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No. 69305-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SEAWEST INVESTMENT ASSOCIATES, L.L.C. a Washington
Limited Liability Company,

Appellant,

vs.

GEORGE CHARLES and WENDY CHARLES and the marital
community composed thereof, SAM DIBELLO and RENEE
DIBELLO and the marital community composed thereof, EMO
ROWE and CAT ROWE and the marital community composed
thereof, and NWREA, LLC, a Washington limited liability company,

Respondents,

and

JILL JENSEN and JEREMY AMES and the marital community
composed thereof,

Defendants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Respondents Charles, DiBello, Rowe (hereafter, the “Owners”) and NWREA, LLC (“NWREA”) are entitled to an order of this court affirming the trial court’s grant of summary judgment, which dismissed the claims of petitioner Seawest Investment Associates, LLC (“Seawest”), and entered judgment against Seawest for the attorney’s fees and costs incurred by Respondents.

Contrary to Seawest’s assertions, the undisputed facts establish that an *informal* lease arose between Seawest and NWREA as a result of the failure of Seawest to execute timely a written lease drafted by Seawest. When Seawest failed to obtain the notarization of the written lease before a September 26, 2007, 5:00 p.m. deadline contained in the written lease, the failure to satisfy the condition voided all acts of the parties related to the written lease. Nothing said or done by Seawest or the Respondents revived the void written lease document. Instead, NWREA paid a deposit, initial rent and took possession of the premises offered by Seawest. Seawest accepted NWREA’s funds, and allowed NWREA to take possession of the premises. NWREA continued to pay rent each month thereafter.

When NWREA requested rent reductions that Seawest was unwilling to grant, NWREA defaulted in payment of rent, and paid Seawest less than the monthly rent claimed due. Seawest sued the Owners instead of NWREA, claiming the Owners were members of a general partnership identified as “Keller Williams Realty Kirkland,” the tenant identified in the void written lease. The Owners asserted that the tenant of the lease with Seawest was NWREA, which does business as “Keller Williams Realty Kirkland,” and claimed that Seawest was not entitled to collect delinquent rent from anyone; not from the Owners, because they were not the “tenant” under the written lease, nor from NWREA, because the written lease was defective, and could not be enforced against NWREA for any period exceeding one calendar month. Seawest added NWREA as a defendant in the lawsuit.

The trial court agreed with Respondents that, based upon the undisputed facts, the written lease relied upon by Seawest was void for lack of timely execution by Seawest, and that the resulting informal lease between NWREA and Seawest had a month-to-month term. Since Seawest continued to accept monthly rent from NWREA throughout NWREA’s occupancy of Seawest’s premises, Seawest had no claims for unpaid rent against anyone, and

dismissed Seawest's claims. Judgment was entered in favor of the Owners for the attorney's fees and costs they incurred in defending against Seawest's claims.

II. RESTATEMENT OF ISSUES

1. Was an informal lease formed between Seawest and NWREA?

2. Did Seawest's failure to "execute" a proposed written lease by the deadline contained in the lease prevent formation of a written lease between Seawest and Respondents Charles, DiBello and Rowe?

3. Did NWREA's occupancy of the leased premises, and Seawest's acceptance of rent from NWREA, create the "lease" referred to by the parties during their pre-litigation relationship, and throughout the proceedings before the trial court?

4. Did the Owners and NWREA establish as a matter of undisputed fact and law that Seawest's claims for delinquent rent brought against the Owners should be dismissed because (a) there was no written lease formed between Seawest and the Owners, (b) NWREA became the tenant of the leased premises by an informal lease, and (c) after declaring defaults in performance, Seawest

accepted rent from NWREA, waiving all Seawest's claims for unpaid rent?

5. Once established by undisputed facts that the Owners and NWREA were entitled to dismissal of Seawest's claims, did the burden shift to Seawest to show the existence of a genuine issue of material fact to prevent dismissal?

6. Were the issues of fact identified by Seawest in its response to the motion for summary judgment immaterial, and therefore irrelevant to the court's decision to grant the motion?

7. Did an unacknowledged amendment made to a lease - which must be acknowledged to comply with the Statute of Frauds and which amendment occurs after the contract is rendered void by its own terms - fail to resurrect the voided lease document?

8. Is there any evidence to support Seawest's claim that Respondents waived their rights to challenge Seawest's enforcement of the written lease?

9. Is there any evidence to support Seawest's claim that Respondents are estopped from challenging Seawest's enforcement of the written lease?

10. Did Seawest waive its right to claim a default in the payment of rent by its acceptance of rent from NWREA?

11. Was the trial court entitled to enter summary judgment in favor of NWREA based upon the pleadings submitted by the other parties to the action, when the position of NWREA in the action was fully briefed and Seawest made all of its arguments against the grant of relief to NWREA before judgment was entered?

12. Are Respondents entitled to an award of attorney's fees and costs incurred on appeal?

III. RESTATEMENT OF FACTS

A. Seawest Offered to Lease its Property, Conditioned Upon a Deadline for Execution of the Lease by All Parties.

In 2007, the Owners of NWREA engaged in negotiations for the lease of office space located at 13131 NE 85th Street in Kirkland, Washington, owned by Seawest. (CP 246) Representing Seawest in the negotiations was its manager, Massoud M. Aatai. (CP 518). During the course of negotiations, Mr. Aatai prepared a lease agreement for consideration and execution by "Tenant: Keller Williams Realty" (on the title page) and "Keller Williams Realty Kirkland" on the signature page and in the single corporate form of jurat supplied for the notary. (CP 752, Charles Dep. P. 53). The ambiguity created by Mr. Aatai's unskilled legal work forms the basis for this dispute.

Respondents Charles, DiBello and Rowe formed NWREA to operate a real estate brokerage known as “Keller Williams Kirkland.” (CP 740, Charles Dep. P. 6-8) Jill Jensen and Jeremy Ames, two other named defendants who initially held ownership interests in NWREA, did not participated in the case after Jill Jensen and the marital community composed of Jill Jensen and Jeremy Ames filed a petition for relief with the United States Bankruptcy Court. (CP 5-6) No relief was sought against Jensen and Ames by Seawest due to the bankruptcy petition, and they were not parties to the trial court proceedings. (CP 934, footnote 1)

As a part of the negotiations which led to Mr. Aatai’s preparation of the lease which forms the foundation of Seawest’s claims, Mr. Aatai also sought the personal guarantees of all owners of the tenant who would occupy the leased space. (CP 520) Therefore, along with the lease, Mr. Aatai also delivered to the Owners for execution personal guaranties. (CP 748, Charles Dep. P. 40-41) The notable feature of the personal guaranties delivered to the Owners was the duration of the personal guaranties; only the first 3 years of the 5 year lease term were to be guaranteed by the Owners; the last 2 years of the proposed lease term were not guaranteed at all. (CP 520)

The lease document drafted by Mr. Aatai also had an unusual provision which required that the lease negotiations be concluded, and the lease executed by all parties, by a certain date and time. Article 1, *Basic Terms*, subsection 1.2, *Minimum Rent* (CP 528-29) provides:

LEASE AND RENT COMMENCEMENT: This lease will become null and void unless it is executed by all parties by 5:00 p.m. September 26, 2007. Lease Commencement shall be upon mutual execution of this lease agreement...

