

67547-8

67547-8

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

*Court of Appeals Cause # 675478
(Superior Court cause # 11-2-01638-9)*

TINA WADSWORTH,
Appellant/Defendant,

v.

INDIGO REAL ESTATE SERVICES, INC.
Respondent/Plaintiff

**APPELLANT TINA WADSWORTH'S
REPLY BRIEF**

ORIGINAL

Submitted by:

Harry L. Johnsen (WSBA# 4955)
RAAS, JOHNSEN & STUEN, P.S.
1503 E Street
Bellingham, WA 98225
360-647-0234 *phone*
360-733-1851 *fax*

2012 JAN 17 AM 10:52

**FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON**

TABLE OF CONTENTS

A. Indigo incorrectly represents the record below on two critical issues.

1. Ms. Wadsworth did not admit that she breached her Lease ... 1

2. Ms. Wadsworth presented several defenses below 2

B. The “abuse of discretion” standard of review does not apply here ... 4

C. Indigo misconstrues state unlawful detainer law 6

D. Indigo unlawfully terminated Ms. Wadsworth’s tenancy 7

E. Indigo ignores controlling federal law 8

**F. The Trial Court Had Discretion to Balance the
 Equities and Deny the Writ 11**

G. Conclusion 13

TABLE OF AUTHORITIES

CASES:

<i>Barrientos v. 1801-1825 Morton, LLC</i> , 583 F.3d 1197 (9 th Cir. 2009)	11
<i>Bowcutt v. Delta North Star Corp.</i> , 95 Wash.App. 311, 320 (1999)	5
<i>Deming v. Jones</i> , 173 Wash. 644 (1933).	5
<i>Housing Authority of City of Pasco and Franklin County v. Pleasant</i> , 126 Wash.App. 382 (2005)	5
<i>Housing Authority of Everett v. Terry</i> , 114 Wn.2d 558 (1990)	9, 10, 11
<i>In re Detention of Mines</i> , --- Wn. App. ----, 2011 WL 5924538 (November 29, 2011)	5
<i>Josephinium Assocs. v. Kahli</i> , 111 Wn.App.617 (2002)	5
<i>Leda v. Whisnand</i> , 150 Wn. App. 69 (2009)	3
<i>Shoemaker v. Shaug</i> , 5 Wn. App. 700 (1971)	6, 12
<i>State v. Grayson</i> , 154 Wash.2d 333, 341-42 (2005).	5
<i>State v. Lamb</i> , 163 Wash.App. 614 (2011)	4
<i>Thisius v. Sealander</i> , 26 Wn.2d 810 (1946)	6, 7, 12

STATUTES:

42 U.S.C.§ 1437f	9
RCW 59.18.380	5
RCW 59.12.190	6,7
RCW 59.12.030	8,10

Indigo's Response Brief incorrectly represents the record below on two critical issues, misstates the applicable standard of review, ignores both the covenants of its own lease and applicable federal law, and fails to address most of Ms. Wadsworth's arguments. Ms. Wadsworth files this limited brief to correct Indigo's errors, and reply to its arguments.

A. Indigo incorrectly represents the record below on two critical issues.

1. *Ms. Wadsworth did not admit that she breached her Lease.*

Indigo claims that Ms. Wadsworth admitted that she breached her lease. *Indigo Brief at 5, 11.* That is not true. Ms. Wadsworth admitted that she left the plywood screening on the balcony for four days past Indigo's deadline, but denied that this was a breach of her lease. *See, e.g. CP 28-29 & n.3.* As noted in Ms. Wadsworth's Opening Brief, Indigo's ten-day Notice to Comply relied on the following provision of the parties' lease: "Balconies and patios shall be kept neat and clean at all times." *CP 117.*¹ Ms. Wadsworth's balcony *was* neat and clean – she was simply using a sheet of plywood to block the public's view into her apartment.

