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NO. 90179-1

SUPREME COURT
OF THE STATE OF WASHINGTON

WESTERN PLAZA,

Petitioner,

v.

NORMA TISON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Is a former mobile home park landlord's freely-, voluntarily- and specifically-negotiated cap on annual rent increases, limited to an elderly tenant's remaining tenancy in the park under "automatically renewed" one-year written rental agreements pursuant to RCW 59.20.090(1) and honored by the former park landlord for seven years, enforceable against a successor landlord who presumably had the opportunity to review park rental agreements before purchase of the park and in any event conceded that it was subject to the rental agreement in question?

II. COUNTER-STATEMENT OF THE CASE

The mobile home park landlord asserts here, as it did in the trial court and court of appeals, that the landlord "may change *any term of any lease* . . . upon expiration of any term, after three months' written notice prior to the effective date of the increase" (CP 55) [italics added]. This novel proposition is not supported by any statute, case or cogent legal authority.

In the present case, Ms. Tison purchased a mobile home and signed a one-year rental agreement with the owner of the park (CP 19). She was concerned that, following her imminent retirement, the rent could be increased to a level that she could not afford to pay, since she

was going to be living on a "very fixed" income (CP 19). Joel Erlitz, one of the owners of the park at that time, assured Ms. Tison through the park manager that there would not be large rent increases, and that he would not increase the rent more than $10 per month every other year (CP 19-20). Ms. Tison asked that such a provision be written down in the rental agreement (CP 19).

The park manager telephoned the park owner in Ms. Tison's presence (CP 19) and asked him if it was permissible to add such a limitation in the rental agreement (CP 19-20). Mr. Erlitz agreed to do so (CP 20). The park manager then wrote in her own handwriting two footnotes which were added to the rental agreement (CP 20).

The initial rent was set forth in the rental agreement as $345 per month, and the first footnote stated that "Landlord, Erlitz, agrees to have land rent remain at $345.00 for two years" (CP 20, 23). The second footnote indicated that "every other year, rent will be raised no more than $10.00 for remaining tenancy" (CP 20, 23). These footnotes reflected the conversations Ms. Tison had with the park manager, who had spoken with Joel Erlitz (CP 19-20). Ms. Tison signed the agreement as modified (CP 20).

The current owner of the park, Western Plaza, LLC, purchased the park seven years later in February, 2008 (CP 25). Ms. Tison received a notice of rent increase effective October 1, 2011, to pay

$495.00 per month (CP 20, 26). Ms. Tison continued to tender the proper amount of rent as specified in the formula in her rental agreement–$395.00 per month–but the new owner refused to accept the rent and sent it back to Ms. Tison (CP 20). The new owner then filed an unlawful detainer action against Ms. Tison, claiming that Ms. Tison should be paying $495.00 per month instead of the $395.00 as specified in Ms. Tison's written rental agreement (CP 20-21).

Ms. Tison filed a motion for summary judgment (CP 16, CP 11). She asked the court to rule that her rental agreement was valid and that she was paying the correct amount of rent, and that the court should dismiss the park's unlawful detainer action against her (CP 21).

In its briefing to the trial court, the park argued that the "landlord may change any term of any lease, including perhaps the most material term of any lease: the amount of the rent or what amenities it includes; because the law provides the landlord with the legal right to change any term of the lease upon expiration of any term, after three months' written notice prior to the effective date of the increase. RCW 59.20.090(2); *McGahuey* at 183" (CP 55).[1]

The trial court ruled in favor of the park owner (CP 94), apparently agreeing with the park's position, the court stating it did

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[1]The case referred to is *McGahuey v. Hwang*, 104 Wn. App. 176, 15 P.3d 672, *review denied*, 144 Wn.2d 1004 (2001).

"not believe that Ms. Tison has the right to require that the terms of that one-year lease continue once there has been an objection to those terms." VRP 5/4/12 at 15. The trial court entered a judgment in the amount of $11,777 against Ms. Tison, which included rent Ms. Tison had tendered, but the park had refused, costs and attorney's fees (CP 164).

Ms. Tison appealed, and the court of appeals reversed. The court ruled that the rent limitation provision was enforceable, as it was specifically bargained for, "does not violate the MHLTA and the MHLTA does not render it unenforceable." Slp. opn. at 3.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals' Decision Does Not Conflict With Case Law Regarding Lease Renewals.

