00. See Court's Order attached hereto as Exhibit 1;
4 see also spreadsheet attached hereto as Exhibit 2.

5 By entering into this Stipulation, the parties do not admit
6 liability or waive their right to contest and/or appeal the
7 Court's ruling on Summary Judgment with regard to any issue,
8 including but not limited to, liability.

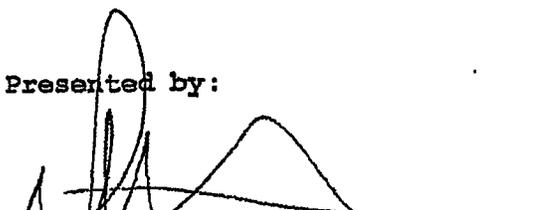
9 This Stipulation does not address and Plaintiff Terry
10 Terrace Condominium Owners Association reserves the right to
11 assert claims for pre-judgment interest, costs and attorney's
12 fees. Defendant/Third-Party Plaintiff Terry Terrace Apartments,
13 LLC, reserves the right to contest any claims for pre-judgment
14 interest, costs and attorney's fees.

15 DATED this 10 day of April, 2009.

16 Donald Haley

17
18 Honorable Christopher Washington
19 King County Superior Court Judge

20 Presented by:

21
22 
23 Dean Martin WSBA #14374-21970
24 Inge Fordham WSBA #38256
25 BARKER MARTIN, P.S.
26 Attorneys for Plaintiff

STIPULATED MOTION AND ORDER
RE: AMOUNT OF LEASE PROCEEDS - 4

LAW OFFICE OF
HECKER WAKSFIELD & FEILBERG, P.S.
321 FIRST AVENUE WEST
SEATTLE, WA 98119
(206) 447-1900
FACSIMILE: (206) 447-9075

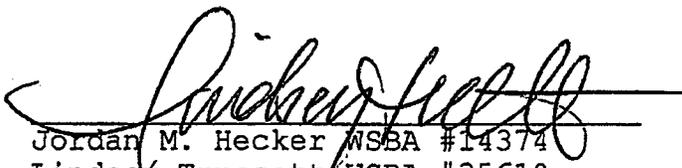
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Copy Received; Approved As To Form;
Notice of Presentation Waived:

See Attached Signature Page

Rhys Farren WSBA #19398
DAVIS WRIGHT TREMAINE LLP
Attorneys for Defendant Seattle SMSA
Limited Partnership d/b/a
Verizon Wireless

Copy Received; Approved As To Form;
Notice of Presentation Waived:



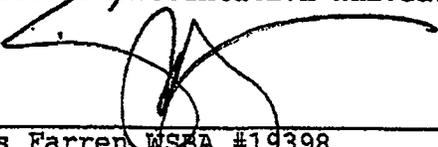
Jordan M. Hecker WSBA #14374
Lindsey Truscott WSBA #35610
HECKER WAKEFIELD & FEILBERG, P.S.
Attorneys for Defendant Terry
Terrace Apartments

STIPULATED MOTION AND ORDER
RE: AMOUNT OF LEASE PROCEEDS - 5

LAW OFFICE OF
HECKER WAKEFIELD & FEILBERG, P.S.
321 FIRST AVENUE WEST
SEATTLE, WA 98119
(206) 447-1900
FACSIMILE: (206) 447-9075

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Copy Received; Approved As To Form;
Notice of Presentation Waived:



Rhys Farren WSEA #19398
DAVIS WRIGHT TREMAINE LLP
Attorneys for Defendant Seattle SMSA
Limited Partnership d/b/a
Verizon Wireless

Copy Received; Approved As To Form;
Notice of Presentation Waived:

Jordan M. Hecker WSEA #14374
Lindsey Truscott WSEA #35610
HECKER WAKEFIELD & FEILBERG, P.S.
Attorneys for Defendant Terry
Terrace Apartments

STIPULATED MOTION AND ORDER
RE: AMOUNT OF LEASE PROCEEDS - 5

LAW OFFICE OF
HECKER WAKEFIELD & FEILBERG, P.S.
321 FIRST AVENUE WEST
SEATTLE, WA 98119
(206) 447-1900
FACSIMILE: (206) 447-9075

EXHIBIT 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

COPY RECEIVED

The Honorable Chris Washington
Hearing: October 18, 2007
Without Oral Argument

OCT 23 2007

HECKER WAKEFIELD
& FEILBERG, P.S.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TERRY TERRACE CONDOMINIUM
OWNERS ASSOCIATION, a Washington non-
profit corporation,

Plaintiff,

vs.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company and
SEATTLE SMSA LIMITED PARTNERSHIP, a
Delaware limited partnership, d/b/a Verizon
Wireless,

Defendant.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company,

Third Party Plaintiff,

vs.

VERA FELIX, JOY & GARRETT BENDER,
PETER ONG LIM, JUSTIN R. IRISH,
GEORGE M. ABEYTA, CARY R. PETTY,
KURT KLINGMAN, VICTORIA DIAZ &
MICHAEL EASTON, AARON J. MUNN,
AAMER HYDRIE & HABIBUDDIN SALONE,
LAWRENCE LADUKE, JAMES AND

No. 06-2-14221-7SEA

ORDER REGARDING

(1) PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT
REGARDING LEASE
TERMINATION AND
RESTITUTION OF LEASE
PROCEEDS, AND

(2) DEFENDANT/THIRD-
PARTY PLAINTIFF'S CROSS
MOTION FOR SUMMARY
JUDGMENT

[PROPOSED]

ORIGINAL

COPY

1 MADELINE HANDZLIK, ALAN BULLER,
2 DEREK SWANSON, AIMEE SCHANTZ,
3 TORGER OAAS, ROLDAN V. DIN,
4 VINCENT LIPE, ROMAN LOPEZ JR. &
5 SUMMER GOTHARD-LOPEZ,
6 ANN M. GOTHARD, REBECCA DEXTER,
7 JEFFREY T. GILBERT,
8 RHIANNON HOPKINS, HARVINDER &
9 ARADH CHOWDHARY,

10 Third Party Defendants.

11 This matter came on regularly for hearing before the Court on Plaintiff's Motion for
12 Summary Judgment Regarding Lease Termination and Restitution of Lease Proceeds and
13 Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Cross-Motion for
14 Summary Judgment.