Ms. Wadsworth also argued that leaving the plywood in place for

¹ Indigo states in its Brief that Ms. Wadsworth "failed to comply with the balcony rules in the Community Policies, Rules and Regulations which rule provides that . . . 'No . . . items shall be stored, hung or draped on railings or other portions of balconies or patios.'" BALCONY or PATIO". *Indigo Brief at 14.* However, Indigo did not cite this provision in its 10-day notice. *CP 117.*

four extra days was not an *actionable* breach of the lease, regardless of whether her tardy removal of the screening violated Indigo's rules. *CP 28-30*. When Indigo accepted Ms. Wadsworth as a Section 8 tenant, Indigo agreed that it would not take legal action to terminate Ms. Wadsworth's tenancy unless she had committed

[r]epeated minor violations of the Lease which disrupt the livability of the project, adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment of the lease (sic) premises and retained facilities, interfere with the management of the project or have an adverse financial effect on the project.

CP 23. Ms. Wadsworth did not admit (and Indigo did not prove) that the presence of the screen disrupted the livability of the project, adversely affected the health or safety of any person, adversely affected the quiet enjoyment of the premises, or adversely affected the management or finances of the project. Ms. Wadsworth did not commit an actionable breach of her lease.

2. *Ms. Wadsworth presented several defenses below.*

Indigo made second false statement in its Brief when it claimed that Ms. Wadsworth "presented no defenses to excuse her breach".

Indigo Brief at 8. Ms. Wadsworth asserted the defense of retaliatory eviction both orally and in writing, and offered evidence that Indigo initiated its unlawful detainer action within 90 days after a good faith and lawful complaint by Ms. Wadsworth, which evidence creates a

presumption of retaliation by Indigo. *CP 47-48; July 8 RP at 9:14-21.*

Ms. Wadsworth further defended by offering evidence that Indigo had not enforced its alleged rule against screening on the balcony against any other tenant, thereby waiving any right Indigo might have had to use the presence of screening on Ms. Wadsworth's balcony to evict her. *July 8 RP at 9:3-11.* Ms. Wadsworth also offered evidence that she had placed the plywood on her balcony to protect herself and her daughter from harassment by an unlawful tenant living below them, because Indigo failed to respond to her concerns. *CP 48; July 8 RP at 7:17-23.* In addition, Ms. Wadsworth asked the Court to exercise its equitable discretion to refuse to evict her because her alleged violation was *de minimus*. *See, e.g., July 8 RP at 10:8-15.*

All of these defenses were valid and viable. According to *Leda v. Whisnand*, 150 Wn. App. 69 (2009), cited by Indigo at page 7 of its Brief, the trial court erred in refusing to admit Ms. Wadsworth's evidence in support thereof:

The proper procedure [for a] show cause hearing is as follows: (1) the trial court must ascertain whether either the defendant's written or oral presentations potentially establish a viable legal or equitable defense to the entry of a writ of restitution, and (2) the trial court must then consider sufficient admissible evidence (including testimonial evidence) from the parties and witnesses to determine the merits of any viable asserted defenses.

150 Wn. App. at 83, quoted at pages 7-8 of Indigo's brief.

B. The “abuse of discretion” standard of review does not apply here.

Indigo claims that the trial court’s ruling on reconsideration should be reviewed for abuse of discretion. *Indigo Brief at 6*. That is incorrect.

While Indigo is correct that a motion for reconsideration itself is addressed to trial court’s discretion, the court’s rulings on legal issues decided on reconsideration are subject to *de novo* review:

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds; this standard is also violated when a trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law. *[Citations omitted.]* When we review whether a trial court applied an incorrect legal standard, we review *de novo* the choice of law and its application to the facts in the case. *[Citations omitted.]* FN7

FN7. The distinctions in our standard of review cannot be overstated. Under an abuse of discretion standard, we defer to the decision of the trial court and will reverse only when the trial court’s decision rests on untenable grounds. But we review *de novo* the trial court’s choice of law, its interpretation, and its application to the facts of the case. *[Citation omitted.]* Thus, to determine whether the trial court committed an error of law, which is included in the abuse of discretion standard, we review the alleged error of law itself *de novo*.

State v. Lamb, 163 Wash.App. 614, 625 (2011).

In addition, Judge Uhrig clearly indicated at the hearing on reconsideration that he did not believe he had any discretion, and therefore he was not exercising discretion:

I am supposed to be dispassionate. I don't know if that means heartless, but that stuff doesn't matter. There [are] legal issues and they have [an] [e]ffect on people in a very human way but I can't consider those.

July 15 RP at 3:22-4:1.