Mobile home park owners and tenants are generally free to bargain for any provision in the rental agreement that does not violate a statute or public policy. *Little Mountain Estates Tenants Association v. Little Mountain Estates MHC LLC*, 169 Wn.2d 265, 273 fn 3, 236 P.3d 193 (2010). Ms. Tison was concerned about the decline in her future income following her upcoming retirement, so prudently negotiated a provision in her rental agreement limiting future rent increases to $10 per month every two years. There is no rent control limiting mobile home park space rents in the State of Washington, and

RCW 59.20.090(2) permits the park owner to raise rent (without any limitation) upon three months' prior notice, so the limitation in the rental agreement was the only protection Ms. Tison had against being priced out of her home.

The park owner's remarkable claim that it can change any term in the rental agreement upon three months' notice is an unwarranted extrapolation from RCW 59.20.090(2). Its argument that it can ignore the express written rent limitation in the signed rental agreement is without foundation in either the MHLTA, the case law construing it or equitable principles.

The Court of Appeals in the case at bar specifically relied on *Little Mountain* as this Court's affirmance of the fundamental principle that parties are free to contract on any terms they agree upon, so long as the agreement is not prohibited by law. The park owner cites no law prohibiting the agreement made in this case. That agreement is therefore enforceable.

Accordingly, *Little Mountain*, which enforced the lease in that case as written, provides no support for the park owner's bare assertion that mobile home park landlords may change *any term* in any rental agreement upon three months' notice prior to the end of the term. While the park owner here claims that this Court in *Little Mountain* "understood that mobile home park leases were subject to

modification as to their duration and term[,]" there is no support for such a broad abstract assertion in the opinion in *Little Mountain.*[2]

The park owner argues here that the case of *McGahuey v. Hwang, supra*, 104 Wn. App. 176, allows the park owner to change any term of the rental agreement upon three months' notice. While that case did allow a change in the rental agreement to permit charges for utilities, *McGahuey* also stated that the tenant had to be protected by any change, and "whatever alterations [to the lease] the landlord seeks must be equitable." 104 Wn App. at 182. The park owner has failed to address in the trial court, the Court of Appeals or in this Court the equitableness of the change it sought in Ms. Tison's rental agreement.

The equities favor Ms. Tison. She specifically negotiated the provision in question, and the park owner at the time agreed to it. She wanted to protect herself from buying a home which she later could not afford due to her impending retirement and living on a limited income.

The new park owner, on the other hand, bought the park subject to the existing tenant leases. It therefore could have or should have negotiated a lower purchase price for the park, if it thought that Ms. Tison's rental agreement had a negative impact on the value of the park. To the extent that the current park owner did so, allowing the park owner to essentially abrogate

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[2]Petition for Review at 6.

the rent limitation clause Ms. Tison specifically negotiated, would give an undeserved windfall to the park owner. The balance of the equities therefore favors Ms. Tison.

Thus, *McGahuey* does not conflict with the decision of the court of appeals in the case at bar. The Court of Appeals properly distinguished *McGahuey* from the circumstances of the present case. Slp. opn. at 7-8.

In *Seashore Villa v. Hagglund*, 163 Wn. App. 531, 260 P.3d 906 (2011), *review denied,* 173 Wn.2d 1036 (2012), Division II soundly rejected the park owner's argument that the park owner could change any term in the rental agreement upon three months' notice. There the park owner, relying on *McGahuey*, tried to give a three-month notice effectively transferring the responsibility for the maintenance of carports and sheds to he tenants, in violation of RCW 59.20.135. The court distinguished *McGahuey* and held that the park owner could not alter the provisions of a rental agreement in violation of statute.

There is thus no conflict in the three appellate decisions cited by the park owner in the case at bar. *Little Mountain* affirmed the principle of freedom of contract. *McGahuey* permitted the alteration of the rental agreement, at least with respect to utility charges, where the tenant was protected and any proposed change was equitable. *Seashore Villa* prohibited a change in a rental agreement which would effectively negate a statutory

prohibition. The Court of Appeals in the case at bar affirmed the principle of freedom of contract and held the park owner (and successor) to the terms that were specifically agreed to. These decisions do not conflict.