15 The Court having heard oral argument on February 16, 2007, from counsel for
16 Plaintiff Terry Terrace Condominium Owners' Association, Defendant/Third-Party Plaintiff
17 Terry Terrace Apartments, LLC, Seattle SMSA Limited Partnership d/b/a Verizon Wireless,
18 and Third-Party Defendants, and reviewed the following pleadings and materials, together
19 with any related exhibits:

- 20 1. Plaintiff's Motion for Summary Judgment Regarding Lease Termination and
21 Restitution of Lease Proceeds;
- 22 2. Declaration of Rhiannon Hopkins in Support of Plaintiff's Motion for
23 Summary Judgment Regarding Lease Termination and Restitution of Lease
24 Proceeds;
- 25 3. Declaration of Dean Martin in Support of Plaintiff's Motion for Summary
26 Judgment Regarding Lease Termination and Restitution of Lease Proceeds,
and exhibits attached thereto;
4. Certain Third-Party Defendants' Joinder in Association's Motion for Summary
Judgment and Motion for Summary Judgment Dismissing Third-Party
Complaint;
5. Declaration of Jo M. Flannery in Support of Motions for Summary Judgment
and exhibits attached thereto;
6. Declaration of Aimee Schantz in Support of Motions for Summary Judgment;

- 1 7. Declaration of Rebecca Dexter in Support of Motions for Summary Judgment;
- 2 8. Declaration of Vincent Lipe in Support of Motions for Summary Judgment;
- 3 9. Declaration of Cary Petty in Support of Motions for Summary Judgment;
- 4 10. Declaration of Joy Bender in Support of Motions for Summary Judgment;
- 5 11. Declaration of Peter Ong Lim in Support of Motions for Summary Judgment;
- 6 12. Declaration of Jeffrey Scott in Support of Motions for Summary Judgment;
- 7 13. Declaration of Salone Habbibudin in Support of Motions for Summary
- 8 Judgment;
- 9 14. Declaration of Derek Swanson in Support of Motions for Summary Judgment;
- 10 15. Declaration of Harvinder Chowdhary in Support of Motions for Summary
- 11 Judgment;
- 12 16. Declaration of Jeffrey Gilbert in Support of Motions for Summary Judgment;
- 13 17. Declaration of Roldan Din in Support of Motions for Summary Judgment;
- 14 18. Third-Party Defendants Handzlik's Joinder in Association's Motion for
- 15 Summary Judgment and Motion for Summary Judgment Dismissing Third-
- 16 Party Complaint;
- 17 19. Declaration of James and Madeline Handzlik in Support of Motions for
- 18 Summary Judgment;
- 19 20. Defendant/Third-Party Plaintiff's Cross-Motion for Summary Judgment;
- 20 21. Declaration of Andrew C. Rapp in Support of Defendant/Third-Party
- 21 Plaintiff's Cross-Motion for Summary Judgment and exhibits attached thereto;
- 22 22. Declaration of Tim Kennedy in Support of Defendant/Third-Party Plaintiff's
- 23 Cross-Motion for Summary Judgment and exhibits attached thereto;
- 24 23. Declaration of James C. Middlebrooks in Support of Defendant/Third-Party
- 25 Plaintiff's Cross-Motion for Summary Judgment and exhibits attached thereto;
- 26 24. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Response to
- Plaintiff's and Third-Party Defendants' Summary Judgment Motions;

- 1 25. Second Declaration of Tim Kennedy in Support of Defendant/Third-Party
2 Plaintiff's Response to Plaintiff's and Third-Party Defendants' Summary
3 Judgment Motions;
- 4 26. Second Declaration of Andrew C. Rapp in Support of Defendant/Third-Party
5 Plaintiff's Response to Plaintiff's and Third-Party Defendants' Summary
6 Judgment Motions and exhibits attached thereto;
- 7 27. Defendant Verizon Wireless's Response to Motions for Summary Judgment;
- 8 28. Declaration of Tina Lewis in Support of Defendant Verizon Wireless's
9 Response to Motions for Summary Judgment and exhibits attached thereto;
- 10 29. Plaintiff's Reply in Support of Motion for Summary Judgment Regarding
11 Lease Termination and Restitution of Lease Proceeds;
- 12 30. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Supplemental
13 Brief Regarding Its Response to Plaintiff's and Third-Party Defendants'
14 Summary Judgment Motions;
- 15 31. Declaration of Felix Vera in Support of Defendant/Third-Party Plaintiff Terry
16 Terrace Apartment, LLC's Supplemental Brief Regarding Its Response to
17 Plaintiff's and Third-Party Defendants' Summary Judgment Motions;
- 18 32. Certain Third Party Defendants' Objection to Terry Terrace Apartment, LLC's
19 Supplemental Brief;
- 20 33. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Reply to
21 Certain Unit Owners' Opposition to Joinder of Verizon's Motion to Strike and
22 Supplemental Brief; .
- 23 34. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Supplemental
24 Brief Regarding RCW 64.34.312 and Attorney's Fees;
- 25 35. Plaintiff's Supplemental Brief Regarding Duty to Transfer Lease to
26 Association Pursuant to RCW 64.34.312;
36. Declaration of Dean Martin in Support of Plaintiff's Supplemental Brief;
37. Plaintiff's Reply to Defendant's Supplemental Brief Regarding RCW
64.34.312;
38. Defendant/Third-Party Plaintiff Terry Terrace Apartment, LLC's Response to
Plaintiff's Supplemental Brief Regarding RCW 64.34.312;

1 39. Motion for Entry of Order Regarding: (1) Plaintiff's Motion for Summary
2 Judgment Regarding Lease Termination and Restitution of Lease Proceeds;
3 and (2) Defendant/Third-Party Plaintiff's Cross Motion for Summary
4 Judgment; and

5 40. Declaration of Dean Martin in Support of Motion for Entry of Order
6 Regarding: (1) Plaintiff's Motion for Summary Judgment Regarding Lease
7 Termination and Restitution of Lease Proceeds; and (2) Defendant/Third-Party
8 Plaintiff's Cross Motion for Summary Judgment.

9 41. Defendant/Third-Party Plaintiff Terry Terrace Apartment LLC's Response to
10 Plaintiff's Motion for Entry of Order Regarding: 1) Plaintiff's Motion for
11 Summary Judgment Regarding Lease Termination and Restitution of Lease
12 Proceeds; and (2) Defendant/Third-Party Plaintiff's Cross Motion for
13 Summary Judgment.