It is still my belief that the ten days versus 14 days for removal of the plywood is a harsh result. But that's not my determination to make once the plaintiff has made their case.

July 15 RP at 27:16-19.

Failure to exercise discretion is itself an abuse of discretion. *State v. Grayson*, 154 Wash.2d 333, 341-42 (2005). *In re Detention of Mines*, --- Wn. App. ----, 2011 WL 5924538 at page 6 (November 29, 2011); *Bowcutt v. Delta North Star Corp.*, 95 Wash.App. 311, 320 (1999). As argued at pages 18-22 of Ms. Wadsworth's opening brief and as further explained in Section F. below, judges can and must address the equities of the situation in assessing whether to forfeit a tenant's interest under a lease. *Housing Authority of City of Pasco and Franklin County v. Pleasant*, 126 Wash.App. 382, 390 (2005); *Josephinium Assocs. v. Kahli*, 111 Wn.App.617 (2002); *Deming v. Jones*, 173 Wash. 644 (1933); *RCW 59.18.380*. Here, the trial judge was under the erroneous impression that he could not consider the equities; consequently he did not balance the equities in deciding whether to terminate the tenancy, forfeit the lease and issue the writ of restitution. This was an error of law and an abuse of discretion.

C. Indigo misconstrues state unlawful detainer law.

Indigo claims that allowing Ms. Wadsworth to prove that she complied 4 days after Indigo's 10-day notice expired would "eviscerate" Washington's unlawful detainer statutes by allowing *any* tenant to argue that *any* breach can be cured by eventual compliance. *Indigo Brief at 10*. However, Indigo's argument "eviscerates" both its own contractual promises not to evict for a minor violation and the long-standing body of Washington case law that abhors forfeitures and requires courts to avoid them where equity requires it. *Shoemaker v. Shaug*, 5 Wn. App. 700,704 (1971); *Thisius v. Sealander*, 26 Wn.2d 810, 818-819 (1946).

Moreover, Ms. Wadsworth is not arguing that she was legally entitled to cure an alleged breach by late compliance as Indigo contends. She is arguing that the minor nature of the alleged breach, the fact that cure was completed only four days after the landlord's deadline, the absence of any harm to the landlord, and the extreme consequences to her arising from the forfeiture of her lease are equities that must be considered in deciding whether her tenancy should be terminated.²

Far from "eviscerating" the unlawful detainer statute, relief from forfeiture is an explicit part of that statute. *See RCW 59.12.190, and*

²This argument assumes that Indigo has pled an actionable breach of the lease, which Ms. Wadsworth denies. This issue is entirely separate from the argument that Indigo's lease prohibits it from relying on this single minor violation to support lease termination through an unlawful detainer action in the first place.

Thisius v. Sealander, 26 Wn.2d at 818 (“[A] tenant is entitled to relief from forfeiture even after judgment,” citing the earlier codification of current section 190.) The statute explicitly requires “full performance of the conditions of covenants stipulated” as a condition of relief. That compliance must necessarily occur after the expiration of the ten-day notice period, because compliance prior to that deadline would have eliminated the basis for the judgment in the first place. Indigo quotes *Thisius v. Sealander* in its brief, but inexplicably fails to address the language quoted above or the terms of RCW 59.12.190, which were expressly argued in Ms. Wadsworth’s opening brief at page 20.

D. Indigo unlawfully terminated Ms. Wadsworth’s tenancy.

Indigo disingenuously claims that it did not “terminate” Ms. Wadsworth’s tenancy because her tenancy was actually terminated by the unlawful detainer action itself, not by Indigo. Indigo argues that it did not serve a “notice of termination” but rather served a notice to comply with the lease covenants. This argument ignores the fact that Indigo subsequently filed and served a complaint that explicitly sought to terminate Ms. Wadsworth’s tenancy. (“Plaintiff prays for judgment . . . for forfeiture of defendant(s) [*sic*] tenancy” , *Complaint*, p.2, CP 116; it also ignores the fact that the statutorily required summons states that “Your landlord is asking the court to terminate your tenancy” Indigo unquestionably sought to terminate Ms. Wadsworth’s tenancy by filing the

unlawful detainer action based solely on a single, minor alleged violation of her lease. Both the lease and the Section 8 statute and regulations prohibit this.