Thus, all parties had to “execute” the written lease by 5:00 p.m. on September 26, 2007, or “[t]his lease will become null and void.”

B. The Written Lease Prepared by Seawest’s Manager, Mr. Aatai, Was Signed.

It is undisputed that the Owners executed the lease as a group, under the name “Keller Williams Realty Kirkland,” and their signatures were notarized as the “agents” of Keller Williams Realty Kirkland on September 26, 2007. The signature of Mr. Aatai was acknowledged on September 27, 2007, a day later, and after the deadline set by lease subsection 1.2. (CP 551) Seawest treated the lease as having been executed on September 27, 2007, after the September 26 deadline imposed by Seawest in subsection 1.2; Seawest referred to the lease’s “Mutual Execution Date” as “September 27, 2007” on the title page of the lease. (CP 523) In

almost every declaration filed in this case – including his declaration in opposition to the motion for summary judgment - Mr. Aatai stated that the lease was entered into “on or about September 27, 2007.” (CP 25, 381, 518, 756).

It was not until after the motion for summary judgment was granted that Mr. Aatai claimed he actually had signed the lease on September 26, 2007, before the 5:00 p.m. deadline stated in subsection 1.2. (CP 778-79) Even then, Seawest never controverted the fact that the acknowledgement of Mr. Aatai’s signature made by the notary on September 27, 2007, *after* the deadline had passed. The uncontroverted evidence is that the lease was not *executed* before the September 26, 2007 5:00 p.m. deadline because the last, critical step in the creation of a multi-year lease – the notary’s acknowledgement of the landlord’s signature – was not completed until September 27, 2007. Together with Seawest’s repeated admissions throughout the case that the lease was “mutually accepted” on September 27, 2007, it is well-established by undisputed testimony that the parties missed the September 26, 2007 5:00 p.m. deadline for execution because the lease was not notarized by the deadline.

C. NWREA Tendered Performance as the “Tenant” to the Landlord, Seawest

Along with the signed lease, on September 26, 2007 the Owners and NWREA tendered to Seawest checks for the lease deposit and first month’s rent, checks accepted and cashed by Seawest. (CP 620-24) The checks were drawn on the bank account of NWREA, which the Owners believed was the tenant described in the lease as “Keller Williams Realty Kirkland.” (CP 621, 624) One of the exhibits to the lease, Exhibit C “Construction Provisions,” even contained a notation next to the initials of the “Tenant,” identifying the initialing party as “NWREA, LLC.” (CP 556).

However, Seawest denies that it intended to form a lease with NWREA. (CP 519) Seawest insists that it always intended to create a lease between Seawest and the individual Owners directly; Seawest makes this assertion even though it admits that the limited, 3 year guaranties by the Owners, also created by Seawest, would have been rendered superfluous by Seawest’s assertions of personal liability for the Owners under the lease. (CP 520) There is a dispute of fact regarding the intentions of the parties when executing the lease, but the dispute of fact described here is not a *material* dispute, because the written lease which purported to create the

individual liability was rendered void. The lease was not executed by the date and time required by the lease, and the condition of the lease's formation, execution by September 26, 2007 at 5:00 p.m., was never fulfilled.

A landlord-tenant relationship actually commenced, but with each party making different assumptions about whom the "tenant" really was. Seawest claims that it entered a written lease with individual members of a partnership identified as "Keller Williams Realty Kirkland," (CP 22-23; 573) and the Owners believed that the tenant obligated to perform a 5 year lease obligation with Seawest was NWREA, which does business under the name Keller Williams Realty Kirkland. (CP 248-249; 335-36; 620-24) NWREA paid all the deposits and rent due Seawest from the outset of the relationship, and submitted to Seawest proof of insurance identifying NWREA as the tenant. (CP 343-46; 620-22) There is no evidence that Seawest ever refused rent paid by NWREA.

Instead of a written lease between Seawest and "Keller Williams Realty Kirkland," an informal lease, or "general letting" as it is referred to by Professor Stoebuck in his treatise (Stoebuck, *Washington Practice*, Volume 17, Landlord and Tenant, §6.14, p. 333), occurred because NWREA took possession of the premises,

paid the deposit and the rent, and operated a business called “Keller Williams Realty Kirkland.” Seawest accepted its performance.

D. The Lease Amendment Was Signed.

In May, 2009, with NWREA experiencing difficulty in paying rent, the Owners sought a reduction in the rent payment due Seawest. (CP 521) Referring to a lease “dated September 10, 2007” between Seawest and “Keller Williams Realty Kirkland (Tenant),” the lease amendment offered by Seawest reduced the monthly lease payment immediately due Seawest, but accumulated the shortfall and applied interest to the shortfall at 8% per annum. (CP 568-69). The amendment also provided that the guarantors would be subject to the amendment by signing the amendment. (CP 568). All the Owners signed the amendment under the heading “Keller Williams Realty Kirkland,” but none of the signatures – landlord or tenant – were acknowledged. (CP 568) The lease date of “September 10, 2007” refers to another error of Mr. Aatai; the lease was dated on its cover page as “mutually accepted” on September 27, 2007, after the execution deadline, but in the recitals in the document refer to a September 10, 2007 date. (Compare CP 523 with CP 528)

E. The Lawsuit; Motions for Summary Judgment.

In October, 2010, George Charles sent an email to Seawest's manager Mr. Aatai, explaining that NWREA could not make the rent payments due, and sought a renegotiation of the rent obligation. (CP 574). Mr. Aatai responded by claiming that he had never heard of NWREA (despite having received checks from NWREA for payment of rent commencing in September, 2007) and that the Owners were personally responsible for payment of rent as members of a partnership called "Keller Williams Realty Kirkland." (CP 573). This action followed, with Seawest filing a complaint on May 6, 2011 to collect sums allegedly due Seawest (CP 1-4). One of the allegations of Seawest's complaint, contained in Paragraph 6, stated that "On *September 27, 2007*, Seawest and the defendants entered into a commercial lease agreement..." (CP 2, emphasis added). When Seawest amended its complaint on April 26, 2012, almost a year later, to add NWREA as a party on the basis that it too was responsible for unpaid rent, the allegations of paragraph 6 remained unchanged; the date of lease execution was still stated by Seawest to be "*September 27, 2007.*" (CP 3).