14 42. Plaintiff's Reply to Defendant/Third-Party Plaintiff Terry Terrace Apartment
15 LLC's Response to Plaintiff's Motion for Entry of Order Regarding: (1)
16 Plaintiff's Motion for Summary Judgment Regarding Lease Termination and
17 Restitution of Lease Proceeds; and (2) Defendant/Third-Party Plaintiff's Cross
18 Motion for Summary Judgment;

19 43. _____
20 _____
21 _____;

22 44. _____
23 _____
24 _____; and

25 45. _____
26 _____

The Court deeming itself fully advised, NOW, THEREFORE,

IT IS HEREBY ORDERED that:

1. Partial Summary Judgment is GRANTED in favor of Seattle SMSA
Limited Partnership d/b/a Verizon Wireless, LLC ("Verizon") as follows:

a. The Verizon Wireless Building and Rooftop Lease Agreement,
dated June 26, 2002, amended by the Lease Addendum, dated June 28, 2002, and any and

1 all other amendments, modifications and extensions (hereinafter the "Verizon Lease") was
2 valid, binding, and enforceable when entered into between Verizon and Terry Terrace
3 Apartments, LLC ("Declarant"). Verizon's right, title, and interest in the Verizon Lease
4 remains valid, binding, and enforceable.

5 b. The Verizon Lease is not void under the Washington Condominium
6 Act, RCW Ch. 64.34.

7 c. The Verizon Lease was not terminated by the Association.

8 d. Provided that all prior payments were fully and timely made as
9 called for in the Verizon Lease, Verizon shall have no liability to the Association or
10 Declarant for any lease payments due under the Verizon Lease prior to the date of this
11 Order.
12

13 e. Other than as set forth in this Order, the Verizon Lease shall remain
14 in full force and effect, and the Association shall be entitled to all rights, title, and interest
15 in and to the Declarant's interest in the Lease.

16 f. Aside from the foregoing provisions, the Verizon Lease shall be
17 unaffected by this Order.

18 g. The Association shall notify Verizon of the new payee account
19 information at least fifteen (15) days prior to the first direct lease payment by Verizon to
20 the Association.
21

22 2. IT IS FURTHER ORDERED that Verizon's Motion to Strike Evidence as
23 Inadmissible is hereby deemed to be MOOT as a result of the decision set forth herein.
24
25
26

1 3. IT IS FURTHER ORDERED that Partial Summary Judgment is
2 GRANTED in favor of Plaintiff Terry Terrace Owners' Association ("Association") as
3 follows:

OPW
Defendant Terry Terrace Apartments LLC

4 a. Pursuant to RCW 64.34.312(p), the ~~Declarant~~ must transfer the
5 Verizon Lease, and any proceeds from the Verizon Lease received on or after
6 July 10, 2002, to the Association.

7 b. Verizon shall make all future lease payments to the Association.

8 3. IT IS FURTHER ORDERED that the remainder of the Association's, the
9 Declarant's, and Verizon's summary judgment motions are denied.

10 DONE IN OPEN COURT this 18th day of October, 2007.

[Signature]

The Honorable Chris Washington

15 Presented by:

16 BARKER • MARTIN, P.S.

[Signature]

19 Dean Martin, WSBA No. 21970
20 Inge Fordham, WSBA No. 38256
Attorneys for Plaintiff

EXHIBIT 2

**Terry Terrace
Calculation of Payments**

Payment Date	Receipt Date	Payment
May 20, 2003	June 2, 2003	\$ 1,800.00
June 20, 2003	June 25, 2003	\$ 900.00
July 18, 2003	July 29, 2003	\$ 900.00
August 18, 2003	August 28, 2003	\$ 900.00
September 16, 2003	September 25, 2003	\$ 900.00
October 20, 2003	October 29, 2003	\$ 900.00
November 13, 2003	November 20, 2003	\$ 900.00
December 15, 2003	January 14, 2004	\$ 900.00
January 14, 2004	January 27, 2004	\$ 900.00
February 17, 2004	February 25, 2004	\$ 900.00
March 12, 2004	March 25, 2004	\$ 900.00
April 13, 2004	April 27, 2004	\$ 900.00
May 19, 2004	June 2, 2004	\$ 900.00
May 25, 2004	June 11, 2004	\$ 3,300.00
June 10, 2004	June 21, 2004	\$ 2,000.00
August 19, 2004	August 25, 2004	\$ 2,000.00
September 19, 2004	September 24, 2004	\$ 2,000.00
October 19, 2004	October 21, 2004	\$ 2,000.00
November 19, 2004	December 1, 2004	\$ 2,000.00
December 19, 2004	December 27, 2004	\$ 2,000.00
January 19, 2005	January 24, 2005	\$ 2,000.00
February 19, 2005	February 24, 2005	\$ 2,000.00
March 19, 2005	March 24, 2005	\$ 2,000.00
April 19, 2005	April 27, 2005	\$ 2,000.00
May 19, 2005	May 25, 2005	\$ 2,000.00
June 19, 2005	June 24, 2005	\$ 2,000.00
July 19, 2005	July 26, 2005	\$ 2,000.00
August 18, 2005	August 25, 2005	\$ 2,000.00
September 20, 2005	September 27, 2005	\$ 2,000.00
October 14, 2005	October 24, 2005	\$ 2,000.00
November 15, 2005	November 21, 2005	\$ 2,000.00
December 15, 2005	December 27, 2005	\$ 2,100.00
January 17, 2006	February 1, 2006	\$ 2,100.00
February 17, 2006	February 27, 2006	\$ 2,100.00
March 20, 2006	March 28, 2006	\$ 2,100.00
April 18, 2006	April 25, 2006	\$ 2,100.00
May 15, 2006	May 22, 2006	\$ 2,100.00
June 15, 2006	June 22, 2006	\$ 2,100.00
July 17, 2006	July 24, 2006	\$ 2,100.00
August 17, 2006	August 22, 2006	\$ 2,100.00
September 18, 2006	September 25, 2006	\$ 2,100.00
October 17, 2006	October 25, 2006	\$ 2,100.00
October 26, 2006	November 3, 2006	\$ 2,016.32
November 13, 2006	November 30, 2006	\$ 2,100.00
December 13, 2006	December 31, 2006	\$ 2,252.04
January 16, 2007	January 23, 2007	\$ 2,252.04
February 14, 2007	February 21, 2007	\$ 2,252.04