B. The Court of Appeals Decision Does Not Conflict with the Case Law on the Statute of Frauds.

The landlord contends that the statute of frauds renders the rental agreement unenforceable, because the rental agreement is not acknowledged and does not include a legal description. Petition for Review at 8-9. This argument cannot withstand scrutiny.

RCW 59.04.010 provides in relevant part that "[l]eases . . . shall be legal and valid for any term or period not exceeding one year, without acknowledgment, witnesses or seals."[3] RCW 59.04.010. The present rental agreement does not *exceed* a term of one year, as it is "for a term of one year." CP 22, ¶ 1.[4] It has long been held that a lease for a period of one year does not come within the statute of frauds. *Ward v. Hinckley*, 26 Wash. 539, 541, 67 Pac. 220 (1901); *Pappas v. General Market Co.*, 104 Wash. 116, 119-120, 176 Pac. 25 (1918). The fact that the rental agreement is automatically renewed at the end of

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[3]RCW 59.18.210 contains identical wording.

[4]The rental agreement is even entitled "Manufactured Home Lot *One-Year* Rental Agreement" (italics added).

the one-year term by operation of statute and the rental agreement itself does not affect this result.[5] The rental agreement continues at the end of the one-year period and renews for another year. That is the meaning of the words "automatically renewed."

Moreover, even if the statute of frauds applied, part performance takes a rental agreement out of the statute of frauds. *Stevenson v. Parker*, 25 Wn. App. 639, 644, 608 P.2d 1263 (1980) (holding that "long acquiescence" of seven years in the terms of the lease was sufficient part performance to take the unacknowledged lease out of the statute of frauds). Part performance thus applies here.[6]

The park owner cites *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 254-55, 84 P.3d 295 (2004) for the proposition that the rent limitation clause did not "run with the land" and

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[5]RCW 59.20.090(1) provides: "Any rental agreement of whatever duration shall be automatically renewed for the term of the original rental agreement, unless a different specified term is agreed to." RCW 59.20.090(1). "Renew" means to "become new again" or to "start over." *American Heritage Dictionary of the English Language* 1477 (4th ed. 2000).

[6]While it is true that one of the two hand-written clauses added to the rental agreement covered a period of two years, that term expired long before there was any controversy about the limitation in rental increases to $10 per month. If part performance takes an offending clause out of the statute of frauds, then *full performance* should also.

because the clause does not satisfy the statute of frauds, it is therefore not binding on a subsequent purchaser of the park. RB at 30. However, it has been shown above that the rental agreement in issue does satisfy the statute of frauds, because the rental agreement is for a term not greater than one year.

Moreover, the rent limitation clause does satisfy the requirements for "running with the land" as set forth in *Lake Limerick, supra*. Those requirements are as follows:

> (1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant.

Lake Limerick, 120 Wn. App. at 254.

These requirements are satisfied. The rent limitation clause is enforceable between the original parties. The park owner so concedes. Slp. opn. at 7-8. The obligation to pay rent does "touch and concern" the land. The obligation is sought to be enforced by an original party, Ms. Tison, against a successor in possession, i.e., the current park owner. The current park owner clearly had notice of the covenant. So under the very authority cited by the park owner, the rent limitation clause does "run with the land" and is enforceable.

The Court of Appeals saw no need to address the park owner's statute

of frauds argument, as it agreed that the rent limitation clause knowingly and voluntarily entered into by the park owner was enforceable. Slp. opn. at 1, fn 1.

C. While This Case Involves a Significant Issue Under the MHLTA, Such Issue is Not Appropriate for Resolution on the Record at Bar.

If a mobile home park owner were able to modify *any* term in the rental agreement when the rental agreement was "automatically renewed," the specific required provisions in a rental agreement as specified in RCW 59.20.060(1)(a) through (l) would be rendered meaningless after the first year. The park owner could promise the sky to induce unsuspecting tenants to buy a home in the park–including years of no rent raises or even rental rebates–and then conveniently delete these provisions three months before the end of the first year of the rental agreement. The MHLTA requirement of disclosure on key terms of the tenancy would be meaningless.