The Owners initially defended Seawest's claim by seeking to show the court that there were uncontroverted facts establishing

NWREA as the tenant of Seawest, and *not* the Owners as members of a non-existent partnership called “Keller Williams Realty Kirkland.” (CP 16, 96-100) After defeating Seawest’s initial effort to obtain a summary judgment on the basis that NWREA was the true tenant (CP 33-34), Charles sought summary judgment to establish NWREA as the proper tenant, and the Owners as guarantors whose responsibility was limited to the 3 year duration of the separate guaranties. (CP 227-240)

While dismissal of the claims against the Owners was sought through summary judgment, the Owners also preserved their other defenses against Seawest’s enforcement of the written lease. The answers of the Owners all denied the allegations of paragraph 6 of Seawest’s complaint, which alleged the existence of a written lease. (CP 15; 351; 360) Defendants DiBello alleged in their answer that “Plaintiff’s claim is barred for failure of the satisfaction of a condition precedent to DiBello’s obligation to perform any contract that might exist between plaintiff and DiBello.” (CP 361) Rowe raised the same defense, stating “Plaintiff’s claim is barred for failure of a condition precedent to Defendant’s obligations under the contract.” (CP 353). The defenses related to Seawest’s claim

that the written lease governed the landlord-tenant relationship were appropriately raised and preserved.

Twice Seawest sought summary judgment against the Owners on the written lease, claiming that the general partnership tenant identified in the written lease made each Owner liable for the partnership's breach, rejecting the Owners' claim that NWREA was known to Seawest and the intended tenant. (CP 19-24; 364-71) As a part of each motion for summary judgment, Mr. Aatai stated in his motion and supporting declarations that the lease was the "September 27, 2007 lease," or that parties entered into the written lease "on or about September 27, 2007," just as Seawest had alleged in its complaint. (CP 3; 20; 25; 365; 381; 518). In a subsequent declaration, submitted on December 23, 2011, Mr. Aatai included in his declaration this additional statement: "The Lease was finalized and signed on or about September 27, 2007." (CP 520)

The trial court rejected both the Owners' and Seawest's motions for summary judgment on the issue of the tenant's identity in the written lease, finding that factual disputes concerning the intention of the parties at the time the written lease and guaranties were signed precluded summary judgment relief for both parties. (CP 637-38; 661-63; 666-68). The trial court had not been called

upon to consider, however, the defense explicitly raised by DiBello and Rowe in their answers – that the written lease was not binding on *anyone* because it was not executed by the date and time explicitly required by the lease prepared by Mr. Aatai for Seavest, a condition to the written lease taking effect at all.

F. Respondents’ Successful Motion for Summary Judgment

The motion to adjudicate the issues raised by this affirmative defense was filed by the Owners on July 29, 2012. (CP 707-15) The motion contended that (a) because the written lease was not executed by all parties by September 26, 2007, (b) the condition precedent to formation of a lease between Seawest and the Owners was not satisfied; (c) when NWREA took possession of the leased premises and paid rent to Seawest, (d) which Seawest accepted, (e) a lease was formed by Seawest and NWREA (f) which, because it was not the subject of a written agreement signed by Seawest and NWREA and Seawest, but purportedly was for a 5 year term, (g) the unwritten lease became a lease with a month-to-month term by operation of law. (CP 709-11). The Owners contended Seawest’s claim should be dismissed because nothing was owed to Seawest at all; when Seawest accepted rent from NWREA each month during

the month-to-month lease term, Seawest waived all rent claimed to be delinquent, another conclusion compelled by operation of law. (CP 711). Each of the steps to reach the conclusion that Seawest's claims should be dismissed was based upon established law and uncontroverted facts.

Consistent with the theory advocated by the Owners, the Owners included in their request for relief dismissal of all claims of Seawest against the Owners and NWREA, even though NWREA did not separately move for summary judgment. (CP 712) The proposed orders submitted to the trial court contained language seeking dismissal of Seawest's claims against NWREA, consistent with the arguments made in the Owner's motions. (CP 713-14) No additional pleadings were needed from NWREA, since its position was fully briefed by the Owner's motions.

Seawest's initial response to the motion for summary judgment was to reaffirm Seawest's initial allegation that the written lease was not executed until *September 27, 2007*, a day late. (CP 725; 756-57) Mr. Aatai did not contend that he signed the written lease on September 26, 2007 until after Seawest's initial response to the motion, and oral argument before the court. (CP 778-79) Seawest ignored the date the written lease was executed

and contended that the Owners had waived the requirements of subsection 1.2 of the written lease, were estopped from raising the defense of the failed condition precedent, or had ratified the written lease by signing the lease amendment in 2009. (CP 729-32) Before the trial court issued its final decision, Seawest addressed in writing the arguments made by the Owners for dismissal of all claims against all defendants, *including NWREA*, claiming that there existed genuine issues of material fact sufficient to keep Seawest's claims against NWREA alive even if the claims against the Owners were dismissed. (CP 764-66; 774-77; 871-85)

After its initial response and the presentation of oral argument to the trial court, Seawest later added a new basis for challenging the motion for summary judgment. Despite having repeatedly claimed that (a) the written lease's "mutual execution date" was September 27, 2007, (b) the parties entered into the written lease "on or about September 27, 2007, and (c) the written lease "was finalized and signed on or about September 27, 2007, Seawest now claimed that Mr. Aatai signed the lease on September 26, 2007, before 5:00 p.m. (CP 778-79). Seawest did not introduce any evidence to controvert the undisputed statement of the notary, contained in the jurat affixed to the written lease, that the

notarization of the written lease did not occur until September 27, 2007, after the deadline imposed by Seawest in subsection 1.2. (CP 551) Notarization of the written lease was the final step needed to execute a lease for a 5 year term (which must be notarized to comply with RCW 19.36.010(1), the Statute of Frauds). Thus, no genuine issue of material fact was raised by Mr. Aatai's belated attempt to manufacture a question of fact and escape entry of summary judgment against Seawest.

After confusion related to the trial court's inadvertent entry of judgment for the respondents, which occurred before all briefing was closed by the trial court, the trial court entered the orders of dismissal proposed by the Owners. The orders proposed by the Owners included in their scope dismissal of all claims of Seawest against NWREA. (CP 931-32).