March 16, 2007	March 21, 2007	\$ 2,252.04
April 17, 2007	April 30, 2007	\$ 2,364.64
May 16, 2007	May 31, 2007	\$ 2,364.64
June 14, 2007	June 30, 2007	\$ 2,364.64
July 13, 2007	July 31, 2007	\$ 2,364.64
August 17, 2007	August 31, 2007	\$ 2,364.64
September 18, 2007	September 30, 2007	\$ 2,364.64
October 15, 2007	October 31, 2007	\$ 2,364.64
November 14, 2007	November 21, 2007	\$ 2,364.64
December 17, 2007	December 20, 2007	\$ 2,364.64
January 11, 2008	January 31, 2008	\$ 2,364.64
February 14, 2008	February 29, 2008	\$ 2,364.64
March 17, 2008	March 31, 2008	\$ 2,364.64
April 14, 2008	April 30, 2008	\$ 2,482.07
May 15, 2008	May 31, 2008	\$ 2,482.07
June 18, 2008	June 30, 2008	\$ 2,482.07
July 17, 2008	July 31, 2008	\$ 2,482.07
August 1, 2008	August 31, 2008	\$ 2,482.07
September 1, 2008	September 30, 2008	\$ 2,482.07
October 1, 2008	October 31, 2008	\$ 2,482.07
November 1, 2008	November 24, 2008	\$ 2,482.07
December 17, 2007	December 27, 2008	\$ 2,482.07
January 11, 2008	January 21, 2009	\$ 2,482.07
February 14, 2008	February 23, 2009	\$ 2,482.07
March 14, 2009	March 22, 2009	\$ 2,482.07
Total Lease Payments		\$ 144,285.00

Appendix 4

FILED
JUL 21 2009

The Honorable Chris Washington
Hearing: July 10, 2009
Without Oral Argument

BY ANDREW J. HAVENS
COURT REPORTER

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

TERRY TERRACE CONDOMINIUM
OWNERS ASSOCIATION, a Washington non-
profit corporation,

Plaintiff,

vs.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company and
SEATTLE SMSA LIMITED PARTNERSHIP, a
Delaware limited partnership, d/b/a Verizon
Wireless,

Defendant.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company,

Third Party Plaintiff,

vs.

VERA FELIX, et al.,

Third Party Defendants.

No. 06-2-14221-7SEA

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT RE:
DAMAGES AND
PREJUDGMENT INTEREST**

This matter having come before the Court on Plaintiff's Motion for Summary
Judgment re: Damages and Prejudgment Interest.

The Court having considered all of the records and files herein, including:

**ORDER GRANTING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT RE: DAMAGES AND
PREJUDGMENT INTEREST - 1**

eg015101

BARKER • MARTIN, P. S.

719 2ND AVENUE, SUITE 1200 • SEATTLE, WA 98104
P: (206) 381-9806 • F: (206) 381-9807

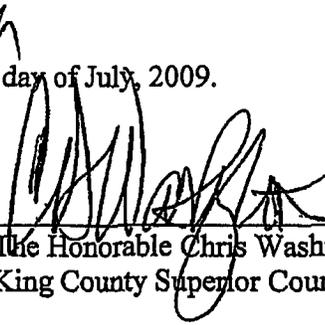
1. Plaintiff's Motion for Summary Judgment re: Damages and Prejudgment Interest;
2. Declaration of Dean Martin In Support of (1) Plaintiff's Motion For Summary Judgment Re: Damages and Prejudgment Interest; and (2) Plaintiff's Motion for Attorneys' Fees, Costs, and Entry Of Final Judgment;
3. Response to Plaintiff's Motion for Summary Judgment Re: (1) Damages and (2) Prejudgment Interest;
4. Declaration of Lindsey Trustcott; and
5. Reply in Support of (1) Plaintiff's Motion for Summary Judgment re: Damages and Prejudgment Interest; and (2) Plaintiff's Motion for Attorneys' Fees, Costs, and Entry of Final Judgment

The Court deeming itself fully advised, NOW, THEREFORE,

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment re: Damages and Prejudgment Interest is GRANTED.

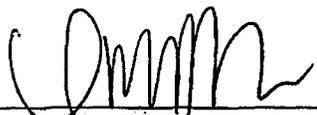
IT IS FURTHER ORDERED that Plaintiff Terry Terrace Condominium Owners Association shall be awarded \$144,285.00 in damages against Terry Terrace Apartments, LLC and \$49,264.68 in prejudgment interest on those damages.

DONE IN OPEN COURT this 17th day of July, 2009.


The Honorable Chris Washington
King County Superior Court Judge

Presented by:

BARKER • MARTIN, P.S.


Dean Martin, WSBA No. 21970
Inge Fordham, WSBA No. 38256
Attorneys for Plaintiff Terry Terrace
Condominium Owners Association

ORDER GRANTING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT RE: DAMAGES AND
PREJUDGMENT INTEREST - 2

BARKER • MARTIN, P. S.
719 2ND AVENUE, SUITE 1200 • SEATTLE, WA 98104
P: (206) 381-9806 • F: (206) 381-9807

Appendix 5

FILED

JUL 21 2009

SUBMITTED

The Honorable Chris Washington
Hearing: July 10, 2009
Without Oral Argument

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

TERRY TERRACE CONDOMINIUM
OWNERS ASSOCIATION, a Washington non-
profit corporation,

Plaintiff,

vs.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company and
SEATTLE SMSA LIMITED PARTNERSHIP, a
Delaware limited partnership, d/b/a Verizon
Wireless,

Defendant.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company,

Third Party Plaintiff,

vs.

VERA FELIX, et al.,

Third Party Defendants.