Indigo attempts to avoid responsibility for its violation of the lease and regulations by arguing that “termination” is a technical term that includes only a landlord’s unilateral decision not to renew a lease or extend a month-to-month tenancy. *Indigo Brief at 18-19*. However, Indigo’s interpretation of the word “termination” does not appear anywhere in the parties’ lease, and is contradicted by the express terms of the HUD Addendum to the parties’ lease. Indigo claims that RCW 59.12.030(2) defines “termination”, *Indigo Brief at 18*, but RCW 59.12.030 does not even *mention* the word “termination”, much less attempt to provide an all-encompassing definition applicable to all cases. The statute simply defines the seven different ways a tenant can be guilty of a statutory “unlawful detainer”.³ Indigo unquestionably terminated Ms. Wadsworth’s lease for a single, minor alleged lease violation, which is prohibited by the parties’ Lease and by applicable federal Section 8 law.

E. Indigo ignores controlling federal law.

Even if Indigo could prevail on its “termination” argument as a

³ One of those examples -- an uncured violation of a lease covenant other than rent, *RCW 59.12.030(4)*, -- is the provision under which Indigo proceeded to terminate Ms. Wadsworth’s tenancy. By Indigo’s logic, this subsection would be the sole definition of “termination of tenancy”.

matter of state law, the legal niceties of Indigo's argument are entirely pre-empted by controlling federal law. Federal Section 8 legislation explicitly provides that the tenant must be given an initial one-year lease which ***"shall provide that during the term of the lease, the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease."*** 42 U.S.C. § 1437f(o)(7)(C)(emphasis added). When Congress passed this statute, it could not possibly have known how each state might define terms or set procedures under at least fifty different landlord/tenant laws. But Congress intended and could reliably expect that courts in all fifty states would understand and enforce a lease provision that prohibits landlords from evicting Section 8 tenants "except for serious or repeated violation of the terms and conditions of the lease." The issue is not whether "termination" has some specialized or unique meaning under state law. The issue is whether state law has been pre-empted by federal law and the lease terms that the federal law require. Knowing that it cannot prevail on this issue, Indigo simply ignores the fact that Section 8 law clearly prohibits eviction under the circumstances of this case.

In addition to ignoring the applicable federal statute and regulations, Indigo stands the relationship between state and federal landlord-tenant law on its head with its discussion of ***Housing Authority of Everett v. Terry***, 114 Wn.2d 558 (1990). *Indigo Brief at 15-16*. In

Terry, the Housing Authority attempted to terminate a tenancy in federally subsidized housing for the mentally ill by issuing a ten-day notice under RCW 59.12.030(4) which did not give the tenant an opportunity to cure the defect, as required by that statute. The tenant argued that an opportunity to cure was a jurisdictional prerequisite to the trial court's subject matter jurisdiction over the unlawful detainer action. The Housing Authority argued that it was not required to comply with the state law "opportunity-to-cure" requirement because Congress intended "prompt eviction of tenants under circumstances such as those presented in this case." *114 Wn.2d at 565*. The trial court agreed with the Housing Authority, and held that federal law pre-empted the "opportunity-to-cure" requirement.

The Washington Supreme Court reversed. The Court pointed out that the Housing Authority had admitted in its brief that it had elected to use the state unlawful detainer procedure in order to avoid a lengthy grievance hearing that would be required under federal law. The Court held that a landlord who elects to use the state unlawful detainer statutes when a parallel federal eviction process is available cannot then turn around and assert federal pre-emption in order to avoid one of the state law requirements:

Having enjoyed the federal procedural advantage of a hearing substitution, as well as the substantive advantages of accelerated trial and restitution under our state's landlord

and tenant act, the Housing Authority cannot be relieved of its burden of compliance with Washington's statutory procedural requirements.