Seawest sought reconsideration of the trial court's orders in two separate motions, one filed before the final summary judgment order was entered, and one in which Seawest sought to vacate the judgments entered by the trial court. (CP 871-85; 933-37) Before the trial court ruled on Seawest's motion to vacate, Seawest filed a Notice of Appeal to this court. (CP 970-86)

G. Reconsideration Denied; Seawest's Motion to Vacate and Notice to Terminate Tenancy

After the trial court entered its order granting the motion for summary judgment, and while the motion to vacate the judgments was pending, Seawest delivered to the leased premises a Notice of Termination of Tenancy, which purportedly directed the Owners and "Keller Williams Realty Kirkland" to vacate the leased premises, on the basis that their lease had ended. (CP 1009-14)

The notice given by Seawest was inconsistent with Seawest's contention that the lease term was for a full 5 years; the 5 year term alleged by Seawest in its complaint had several more months to run. The Notice of Termination of Tenancy purportedly terminated a month-to-month tenancy at the end of the calendar month of September, 2013; no default for failure to pay rent was recited in the Notice given by Seawest. (CP 1011) Seawest's Notice of Termination was provided by Respondents to the trial court in response to Seawest's unsuccessful motion for reconsideration. (CP 1002; 1011) Seawest designated the Notice of Termination as one of the Clerk's Papers for this appeal. (See Index to Clerk's Papers, p. 2)

IV. RESPONSE ARGUMENT

A. Standard of Review

Seawest correctly states in its Appellant's Brief (p. 18) that this court reviews the trial court's decision to grant summary judgment de novo, based upon the record considered by the trial court. *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). In addition to Seawest's correct description of the standards to be applied to summary judgment motions, the court should consider the description of the summary judgment process by the court in *Sligar v. Odell*, 156 Wn. App. 720, 233 P.3d 914 (Div. I, 2010), which description has particular importance in the court's analysis of this case:

A defendant may move for summary judgment by showing that there is an absence of evidence to support the plaintiff's case.

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial", then the trial court should grant the motion.

"In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof

concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.”

In making this responsive showing, the nonmoving plaintiff cannot rely on the allegations made in the pleadings. Rather, the responding party is required to set forth specific facts “by affidavits or as otherwise provided in [CR 56(e)],” showing that there is a genuine issue for trial. “At that point, the evidence and all reasonable inferences therefrom is considered in the light most favorable to the plaintiff, the nonmoving party. An appellate court reviewing a summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party. [citations omitted]

Sligar v. Odell, 156 Wn. App. at 725-26. It is the Respondents’ contention that the Respondents showed the absence of the existence of a genuine issue of material fact here, and shifted the burden to Seawest to show facts sufficient to entitle Seawest to prevail on its claims. Seawest was unable to prove an essential element of its claim for enforcement of the written lease – timely execution by Seawest – and Respondents were entitled to dismissal.

B. No Written Lease Was Ever Formed Between Seawest and the Owners. (Appellant’s Issues #1, #2 and #7)

In this case, there are two reasons why the written lease relied upon by Seawest was never formed. One reason is that the parties failed to satisfy a condition precedent to the formation of the written lease, contained in subparagraph 1.2, which required all

parties to execute the lease before 5:00 p.m. on September 26, 2007. A second reason is that there was never any meeting of the minds between Seawest and the Respondents regarding the identity of the tenant for the lease.

1. Creation of the Written Lease Agreement Had a Condition Precedent

In order to enforce the written lease, Seawest had to prove that it complied with all conditions precedent contained in the lease contract, one of which was subsection 1.2; breach of a material condition precedent relieved the Owners from any liability the Owners offered to undertake when they signed the written lease. See *Ross v. Harding*, 64 Wn.2d 231, 240-41, 391 P.2d 526 (1964).

It is undisputed that the provisions of subsection 1.2 of the written lease required all parties to execute the lease before 5:00 p.m. on September 26, 2007, or else the “lease will become null and void.” There is no ambiguity in this pronouncement; any action taken by the parties to create the lease became a nullity if complete execution was not achieved by the stated deadline.

2. The Condition Precedent Was Not Satisfied Timely

A lease with a term exceeding one year must be acknowledged, and if not acknowledged, the lease becomes a

month-to-month lease. See *Labor Hall Association v. Danielsen*, 24 Wash.2d 75, 163 P.2d 167 (1945). The acknowledgement is the essential final step in “execution” of a multi-year lease, and without the acknowledgement, a lease cannot become effective for a 5 year term. Therefore, the undisputed acknowledgement of the written lease on September 27, 2007 means that the written lease was not “executed” until September 27, 2007, because the last step in the execution process did not occur until that date.

“Execution” is defined as “Carrying out some act or course of conduct to its completion...The completion, fulfillment, or perfection of anything, or carrying into operation and effect.” Execution of an instrument is more than just affixing a signature – it includes “signing, sealing and delivering” the instrument. *Black’s Law Dictionary*, Revised Fourth Edition, p. 677. “Execution includes performance of all acts necessary to render an instrument complete and of every act required to give the instrument validity or to carry it into effect.” *Northwest Steel Rolling Mills v. Commissioner of Internal Revenue*, 110 F.2d 286, 290 (9th Cir. 1940), *rev’d on other grounds*; *Helvering v. Northwest Steel Rolling Mills*, 311 U.S. 46, 61 S.Ct. 109 (1940).

Until the written lease was acknowledged, it was incomplete and unenforceable as a 5 year obligation; the acknowledgement had to be affixed to fully “execute” the written lease. If Section 1.2 of the written lease had made “signing” the written lease by 5:00 p.m. of September 26, 2007 a satisfactory fulfillment of the condition, it would have used the word “signed” rather than “executed;” but because “executed” was the chosen condition, the acknowledgement of the written lease had to be completed by the 5:00 p.m., September 26, 2007 deadline.

3. Seawest’s Failure to Satisfy the Condition Timely Rendered the Execution of the Written Lease by Respondents Void.

Failure of Seawest to complete execution of the written lease by the 5:00 p.m. September 26, 2007 deadline rendered all the signatures and acknowledgements of the Owners void, along with the contents of the written lease. No agreement was reached by the parties on formation of a lease contract before the time limit for the formation of the lease passed.

A “void” contract is “one which never had any legal existence or effect, and such contract cannot in any manner have life breathed into it.” *Black’s Law Dictionary*, Revised Fourth Edition, 1972, p.1745. *The Restatement (Second) of Contracts*, §7, comment a,

defines a void contract as “[a] promise for breach of which the law neither gives a remedy nor recognizes a duty of performance by the promisor,” and notes that “such a promise is not a contract at all.” See *Golden Pices, Inc. v. Fred Wahl Marine Construction, Inc.*, 495 F.3d 1078, 1082 (9th Cir. 2007). Or, as stated by the court in *Taylor Distributing Co., Inc. v. Haines*, 31 Wn. App. 360, 364, 641 P.2d 1204 (1982), “An agreement which produces no legal obligation is frequently called a void contract. Though the phrase is often convenient, it is a contradiction in terms. If an agreement is void it is not a contract.”

No relationship between Seawest and the Owners was created by the written lease agreement which Seawest seeks to enforce in this case. No agreement having been reached, there was nothing for the Owners to modify or ratify in the future, through further communications with Seawest, or through conduct which followed expiration of the deadline imposed by subsection 1.2.