No. 06-2-14221-7SEA

**JUDGMENT AGAINST TERRY
TERRACE APARTMENTS, LLC**

I. JUDGMENT SUMMARY

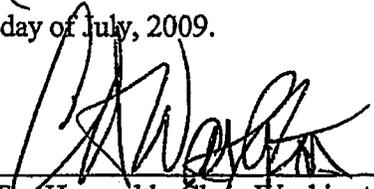
1. Judgment Creditor: Terry Terrace Condominium Owners Association
2. Judgment Debtor: Terry Terrace Apartments, LLC
3. Principal Judgment Amount: \$144,285.00

**JUDGMENT AGAINST TERRY TERRACE
APARTMENTS, LLC - 1**

BARKER • MARTIN, P. S.
719 2ND AVENUE, SUITE 1200 • SEATTLE, WA 98104
P: (206) 381-9806 • F: (206) 381-9807

1 ORDERED, ADJUDGED AND DECREED that there is no just reason for delay and
2 this Judgment shall be entered forthwith; and it is further
3 ORDERED, ADJUDGED AND DECREED that
4
5
6

7 DONE IN OPEN COURT this 17th day of July, 2009.
8

9
10 
11 The Honorable Chris Washington
King County Superior Court Judge

12 Presented by:

13 BARKER • MARTIN, P.S.

14
15 
16 Dean Martin, WSBA No. 21970
17 Inge Fordham, WSBA No. 38256
18 Attorneys for Plaintiff Terry Terrace
Condominium Owners Association
19
20
21
22
23
24
25
26

Appendix 6

FILED
KING COUNTY, WASHINGTON

FEB 16 2007

SUPERIOR COURT CLERK
CARY FOVICK
DEPUTY

FILED
KING COUNTY, WASHINGTON

FEB 16 2007

SEA
SUPERIOR COURT CLERK

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

TERRY TERRACE CONDOMINIUM OWNERS
ASSOCIATION, a Washington non-profit
corporation,

Plaintiff,

v.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company and
SEATTLE SMSA LIMITED PARTNERSHIP, a
Delaware limited partnership, d/b/a Verizon
Wireless,

Defendants.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company,

Third Party Plaintiff.

v.

VERA FELIX, JOY & GARRETT BENDER,
PETER ONG LIM, JUSTIN R. IRISH, GEORGE
M. ABAYTA, CARY R. PETTY, KURT
KLINGMAN, VICTORIA DIAZ & MICHAEL
EASTON, AARON J. MUNN, AAMER HYDRIE
& HABIBUDDIN SALONE, LAWRENCE
LADUKE, JAMES AND MADELINE
HANDZLIK, ALAN BULLER, DEREK
SWANSON, AIMEE SCHANTZ, TORGER
OAS, ROLDAN V. DIN, VINCENT LIPE,
ROMAN LOPEZ JR. & SUMMER GOTHARD-
LOPEZ, ANN M. GOTHARD, REBECCA
DEXTER, JEFFREY T. GILBERT, RHIANNON
HOPKINS, HARVINDER & ARADH
CHOWDHARY,

Third Party Defendants.

The Honorable Charles W. Mertel

NO. 06-2-14221-7 SEA

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; DENYING
DEFENDANT/THIRD-PARTY
PLAINTIFF'S CROSS-MOTION
FOR SUMMARY JUDGMENT;
AND GRANTING THIRD PARTY
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT
[PROPOSED]**

~~Proposed~~ ORDER GRANTING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND GRANTING THIRD PARTY
DEFENDANTS MOTION FOR SUMMARY JUDGMENT - 1

Ryan, Swanson & Cleveland, PLLC

1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
phone 206.464.4224 | fax 206.583.0359

1 This matter having come on for hearing before this court on the Association's Motion
2 for Summary Judgment, Defendant/Third Party Plaintiff's Cross-motion for Summary
3 Judgment, and certain Third Party Defendants' Joinder in the Association's Motion and
4 Motion for Summary Judgment Dismissing the Third Party Complaint, and the court having
5 considered the following:

6 1. Plaintiff's Motion for Summary Judgment Regarding Lease Termination and
7 Restitution of Lease Proceeds;

8 2. Declaration of Dean Martin and Exhibits attached thereto;

9 3. Declaration of Rhiannon Hopkins and exhibits attached thereto;

10 4. Certain Third Party Defendants' Joinder in the Association's Motion for Summary
11 Judgment and Motion for Summary Dismissal of Third Party Complaint

12 5. Declaration of Jo M. Flannery and the exhibits attached thereto;

13 6. Declaration of Aimee Schantz;

14 7. Declaration of Rebecca Dexter;

15 8. Declaration of Vincent Lipe;

16 9. Declaration of Cary Petty;

17 10. Declaration of Jeffrey Gilbert;

18 11. Declaration of Peter Ong Lim;

19 12. Declaration of Derek Swanson;

20 13. Declaration of Joy Bender;

21 14. Declaration of Harvinder Chowdry;

22 15. Declaration of Salone Habibuddin;

23 16. Declaration of Jeffrey Scott; and

24 17. Declaration of Roldan Din;

25 18. Defendant/Third-Party Plaintiff's Cross-Motion for Summary Judgment on
26 claims asserted by the Plaintiff, Terry Terrace Condominium Association;

- 1 19. Declaration of Andrew C. Rapp, and exhibits attached thereto;
- 2 20. Declaration of Tim Kennedy and exhibits attached thereto;
- 3 21. Declaration of James C. Middlebrooks and exhibit attached thereto;
- 4 22. James and Madeline Handzlik's Joinder in Certain Third Party Defendants'
- 5 Joinder in Association's Motion for Summary Judgment and Motion for Summary Judgment
- 6 Dismissing Third Party Plaintiff;
- 7 23. Declaration of James and Madeline Handzlik in Support of Motions for
- 8 Summary Judgment;
- 9 24. Plaintiff's Opposition to Defendant/Third Party Plaintiff's Cross-Motion For
- 10 Summary Judgment;
- 11 25. Declaration of Kathryn Back in Support of Plaintiff's Opposition to
- 12 Defendant/Third Party Plaintiff's Cross-Motion For Summary Judgment and exhibit attached
- 13 thereto;
- 14 26. Defendant/Third-Party Plaintiff Terry Terrace Apartment LLC's Response To
- 15 Plaintiff's And Third-Party Defendants' Summary Judgment Motions;
- 16 27. Second Declaration of Andrew C. Rapp and exhibits attached thereto;
- 17 28. Second Declaration of Tim Kennedy;
- 18 29. Defendant Verizon Wireless's Response to Motions For Summary Judgment;
- 19 30. Declaration of Tina Lewis and exhibits attached thereto;
- 20 31. Declaration of Deposition Transcript;
- 21 32. Declaration of Filing Facsimile Signature;
- 22 33. Plaintiff's Reply;
- 23 34. Certain Third Party Defendants' Joinder in Association's Opposition to
- 24 Defendant's Cross-Motion for Summary Judgment and Reply In Support of Motion for
- 25 Summary Judgment Dismissing Third Party Complaint;
- 26 35. _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

36. _____

37. _____

having heard oral argument of the parties and being fully advised in the premises;

IT IS NOW HEREBY ORDERED that ~~the Association's Motion for Summary Judgment is GRANTED.~~

~~IT IS FURTHER ORDERED that Defendant/Third Party Plaintiff's Cross-Motion for Summary Judgment is DENIED.~~

IT IS ~~FURTHER~~ ORDERED that the homeowners/third party defendants' Motion for Summary Judgment is GRANTED. The defendant's Third Party Complaint is hereby dismissed. Third party defendants are awarded their reasonable attorney fees and other costs. Defendant is hereby ordered to pay the same to the third party defendants.