If the park owner could change *any term* in the rental agreement upon three months' notice, the park owner could also alter the fundamental terms of the tenancy without any recourse by the tenant. The park owner could, for example, reduce the size of the tenant's lot; require the tenant to move from one lot to another; eliminate automobile parking from the tenant's lot or from the park; require tenants with no carport to construct a carport within thirty days of "automatic renewal" of the rental agreement; double or triple the

security deposit required of each present tenant; require removal of sheds, decks, porches and other auxiliary structures, etc., all at great expense to the tenant and potential eviction for non-compliance. The park owner's argument that it can change *any term* in the rental agreement is clearly overreaching and untenable.

The underlying illogic in the park owner's argument stems from the fact that just because not all lease terms remain in force through every automatic renewal–per *McGahuey*, it does not follow that any lease term can be changed. *McGahuey* supplied some standards for deciding what terms could be changed: the changes had to have protections for the tenants, and they had to be "equitable." The park owner here does not even remotely address how deleting a specifically negotiated provision in a rental agreement to limit rent increases to an affordable level for a retiree on a fixed income is "equitable" or protects Ms. Tison.

What provisions of a rental agreement the park owner can change is an important question under the MHLTA. This issue came up in *McGahuey*, *Seashore Villa* and in this case. *McGahuey* provided an answer which park owners have tried to stretch in subsequent cases, as even in the present case the park owner argued–and still argues–that it can change *any term* in the rental agreement. This court could step in and provide guidance to lower courts concerning

which provisions of a mobile home rental agreement a park owner may change on three months' notice. However, that guidance would appear better left to the province of the legislature for at least two reasons: (1) the legislature is better equipped to balance the competing interests involved and make the policy determinations necessary for a fair resolution of the issue, and (2) the record in the present case deals solely with the enforceability of a specifically negotiated rent limitations clause, not with broader issues potentially arising in future cases, e.g. whether the park owner may delete a provision in a rental agreement (a) providing that the landlord maintain the trees in the park; (b) referencing park amenities such as a swimming pool, clubhouse or parking for the tenants' RV's and boats; or (c) allowing a tenant to have an extra occupant or pet. The present case is not a propitious platform for considering these other issues in the context of a limited record dealing with a much narrower issue. Accordingly, this Court should deny the petition for review.

D. Ms. Tison Is Entitled to Attorney's Fee Under RCW 59.20.110 and the Rental Agreement.

Paragraph 27 of the rental agreement provides that the prevailing party "[i]n any actions [sic] arising out of this Agreement, including eviction" shall be entitled to reasonable attorney's fees and costs (CP 23). Where attorney's fees are provided in a contract to be

awarded to the prevailing party, reasonable fees must be awarded. *Singleton v. Frost*, 108 Wn.2d 723, 733, 742 P.2d 1224 (1987). The prevailing party is one in whose favor the judgment is entered. *Kysar v. Lambert*, 76 Wn.App. 470, 493, 887 P.2d 431 (1995).

In addition, RCW 59.20.110 provides that in any action arising out of the MHLTA, "the prevailing party shall be entitled to reasonable attorney's fees and costs." RCW 59.20.110.

Where a statute authorizes fees to the prevailing party, they are available on appeal as well as in the trial court. *Eagle Point Condominium Owners Association v. Coy*, 102 Wn. App. 697, 716, 9 P.3d 898 (2000). Ms. Tison should be awarded her costs and attorney's fees for replying to the petition for review.

V. CONCLUSION

For the reasons set forth above, this Court should deny the petition for review. The Court of Appeals correctly decided this case. Costs and attorney's fees should be awarded to Ms. Tison.

RESPECTFULLY SUBMITTED this 19th day of May, 2014.

Law Offices of Dan R. Young

By /s/ Dan R. Young
Dan R. Young, WSBA # 12020
Attorney for Respondent
Norma Tison

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--Dan Young, WSBA #12020
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DECLARATION OF SERVICE

I, Dan R. Young, declare to be true under penalty of perjury under the laws of the State of Washington as follows:

1. I am an attorney representing the respondent Norma Tison in this action.

2. On May 19, 2014, I sent by the USPS, first class mail with pre-paid postage affixed, a copy of the foregoing Answer to Petition for Review of Respondent to the following:

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Dated: May 19, 2014, at Seattle, Washington.

/s/ Dan R. Young
Dan R. Young

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