4. Seawest Confuses the Void Written Lease With a Contract that is “Voidable”

Seawest is confused by the difference between a contract that is void, for failure of a condition precedent to occur, and a contract which is voidable by the parties due to some deficiency in a party’s

performance. Seawest argues (at pages 26-27 of its Appellant's Brief), without citation to any legal authority, that the written lease had to come into effect first, before respondents could rely upon subsection 1.2, requiring execution of the Lease by September 26, 2007.

By making this argument, Seawest ignores the basic contract principles of "offer and acceptance," and fails to distinguish between the effect of a "void" instrument from a "voidable" one. As stated in *Warner v. Hibler*, 146 Wash. 651, 654, 264 P. 423 (1928):

...There is a vast difference between void and voidable. 'Void' means that an instrument or transaction is so nugatory and ineffectual that nothing can cure it; 'voidable,' when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it.

A "voidable" contract is defined in the Restatement of Contracts (1 Restatement of the Law of Contracts 12, s 13) as one 'where one or more parties thereto have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract; or by ratification of the contract to extinguish the power of avoidance.'" *Taylor Distributing Co., Inc. v. Haines*, 31 Wn. App. at 364.

Seawest's arguments require this court to change the language of the written lease, declaring the written lease "void" for lack of timely execution, to "voidable." The court must give effect to

the “ordinary, usual and popular meaning” of the words used, as the “objective manifestation” of their intent. *Hearst Communications, Inc. v. Seattle Times Company*, 154 W.2d 493, 503-04, 115 P.3d 262 (2005).

The Owners tendered to Seawest an offer to lease, on Seawest’s own contract form, which contained a provision which required that the offer be accepted by a date and time. The offer was delivered to Seawest, and valid only if accepted timely by Seawest. Seawest chose not to execute the written lease by the deadline stated in subsection 1.2, and the restriction upon formation of the written lease took effect. As a result of Seawest’s failure to comply with the pre-condition to lease formation, all acts of the parties to execute the written lease which occurred before the deadline were rendered void. The language relied upon by Seawest, “This lease *will become* null and void...” refers to the offer of the parties to enter into the lease expiring if the condition is not timely fulfilled. Any other interpretation runs directly contrary to the meaning of the word “void.”

5. There Was No Mutual Assent to the Written Lease, as a Matter of Fact and Law.

It is hornbook law that in order to form a contract, there must be mutual assent, a “meeting of the minds” between the parties. As explained by the court in *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122Wn. 2d 371, 388-89, 858 P.2d 245 (1993)

Mutual assent is required for the formation of a valid contract. “It is essential to the formation of a contract that the parties manifest to each other their mutual assent to **the same bargain at the same time**. Mutual assent generally takes the form of an offer and an acceptance.” (Footnote *389 omitted.) *Pacific Cascade Corp. v. Nimmer*, 25 Wash.App. 552, 555–56, 608 P.2d 266, review denied, 93 Wash.2d 1030 (1980) [Emphasis added].

In this case, it is undisputed that no mutual assent to the lease occurred between Seawest and the Owners.

Seawest claims that it believed that a general partnership called “Keller Williams Realty Kirkland” agreed to sign the written lease, and concluded that by entering into a lease with the general partnership, all its partners assumed personal liability for the performance of the written lease, without regarding to the 3 year limitation on the duration of the guaranties. (CP 22-23; 573) However, the Owners signed the written lease as the “agents” of “Keller Williams Realty Kirkland,” and it is undisputed that the Owners believed the

tenant to be NWREA, the Keller Williams franchisee in which they owned membership interests and which paid all the sums due Seawest. Both Seawest and the Owners held different intentions regarding an essential term of the written lease, the identity of the tenant, and no lease contract was formed between them.

C. There Is No Genuine Issue of Material Fact Raised by the Testimony of Seawest’s Manager, Aatai (Appellant’s Issue #2)

Mr. Aatai’s last declaration, in which he claims to have signed the written lease on September 26, 2007 before the 5:00 p.m. deadline (CP 778-79), does not controvert the undisputed fact that the notarization of the written lease, and therefore the lease *execution*, took place on September 27, 2007, a day later.

1. Execution of the Written Lease Did Not Occur Until the Lease Was Acknowledged, Which Occurred September 27, 2007

RCW 64.08.050 describes what a notary public must do to acknowledge a signature which purports to convey an interest in real property, and the effect of the notary’s acknowledgement. The date recited in the acknowledgement – in this case September 27, 2007 – is “the date stated in the certificate that he, she, or they, executed the same freely and voluntarily.”

The notary's uncontroverted statement, contained in the jurat for the written lease, is uncontroverted evidence that Seawest submitted the written lease for acknowledgement on September 27, 2007. The notary's signature on the certificate "shall be prima facie evidence of the facts therein recited." RCW 64.08.050. Seawest supplied no evidence to the court which controverted the notary's statement establishing September 27, 2007 as the date of the Seawest's execution of the Lease. Mr. Aatai may have signed the day before, but it is uncontroverted that the written lease was notarized, completing execution and making it the act of the landlord, Seawest, on September 27, 2007.

2. Mr. Aatai's Declaration Cannot Overcome Judicial Admissions Made by Seawest Prior to Submission of Mr. Aatai's Declaration.

When a party makes factual statements in their pleadings, the statements are properly treated as judicial admissions, conclusive upon the party making the admissions. See *Seidler v. Hansen*, 14 Wn. App. 915, 921, 547 P.2d 917 (1976). Seawest admitted that the written lease was executed on September 27, 2007, because the document signed by Mr. Aatai for Seawest recites the September 27, 2007 as the date of "Mutual Execution." Seawest repeatedly alleged in its pleadings that the written lease was formed

by the parties on September 27, 2007, after the deadline set in subsection 1.2. Seawest refers to the “September 27, 2007 Lease” in numerous pleadings, including those pleadings filed by Seawest *after* defendants’ motion raised the issue of the timing of the execution of the Lease.

The trial court properly treated Seawest’s description of a September 27, 2007 “mutual acceptance” of the Lease, and Seawest’s repeated references to the “September 27, 2007 Lease,” as judicial admissions binding upon Seawest as the date on which the written lease was executed.

3. The Court Was Entitled to Disregard Mr. Aatai’s Declaration as a “Self-Serving” Contradiction of Prior Testimony.

The admissions made by Mr. Aatai and Seawest cannot be contradicted by a new declaration of Mr. Aatai. "When a party has given answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 121, 22 P.3d 818 (2001); See also *Marshall v. AC & S, Inc.*, 56 Wn. App.

181, 185, 782 P.2d 1107 (1989); *State Farm Mutual Automobile Insurance Co. v. Treciak*, 117 Wn. App. 402, 71 P.3rd 703 (2003).