DONE IN OPEN COURT this 16th day of ~~December~~, 2006.
February 2007

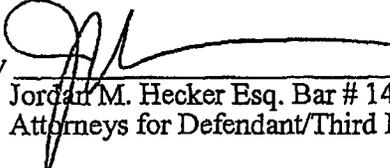
JUDGE CHARLES W. MERTEL
Chris Washington

Presented by:
RYAN, SWANSON & CLEVELAND, PLLC

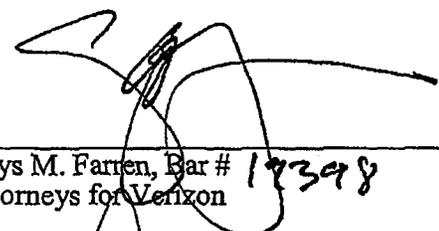
By
Jo M. Flannery WSBA #26086
Attorneys for Certain Third Party Defendants

1 Approved as to form;
2 Notice of presentation waived.

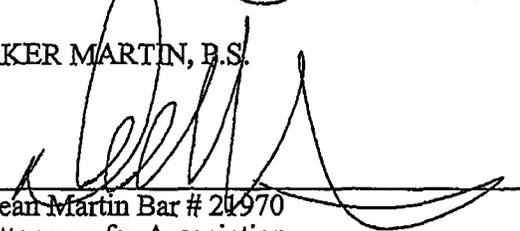
3 HECKER, WAKEFIELD & FEILBERG, P.S.

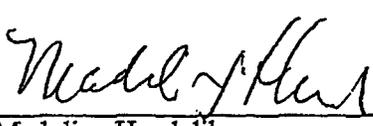
4 
5 By _____
6 Jordan M. Hecker Esq. Bar # 14374
7 Attorneys for Defendant/Third Party Plaintiff

8 DAVIS WRIGHT TRAMAIN, LLP

9 
10 By _____
11 Rhys M. Farnen, Bar # 17398
12 Attorneys for Verizon

13 BARKER MARTIN, B.S.

14 
15 By _____
16 Dean Martin Bar # 21970
17 Attorneys for Association

18 
19 By _____
20 Madeline Handzlik
21 Pro Se

Appendix 7

FILED
KING COUNTY, WASHINGTON

MAR 17 2008

SUPERIOR COURT CLERK
GARY POVICK
DEPUTY

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

TERRY TERRACE CONDOMINIUM OWNERS
ASSOCIATION, a Washington non-profit
corporation,

Plaintiff,

v.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company and
SEATTLE SMSA LIMITED PARTNERSHIP, a
Delaware limited partnership, d/b/a Verizon
Wireless,

Defendants.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company,

Third Party Plaintiff.

v.

VERA FELIX, JOY & GARRETT BENDER,
PETER ONG LIM, JUSTIN R. IRISH, GEORGE
M. ABEYTA, CARY R. PETTY, KURT
KLINGMAN, VICTORIA DIAZ & MICHAEL
EASTON, AARON J. MUNN, AAMER HYDRIE
& HABIBUDDIN SALONE, LAWRENCE
LADUKE, JAMES AND MADELINE
HANDZLIK, ALAN BULLER, DEREK
SWANSON, AIMEE SCHANTZ, TORGER
OAS, ROLDAN V. DIN, VINCENT LIPE,
ROMAN LOPEZ JR. & SUMMER GOTHARD-
LOPEZ, ANN M. GOTHARD, REBECCA
DEXTER, JEFFREY T. GILBERT, RHIANNON
HOPKINS, HARVINDER & ARADH
CHOWDHARY,

Third Party Defendants.

The Honorable Chris Washington

NO. 06-2-14221-7 SEA

**ORDER GRANTING
HOMEOWNERS' MOTION FOR
REASONABLE FEES AND
EXPENSES AND FOR ENTRY OF
JUDGMENT**

~~PROPOSED~~ *DMN*

[Proposed] ORDER GRANTING HOMEOWNERS
MOTION FOR FEES AND EXPENSES AND
ENTRY OF JUDGMENT FOR SAME- 1

Ryan, Swanson & Cleveland, PLLC

1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
phone 206.464.4224 | fax 206.583.0359

1 This matter having come on for hearing before this Court on certain third party
2 defendants' Motion for an award of its reasonable attorney fees and expenses and for entry of
3 Judgment for the same, the court having considered the pleadings and being fully advised in
4 the premises:

5 The court finds that the number of hours expended in this matter and the total fees and
6 expenses incurred and requested in this matter are reasonable under all of the circumstances
7 of the case and are supported by the evidence submitted in the motion and related pleadings.

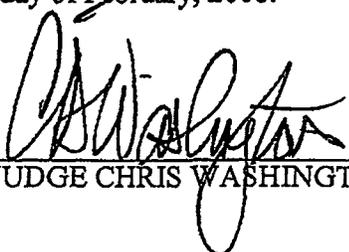
8 IT IS NOW HEREBY ORDERED that the homeowners motion is GRANTED.

9 IT IS FURTHER ORDERED that the homeowners are awarded \$20,980.50 for their
10 reasonable attorney fees incurred to date.

11 IT IS FURTHER ORDERED that the homeowners are awarded \$3,376.68 for their
12 reasonable expenses.

13 IT IS FURTHER ORDERED that a final Judgment in this matter shall be entered,
14 immediately following the entry of this Order, in favor of the homeowners and against the
15 Terry Terrace Apartments, LLC, in the form submitted with the homeowners Motion and
16 consistent with this Order.

17 DONE IN OPEN COURT this ^{14th} day of February, 2008.

18
19
20 
21 JUDGE CHRIS WASHINGTON

22 Presented by:

23 RYAN, SWANSON & CLEVELAND, PLLC

24
25 
26 By Jo M. Flannery WSBA # 26086
Attorneys for Certain Third Party Defendants

[Proposed] ORDER GRANTING HOMEOWNERS
MOTION FOR FEES AND EXPENSES AND
ENTRY OF JUDGMENT FOR SAME- 2

517350.01

Ryan, Swanson & Cleveland, PLLC

1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
phone 206.464.4224 | fax 206.583.0359

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Approved as to form;
Notice of presentation waived.