114 Wn.2d at 568. The Court also held that there was no conflict between the federal and state notice requirements, because it was possible to draft a notice which satisfied the requirements of both statutes. *Id. at 569.*

Terry is wholly inapposite here. Ms. Wadsworth is not trying to claim a benefit under state law and then hide behind the protection of the federal statute. To the contrary, she has consistently relied on federal law, and the federal law protections incorporated into her Lease. Moreover, there is a real conflict here between state and federal law – federal law prohibits eviction of Section 8 tenants for minor lease violations, while Indigo contends that state law allows eviction for any lease violation, however small. Finally, it is indisputable that Congress intended to provide extra protection for Section 8 tenants in exchange for giving landlords the security of federally-backed Section 8 rents. *See Barrientos v. 1801-1825 Morton, LLC*, 583 F.3d 1197, 1202 (9th Cir. 2009).

F. The Trial Court Had Discretion to Balance the Equities and Deny the Writ.

In addition to all of the above errors, Indigo does not even attempt to address the trial court's error in holding that it had no discretion to deny the Writ of Restitution. The law on this issue is clear and unequivocal. Ironically, it is succinctly set out in one of the cases cited by Indigo in its

brief:

There is no question but that equity has a right to step in and prevent enforcement of a legal right whenever such an enforcement would be inequitable.

Thisius v. Sealander, 26 Wn.2d at 818.

Shoemaker v. Shaug, 5 Wn. App. 700 (1971) is directly on point.

There, a commercial tenant had assigned its lease without getting the landlord's consent of the lessor, in violation of the lease. The trial court entered judgment in the landlord's favor terminating the lease, and the tenant-assignee appealed.

The Court of Appeals reversed. The Court held that even though there had been a breach of the lease, "nevertheless . . . the lease should not be forfeited." *Id. at 703*. The Court explained:

It is elementary law in this jurisdiction that forfeitures are not favored and never enforced in equity unless the right thereto is so clear as to permit no denial. . .

Equity's abhorrence of forfeiture is mirrored in the unlawful detainer code [. . .] RCW 59.12.190. . . .

Id. at 704. The Court noted that "equity's goal is always to do substantial justice to both contracting parties when a forfeiture is sought," and that the tenant-assignee there would suffer a substantial loss while the landlord would lose nothing. *Id.* The Court concluded that "[c]learly this is a case where equity should 'step in' to prevent an inequitable forfeiture." *Id. at 705*.

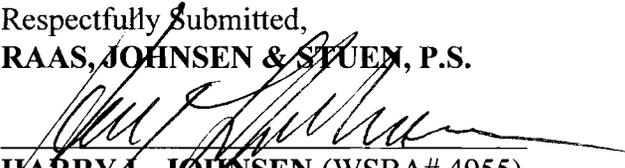
The case at bar is equally compelling. Indigo would suffer no harm if the trial court had refused to terminate Ms. Wadsworth's lease -- rent was guaranteed and the issue of the plywood screen had been resolved in Indigo's favor before suit was even filed. Ms. Wadsworth, on the other hand, had much to lose. She is indigent, and unable to afford a place to live without Section 8 benefits. *CP 54*. Indigo's eviction action triggered an administrative proceeding to terminate Ms. Wadsworth's Section 8 benefits, *CP 88*, and caused Ms. Wadsworth and her 7-year-old daughter to become homeless. Only Judge Uhrig's belief that he lacked the power to do otherwise could have caused him to put Ms. Wadsworth and her daughter on the street simply for leaving a piece of plywood on a balcony four days too long. This was clear error.

G. CONCLUSION

For all the reasons stated above and in Ms. Wadsworth's Opening Brief, the Court should reverse the trial court, hold that Ms. Wadsworth's tenancy could not be terminated for the alleged lease violation, remand the cause to the trial court for dismissal of Indigo's complaint and for further proceedings consistent with governing federal law, and hold that Ms. Wadsworth is the prevailing party both on appeal and in the trial court.

DATED this 13 day of January, 2012.

Respectfully Submitted,
RAAS, JOHNSEN & STUEN, P.S.



HARRY L. JOHNSEN (WSBA# 4955)
Attorney for Tina Wadsworth

DECLARATION OF MAILING

I, Lynn S. Torno, hereby declare under penalty of perjury under the laws of the State of Washington that, on the date set forth below, I placed a true and correct copy of the foregoing reply brief in the US Mail, postage prepaid, addressed to Michael Walsh, Puckett & Redford PLLC, 901 Fifth Avenue, Suite 800, Seattle, WA 98164.

Dated this 13th day of January, 2012.



Lynn S. Torno, Paralegal