Mr. Aatai's declaration attempts to contradict his and Seawest's admissions that the execution of the written lease occurred on September 27, 2012, by stating that Mr. Aatai "signed" the written lease on September 26, 2007. If this statement was offered by Mr. Aatai for the purpose of creating a genuine issue of material fact, it should be disregarded by the court because it seeks to controvert Seawest's and Mr. Aatai's prior admissions. However, if treated by the court as only evidence of the date Mr. Aatai "signed" the written lease, but distinguishes the fact that the written lease was not "executed" because the required notary's acknowledgement did not occur until September 27, 2007, then Mr. Aatai's declaration does not create a genuine issue of fact, even if considered by the court.

D. The Burden of Coming Forward With Controverting Evidence Properly Shifted to Seawest After Respondents Introduced Evidence That the Condition Imposed by Written Lease Subsection 1.2 Was Not Timely Satisfied (Appellant's Issue #1)

Seawest argues in its Appellant's Brief (at page 19-20) that the trial court improperly shifted the burden of proof to Seawest to show that the lease was executed by all parties by 5:00 p.m. on

September 26, 2007. The shift in the burden of proof properly occurred only after the Respondents satisfied their burden of introducing evidence sufficient to show that the parties had *not* executed the written lease timely.

The manner in which the court should treat evidence introduced by the parties in support of or in opposition to summary judgment is succinctly stated by this court in *Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 266 P.3rd 881 (2011):

The moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a defendant who meets the initial burden, then the inquiry shifts to the party with the burden of proof at trial. If that party fails to make a showing sufficient to establish an element essential to its case, and on which that party bears the burden of proof at trial, then the trial court should grant the motion.

Seawest has the burden of proof at trial to prove every element of its claim for enforcement of the written lease against the Owners. After the Owners introduced evidence in support of their motion for summary judgment, and showed the trial court that the written lease was not timely executed by Seawest rendering the written lease void, the burden of proof shifted to Seawest to prove timely execution of the written lease. The trial court correctly described the burden of proof in its order. Seawest failed to show

timely execution of the written lease; the admissions of a September 27, 2007 execution by Seawest and evidence of the notary's acknowledgement of the written lease on September 27, 2007 were never controverted by evidence.

E. An Informal Lease Was Formed Between Seawest and NWREA When Seawest Accepted Rent From NWREA, and Allowed NWREA to Occupy the Leased Premises. (Appellant's Issue #8)

A landlord who allows a tenant to enter the leased premises, and a tenant who pays rent to the landlord in exchange for the right of occupancy, create a landlord-tenant relationship which is not based upon a written instrument, or any specific oral agreement. The terms used by Professor Stoebuck to describe the relationship are an "informal lease" or "general letting" of the leased premises, a "very common" arrangement. Stoebuck, *Washington Practice*, Volume 17, Landlord and Tenant, §6.14, p. 333.

When a written lease fails because of a defect in its execution by the parties, such as a violation of the Statute of Frauds provision requiring acknowledgement of leases with a term exceeding 1 year, an informal lease may also be created. Stoebuck, *Washington Practice*, Volume 17, Landlord and Tenant, §6.14, p. 334-35. In this case, the defect in formation of the lease was the failure of the

condition precedent - timely execution of the written lease by Seawest - which resulted in the written lease being rendered void. The informal lease resulted from NWREA taking possession of Seawest's premises and paying rent. NWREA became the tenant by Seawest allowing NWREA to take possession of the premises without an enforceable, written 5 year lease, and Seawest's acceptance of NWREA's deposit and rent checks.

F. The Written Lease, Void Because of Lack of Timely Execution, Was Not Revived by the Execution of the Lease Amendment. (Appellant's Issue #3)

The lease amendment relied upon by Seawest to revive the void written lease was not acknowledged. In order to create a valid lease with a term exceeding 1 year, the amendment to the written lease had to be acknowledged as a conveyance of an interest in real property. *Labor Hall Association v. Danielsen*, 24 Wash.2d 75, 94, 163 P.2d 167 (1945). The original lease acknowledgement could not supply the required acknowledgement – the instrument had been rendered void by the plaintiff's delay in signing it. When the amendment was not acknowledged, the written lease remained unenforceable for its 5 year term from the lack of an acknowledgement. Based upon all undisputed facts and the

documents exchanged by the parties, the lease had a month-to-month term.

G. There is No Evidence of Respondent's Waiver of Their Right to Challenge the Written Lease. (Appellant's Issues #4 and #5)

“Waiver is the voluntary relinquishment of a known right.” *Jones v. Best*, 134 Wash.2d 232, 241-42, 950 P.2d 1 (1998). However, the Owners acquired *no* rights under the Lease, because the Lease was void for Seawest's failure to execute the Lease by 5:00 p.m. September 26, 2007. Because a void contract never comes into existence, the parties acquired no rights to waive by their future conduct. In *Jones*, another case in which a void contract was the subject of the claim, the court came to the same conclusion: “In this case, Mr. Jones did not waive his rights by express agreement, as there was no agreement.” *Jones v. Best*, 134 Wash.2d at 242. Likewise, any subsequent communications or acts of the Owners which refer to the void written lease are of no effect.

Evidence of a party's intent to waive a right “must be shown by unequivocal acts or conduct,” “inconsistent with any intention other than to waive.” *Mid-Town Ltd. Partnership v. Preston*, 69 Wn. App. 227, 233-34, 848 P.2d 1268 (Div. I, 1993). Seawest claims that Respondents engaged in a series of unequivocal acts evidencing

their intent to waive the requirements of subsection 1.2 of the written lease. (Appellant's Brief, p.23-24) However, none of the Respondents alleged acts evidence and intent to waive, are mischaracterized in their presentation by Seawest, and the citations to the record made by Seawest are patently misleading.

For example, Seawest claims that "Respondents moved into the Property and began performing in accordance with their specific, written obligations under the Lease," citing CP 757 – a statement of Mr. Aatai which is not evidence, but is a conclusion of law. It is uncontroverted that NWREA, not any individual defendant, took possession of the leased premises, paid the rent deposit and paid rent. There is no evidence to support Seawest's conclusion that the individual Respondents "moved in" or did any of the things required by the lease, and only Mr. Aatai's inadmissible legal opinion is offered as evidence.

Seawest states that "Respondents" signed an amendment to the Lease, citing CP 433. However, it is undisputed, and apparent from the documents relied upon by Seawest, that *Respondent NWREA signed nothing related to the written lease*. NWREA's absence from the purported lease amendment is important since

NWREA was the sole Respondent who paid rent and occupied the leased premises.

Seawest also states that “Respondents admitted the existence of a valid Lease in correspondence with Seawest, and in fact requested renegotiation or assignment of the Lease,” citing CP 436. However, the letter from Respondent Charles, cited at CP 436 by Seawest, describes a lease which is not between *all* Respondents and Seawest, but rather *only between Respondent NWREA and Seawest* – the lease relationship which Seawest denies ever existed. Respondent Charles believed that the written lease was formed between NWREA and Seawest.