HECKER, WAKEFIELD & FEILBERG, P.S.

By _____
Jordan M. Hecker Esq. Bar # 14374
Attorneys for Defendant/Third Party Plaintiff

DAVIS WRIGHT TRAMAIN, LLP

By _____
Rhys M. Faren, Bar #
Attorneys for Verizon

BARKER MARTIN, P.S.

By _____
Dean Martin Bar # 21970
Attorneys for Association

By _____
Madeline Handzlik
Pro Se

Appendix 8

FILED
KING COUNTY, WASHINGTON

MAR 17 2008

SUPERIOR COURT CLERK
GARY POVICK
DEPUTY

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

TERRY TERRACE CONDOMINIUM OWNERS
ASSOCIATION, a Washington non-profit
corporation,

Plaintiff,

v.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company and
SEATTLE SMSA LIMITED PARTNERSHIP, a
Delaware limited partnership, d/b/a Verizon
Wireless,

Defendants.

TERRY TERRACE APARTMENTS, LLC, a
Washington limited liability company,

Third Party Plaintiff.

v.

VERA FELIX, JOY & GARRETT BENDER,
PETER ONG LIM, JUSTIN R. IRISH, GEORGE
M. ABEYTA, CARY R. PETTY, KURT
KLINGMAN, VICTORIA DIAZ & MICHAEL
EASTON, AARON J. MUNN, AAMER HYDRIE
& HABIBUDDIN SALONE, LAWRENCE
LADUKE, JAMES AND MADELINE
HANDZLIK, ALAN BULLER, DEREK
SWANSON, AIMEE SCHANTZ, TORGER
OAS, ROLDAN V. DIN, VINCENT LIPE,
ROMAN LOPEZ JR. & SUMMER GOTHARD-
LOPEZ, ANN M. GOTHARD, REBECCA
DEXTER, JEFFREY T. GILBERT, RHIANNON
HOPKINS, HARVINDER & ARADH
CHOWDHARY,

Third Party Defendants.

The Honorable Chris Washington

NO. 06-2-14221-7 SEA

JUDGMENT

(Clerk's action required)

JUDGMENT - 1

Ryan, Swanson & Cleveland, PLLC

1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
phone 206.464.4224 | fax 206.583.0359

1 **JUDGMENT SUMMARY**

2 Judgment Creditors: JOY AND GARRETT BENDER,
3 PETER ONG LIM,
4 JUSTIN R. IRISH,
5 GEORGE M. ABEYTA,
6 CARY R. PETTY,
7 KURT KLINGMAN,
8 AARON J. MUNN,
9 AAMER HYDRIE & SALONE
10 HABIBUDDIN,
11 ROLDAN V. DIN,
12 ALAN BULLER,
13 DEREK SWANSON,
14 AIMEE SCHANTZ,
15 VINCENT LIPE,
16 REBECCA DEXTER,
17 JEFFREY T. GILBERT,
18 RHIANNON HOPKINS,
19 HARVINDER CHOWDHARY & ARADHNA
20 CHETAL

12 Attorneys for Judgment Creditors: Jo M. Flannery
13 Ryan Swanson & Cleveland PLLC
14 1201 Third Avenue, Suite 3400
15 Seattle, Washington 98101

14 Judgment Debtor: Terry Terrace Apartments, LLC, a Washington
15 limited liability company

16 Attorneys for Judgment Debtor: Jordan Hecker
17 Hecker Wakefield & Feilberg, P.S.
18 Seattle, Washington 98119

18 Principal Judgment Amount: \$24,357.18

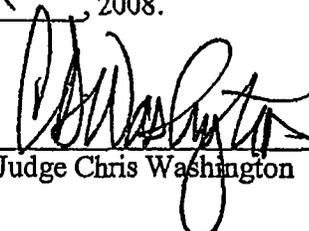
19 Prejudgment Interest: \$ 0

20 Interest on Judgment Amount: 12% per annum

1 JUDGMENT

2 The Court having awarded the homeowners their attorney fees and other costs and
3 having found the amount of fees and costs or expenses of \$24,357.18 to be reasonable,
4 Judgment is hereby entered in favor of certain third party defendants, JOY AND GARRETT
5 BENDER, PETER ONG LIM, JUSTIN R. IRISH, GEORGE M. ABEYTA, CARY R.
6 PETTY, KURT KLINGMAN, AARON J. MUNN, AAMER HYDRIE & SALONE
7 HABIBUDDIN, ROLDAN V. DIN, ALAN BULLER, DEREK SWANSON, AIMEE
8 SCHANTZ, VINCENT LIPE, REBECCA DEXTER, JEFFREY T. GILBERT, RHIANNON
9 HOPKINS, HARVINDER CHOWDHARY & ARADHNA CHETAL ("homeowners") and
10 against third party plaintiff Terry Terrace Apartments, LLC, in the principal amount of
11 \$24,357.18. Said Judgment to bear interest at the rate of 12 percent (12%) per annum until
12 the Judgment and accrued interest and all other costs are paid in full.

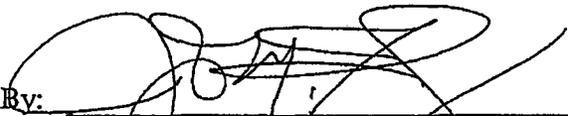
13 DATED this 14th day of March, 2008.

14 
15 _____
16 Judge Chris Washington
17
18
19
20
21
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Presented by:

RYAN SWANSON & CLEVELAND PLLC

By: 
Jo M. Flannery, WSBA #26086
Attorneys for certain third party defendants

Copy received, approved as to form:

HECKER WAKEFIELD & FEILBERG, P.S.

By: _____
Jordan Hecker, WSBA #14374
Attorneys for Terry Terrace Apartments LLC

Appendix 9

RCW 64.34.312

Control of association — Transfer.