Finally, Seawest claims that “Respondents never questioned the validity of the written Lease in multiple summary judgment motions and oppositions, citing a chain of documents from the file. This claim is grossly misleading. The allegation of Seawest’s complaint which claimed the existence of an enforceable lease between the Owners and Seawest was denied in all answers filed with the court. Affirmative defenses were raised by DiBello and Rowe, claiming that a condition precedent to the formation of a valid lease never occurred. The parties’ summary judgment motions initially focused their efforts on one theory of the case, a mistake by

Seawest in the identification of the true tenant for the written Lease. Arguments over the Respondents' attempt to reform the written lease to make NWREA the tenant cannot reasonably be construed as waiver of other defenses to Seawest's claims timely raised and preserved.

Although Seawest has titled its arguments for reversal using the term "waiver," Seawest really argues that the Owners ratified the written lease by their conduct and communications following the failure of the written lease. Ratification fails to bind defendants to the Lease, however, because a contract which is "void" cannot be ratified by subsequent acts of the parties. *Taylor Distributing Co., Inc. v. Haines*, 31 Wn. App. at 364. Only a contract that comes into existence, but may later be avoided at the election of one of the parties to the instrument and is therefore voidable, can be ratified.

In this case, when drafting the written lease Seawest chose to declare the lease *void* for failure of the parties to execute the lease timely; Seawest could have provided instead that the written lease was *voidable at the option of the landlord* if the lease was not executed by all parties by September 26, 2007. Seawest is bound by its choice to make the timely execution of the written lease a condition of the formation of the lease, and by describing the

instrument as *void* for failure to execute timely, preventing any ratification of the lease by the parties if the lease was signed late. The literal language of the written lease, characterizing the lease as void if not executed timely by all parties, is not capable of any interpretation other than one invalidating the notarized signatures of the Owners. Seawest's choice to render the written lease void for lack of timely execution is consistent with the written lease's provision stating that "Time is of the essence with respect to the performance of each of the covenants and agreements of this Lease." (CP 549, Lease subsection 33.12)

H. There Was No Conduct of Respondents Which Entitles Seawest to Estoppel Relief. (Appellant's Issues #4 and #5)

Seawest, continuing its mischaracterization of the facts, claims that "Respondents not only waived any right they may have had to terminate the Lease, but they are also estopped from the denying the existence of the Lease" (Appellant's Brief, p. 25-26). This statement misconstrues the undisputed facts of the case in three separate ways, and fails to support the application of the equitable doctrine of estoppel.

First, not all the "Respondents" signed the written Lease, and therefore Seawest could not rely upon the written Lease as a basis

for imposing liability on Respondent NWREA. Second, Respondents have never sought to terminate the written Lease; it is Respondents' position, accepted by the trial court, that the undisputed evidence establishes that the written lease was never fully executed timely, rendering the written lease void by its own condition precedent. Third, the Respondents do not deny the existence of an informal lease between Seawest and NWREA, which arose as a result of their actions; Respondents simply deny that the written lease, alleged by Seawest to be the description of the relationship between the Owners and Seawest, ever created an enforceable contract between them.

Even using Seawest's contorted description of the facts, no estoppel could occur here. All of the acts of Respondents are consistent with the Respondents' claim that a lease existed between Seawest and NWREA, arising from their conduct. NWREA is undisputedly the Keller Williams Realty licensee which took possession of the leased premises and operated its business from the location commencing with the date of first possession, not the individual Owners. The deposit and rent payments were made by NWREA to Seawest, and Seawest accepted the payments tendered without challenge to their source. Seawest fails to identify any

specific acts of the Owners which evidence their intent to perform the lease in their individual capacities, stating only in conclusion that “Respondents all signed the Lease, moved into the Property, and began performing in accordance with the specific terms of the Lease” without citation to any portion of the record. (Appellant’s brief, p. 25)

Seawest’s alleged reliance upon Respondents’ conduct mischaracterizes the undisputed facts. Seawest now claims it made tenant improvements in reliance upon the belief that Respondents considered the written lease binding upon them, yet the improvements were made by Seawest *after* acceptance of a deposit and first rent payment from NWREA, not the Owners. (CP 620-24) NWREA was the only tenant who ever paid money to Seawest for rent, utilities and taxes. (CP 622) Since payment of money was the only evidence of the tenant’s performance within the knowledge of Seawest, Seawest could not have relied upon the Owners’ performance of the written lease because the Owners never tendered any funds to Seawest.

When the lease amendment was prepared and signed by the Owners, it was signed by the Owners under the name of “Keller Williams Realty Kirkland.” The Owners were not identified as

partners of a general partnership, and not as individual lessees; the “tenant” was an entity “Keller Williams Realty Kirkland.” (CP 571) Seawest could not rely upon the execution of the amendment as evidence of an admission of *individual* liability for performance of the written lease by the Owners, since the Owners signed for an *entity* they believed was the same as NWREA. By placing the qualifier “Keller Williams Realty Kirkland” above their signatures, Seawest perpetuated the appearance that all signatures were made as members of the entity, not as persons individually liable for performance of the written lease.

Contrary to Mr. Aatai’s assertion in a 2010 letter that NWREA was unknown to him until after the purported lease amendment, Seawest itself admitted, through documentation submitted to the trial court by Seawest, that the role of NWREA as tenant was known to Seawest. Not only does Seawest concede it was paid by NWREA for sums due Seawest, a document relied upon by Seawest contains a reference to NWREA as the tenant. Exhibit C of the written lease, which was initialed by the tenant and who is identified as “NWREA,” was submitted to the trial court by Seawest in support of its claims based upon the written lease. (CP 556)

If Seawest truly relied upon the signatures of the Owners as evidence of their consent to be personally bound by the written lease, Seawest would not have created the redundant “guaranties” which accompanied the written lease proposed by Seawest, and would not have accepted the deposit, rent and occupancy of NWREA. The testimony of Mr. Aatai illustrates that Seawest did not expect personal liability of those who signed the written lease to exceed the 3 years of the guaranty. Mr. Aatai states in his declaration:

“10. The Defendants’ personal guaranties were originally drafted to last for the term of the Lease. I agreed to limit the duration of the personal guaranties to three years at Mr. Charles’ request because he explained to me that he expected his partners to come and go from the business and wanted to be able to add and subtract the individuals bound under the Lease and the personal guaranties at a later date, if he needed. I agreed to Mr. Charles’ request.”

(CP 520). Mr. Aatai’s description of the relationship of the guarantors to the written lease illustrates that Seawest anticipated the entity Keller Williams Realty Kirkland would remain the tenant for the entire written lease term, but that Seawest did not expect all of the individuals to remain liable beyond their 3 year guaranty commitment – the same position which Respondents claim is established by all of the other undisputed evidence.

There are no grounds here for application of the doctrine of estoppel; Respondents' conduct is consistent with the assertion of NWREA as the tenant, and Seawest was not misled by Respondents' communications or conduct.