(1) Within sixty days after the termination of the period of declarant control provided in RCW 64.34.308(4) or, in the absence of such period, within sixty days after the first conveyance of a unit in the condominium, the declarant shall deliver to the association all property of the unit owners and of the association held or controlled by the declarant including, but not limited to:

- (a) The original or a photocopy of the recorded declaration and each amendment to the declaration;
- (b) The certificate of incorporation and a copy or duplicate original of the articles of incorporation of the association as filed with the secretary of state;
- (c) The bylaws of the association;
- (d) The minute books, including all minutes, and other books and records of the association;
- (e) Any rules and regulations that have been adopted;
- (f) Resignations of officers and members of the board who are required to resign because the declarant is required to relinquish control of the association;
- (g) The financial records, including canceled checks, bank statements, and financial statements of the association, and source documents from the time of incorporation of the association through the date of transfer of control to the unit owners;
- (h) Association funds or the control of the funds of the association;
- (i) All tangible personal property of the association, represented by the declarant to be the property of the association or ostensibly the property of the association, and an inventory of the property;
- (j) Except for alterations to a unit done by a unit owner other than the declarant, a copy of the declarant's plans and specifications utilized in the construction or remodeling of the condominium, with a certificate of the declarant or a licensed architect or engineer that the plans and specifications represent, to the best of their knowledge and belief, the actual plans and specifications utilized by the declarant in the construction or remodeling of the condominium;
- (k) Insurance policies or copies thereof for the condominium and association;
- (l) Copies of any certificates of occupancy that may have been issued for the condominium;
- (m) Any other permits issued by governmental bodies applicable to the condominium in force or issued within one year before the date of transfer of control to the unit owners;
- (n) All written warranties that are still in effect for the common elements, or any other areas or facilities which the association has the responsibility to maintain and repair, from the contractor, subcontractors, suppliers, and manufacturers and all owners' manuals or instructions furnished to the declarant with respect to installed equipment or building systems;
- (o) A roster of unit owners and eligible mortgagees and their addresses and telephone numbers, if known, as shown on the declarant's records and the date of closing of the first sale of each unit sold by the declarant;
- (p) Any leases of the common elements or areas and other leases to which the association is a party;
- (q) Any employment contracts or service contracts in which the association is one of the contracting parties or service contracts in which the association or the unit owners have an obligation or a responsibility, directly or indirectly, to pay some or all of the fee or charge of the person performing the service;
- (r) A copy of any qualified warranty issued to the association as provided for in RCW 64.35.505; and
- (s) All other contracts to which the association is a party.

(2) Upon the transfer of control to the unit owners, the records of the association shall be audited as of the date of transfer by an independent certified public accountant in accordance with generally accepted auditing standards unless the unit owners, other than the declarant, by two-thirds vote elect to waive the audit. The cost of the audit shall be a common expense unless otherwise provided in the declaration. The accountant performing the audit shall examine supporting documents and records,

including the cash disbursements and related paid invoices, to determine if expenditures were for association purposes and the billings, cash receipts, and related records to determine if the declarant was charged for and paid the proper amount of assessments.

[2004 c 201 § 10; 1989 c 43 § 3-104.]

Appendix 10

Sec. 3-104. TRANSFER OF ASSOCIATION CONTROL.

1. Section 3-104 is derived from Alaska Statutes Sec. 34.08.340 rather than the Uniform Condominium Act. It is designed to ensure that the property and funds belonging to the association as well as the information and documents needed for assuming control of the association and the management of the condominium are in fact transferred to the association.

2. In order to ensure that the declarant and the board of directors appointed by the declarant have properly managed the financial affairs of the association during the period of declarant control and that all funds and property belonging to the association has been turned over to the board of directors elected by the unit owners, the Act requires an audit of the association's books and records as of the date of transfer of control by an independent certified public accountant unless the unit owners, other than the declarant, by two-thirds vote elect to waive the audit.

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

TERRY TERRACE APARTMENTS,)
LLC, a Washington Limited)
Liability Company,)

Appellants,)

Vs.)

TERRY TERRACE CONDOMINIUM)
OWNERS ASSOCIATION, a)
Washington non-profit)
corporation,)

AND)

VERA FELIX, JOY & GARRETT)
BENDER, PETER ONG LIM,)
JUSTIN R. IRISH, GEORGE M.)
ABEYTA, CARY R. PETTY,)
KURT KLINGMAN, VICTORIA DIAZ)
& MICHAEL EASTON, AARON J.)
MUNN, AAMER HYDRIE &)
HABIBUDDIN SALONE, LAWRENCE)
LADUKE, JAMES AND MADELINE)
HANDZLIK, ALAN BULLER,)
DEREK SWANSON, AIMEE SCHANTZ,)
TORGER OAAS, ROLDAN V. DIN,)
VINCENT LIPE, ROMAN LOPEZ JR.)
& SUMMER GOTHARD-LOPEZ,)
ANN M. GOTHARD, REBECCA)
DEXTER, JEFFREY T. GILBERT,)
RHIANNON HOPKINS, HARVINDER)
& ARADH CHOWDHARY,)

Respondents.)

NO. 63912-9-I

DECLARATION OF
SERVICE

2009 NOV 16 PM 2:40

COURT OF APPEALS
STATE OF WASHINGTON

FILED

ORIGINAL

1 I, Leslie Kay Peppard, hereby certify under
2 penalty of perjury under the laws of the State of
3 Washington that on November 16, 2009, I caused to
4 be filed with the Court, via ABC Legal Messengers
5 Incorporated, the originals of the following
6 documents:

- 1 1. Appellant's Opening Brief;
- 2 2. Appellant's Motion To File An Over-Length
3 Brief; and
- 4 3. Declaration of Service.

5 and served copies of the above-named documents
6 upon:

7 Dean Martin
8 Inge Fordham
9 BARKER MARTIN
10 719 - 2nd Avenue, Suite 1200
11 Seattle, WA 98104

12 Attorney for Terry Terrace Condominium Owners
13 Association

- 14 Via telecopier
15 Via U.S. Mail
16 Via ABC Legal Messengers
17 Via Hand delivery

18 Michael J. Corl
19 Rhys M. Farren
20 DAVIS WRIGHT TREMAINE, LLP
21 2300 Rainier Plaza
22 777 108th Avenue N.E.
23 Bellevue, WA 98004

24 Attorney for Seattle SMSA Limited Partnership
25 d/b/a Verizon Wireless

- 26 Via telecopier
 Via U.S. Mail
 Via ABC Legal Messengers
 Via Hand delivery

Jo M. Flannery
RYAN, SWANSON & CLEVELAND, PLLC
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034

Attorney For Third-Party Defendants

LAW OFFICE OF
HECKER WAKEFIELD & FEILBERG, P.S.
321 FIRST AVENUE WEST
SEATTLE, WA 98119
(206) 447-1900
FACSIMILE: (206) 447-9075