I. The Identity of the Tenant of the Informal Lease is Irrelevant, Because the Landlord's Acceptance of Rent Waives Claims for Past-Due Rent, Whomever is the Tenant. (Appellant's Issues #6 and #9)

The common law rule is that when a landlord accepts rent from a tenant that the landlord knows is in breach of a rental agreement, the acceptance of the rent tendered waives the breaches of the tenant which occurred prior to the landlord's acceptance of the rent. *Wilson v. Daniels*, 31 Wn.2d 633, 639-40, 198 P.2d 496 (1948). In this case, there is no clause in any written document signed by Seawest and NWREA which would modify or preclude application of this common-law waiver rule. The written lease signed by Seawest and the Owners, which contained a waiver clause, was void as discussed above. The written lease *was never signed by NWREA*, so the common law rule of waiver applies here.

As Seawest accepted rent from NWREA in each month of NWREA's occupancy, Seawest waived any claim for any additional rent allegedly due and owing to Seawest. If Seawest was dissatisfied

with the rent paid by its month-to-month tenant, NWREA, Seawest's remedy was to give NWREA a notice under RCW 59.12.030(2), 20 days prior to the end of a calendar month to terminate the tenancy.

Seawest ultimately chose to terminate NWREA's tenancy by such a notice, while Seawest's motion to vacate the trial court's judgments was pending. (CP 1011) By issuing such a notice to NWREA, Seawest admitted that it entered into an informal lease with NWREA, which could be terminated by Seawest on 20 days' notice given under RCW 59.12.030(2). This post-judgment admission was part of the record when Seawest sought the trial court's further reconsideration of the entry of summary judgment, and included in the record on appeal by Seawest.

Seawest argues in its Appellant's Brief (at page 30) that there exists a genuine issue of material fact whether Seawest waived its rights to additional rent claimed due by accepting the rent tendered by NWREA each month. Seawest ignores the fact that NWREA never signed the written lease upon which Seawest relies as evidence for the informal lease between Seawest and NWREA. Seawest states, without any factual support, that "The Lease, even if invalid,

is evidence of the parties' agreement that Seawest would not waive its rights..."

There is no evidence that Seawest and NWREA ever reached agreement to incorporate any of the contents of the written lease, voided by its delayed execution, into the informal lease. Mr. Aatai offered into evidence his statement made to Respondents denying that he ever knew about NWREA's existence until 2010, so no agreement between Seawest and NWREA incorporating terms from the 2007 written lease was possible. (CP 573). The uncontroverted evidence is that the informal lease between Seawest and NWREA arose as the result of no communication between Seawest and NWREA; the only informal lease terms agreed to were the occupancy of the leased space by NWREA, in exchange for Seawest's acceptance of the rent tendered by NWREA.

J. The Trial Court Could Grant Summary Judgment to NWREA Because the Liability of NWREA Was Fully Briefed and Argued. (Appellant's Issue #10)

The request for relief on behalf of all defendants – not just the Owners, but including NWREA – was made when DiBello filed the motion for summary judgment in May, 2012. (CP 707-15) The arguments made by DiBello applied to all of the defendants, so DiBello sought an order for the benefit of all. The proposed orders

submitted by the DiBello to the trial court included with them a recitation that provided for the dismissal of Seawest's claims against NWREA. (CP 713-14) The issues of NWREA's liability to Seawest were the same as the issues as those of the Owner's liability, and were briefed by the moving and responding parties before the trial court issued its final order dismissing Seawest's claims against NWREA.

Some of the defendants filed joinders in the DiBello's motion, (CP 716-23) but NWREA did not file any joinder document before the motion was heard; NWREA filed its joinder after the trial court issued its decision to dismiss Seawest's claims, when Seawest sought to vacate the judgment. (CP 987-88)

Both the Washington State and federal courts, which utilize a similar version of CR 56 to govern the consideration of summary judgment motions, allow a trial court to grant summary judgment to a non-moving party *sua sponte* (without formal motion) if the party against who judgment is entered is "fairly apprised" that the sufficiency of the moving party's claim will be at issue. As stated by the 9th Circuit Court of Appeals in *Cool Fuel v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982):

Cool Fuel served and filed a motion for summary judgment. The IRS made no motion, except a possible oral motion during argument. In this circuit oral motions for summary judgment are not authorized or recognized. *Sequoia Union High School District v. United States*, 245 F.2d 227 (9th Cir. 1957). It is, nevertheless, true that the overwhelming weight of authority supports the conclusion that if one party moves for summary judgment and, at the hearing, it is made to appear from all the records, files, affidavits and documents presented that there is no genuine dispute respecting a material fact essential to the proof of movant's case and that the case cannot be proved if a trial should be held, the court may *sua sponte* grant summary judgment to the non-moving party.

The Washington State Supreme Court affirmed a Superior Court's *sua sponte* grant of a motion for summary judgment in *Health Insurance Pool v. Health Care Authority*, 129 Wn.2d 504, 919 P.2d 62 (1996). As long as the parties to the motion brief and argue the merits of the issue determined *sua sponte*, entry of summary judgment without the filing of a separate motion made by the non-moving party is proper. Seawest argued the merits of its claims against NWREA, and fully briefed the issue; entry of final judgment in favor of NWREA was appropriate.

K. Seawest is Not Entitled to its Attorney's Fees and Costs at This Stage of the Proceeding.

If successful in its appeal, Seawest is not entitled to any award of attorney's fees or costs, since reversal of the trial court's judgments will not make Seawest the prevailing party in this action.

Reversal will leave all of the issues regarding the enforceability of the written lease to the trial court for determination, and that court could still conclude that the written lease was void, as claimed by Respondents. See *Landis & Landis Const., LLC v. Nation*, 171 Wash. App. 157, 168, 286 P.3d 979 (2012).

L. Respondents Are Entitled to Their Attorney's Fees and Costs Based Upon the Written Lease Seawest Seeks to Enforce and RAP 18.1.

Seawest claimed entitlement to attorney's fees and costs in seeking enforcement of the void written lease, under Section 26.13 and Article 32 of the Lease. When a plaintiff claims entitlement to attorney's fees and costs under such contract provisions, and the contract are determined to be unenforceable, those who successfully defend against the contract's enforcement are entitled to an award of attorney's fees and costs. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 197 P.3d 710 (2008). Under RAP 18.1, Respondents should receive an award of the attorney's fees and costs incurred in this appeal.

V. CONCLUSION

This court should affirm the judgments dismissing Seawest's claims, and award the Respondents their fees and costs on appeal.

Dated this 6th day of March, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of March, 2013, served a true and correct copy of the foregoing document upon counsel of record, via the method noted below, properly addressed as follows:

Appellant Seawest Investment Associates, LLC:

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Hand Delivery
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class, postage
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 Facsimile
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of March, 2013, at Seattle, Washington.


David S. Kerruish, WSBA No. 11090
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