

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

NEW GRACE INVESTMENT, INC.,	)	
a Washington corporation,	)	
	)	No. 67771-3-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
TAE HO CHUNG and JANE DOE	)	UNPUBLISHED OPINION
CHUNG, husband and wife and	)	
their marital community,	)	
	)	
Appellants.	)	FILED: January 14, 2013
	)	

Leach, C.J. — In this commercial lease dispute, tenant Tae Ho Chung appeals the summary judgment granted to landlord New Grace Investment Inc. Because Chung fails to demonstrate that material facts are in dispute, we affirm. We also grant attorney fees to New Grace as the prevailing party on appeal.

**FACTS**

In July 2007, Chung leased from New Grace two units of a commercial property in Lynnwood, Washington. The lease agreement provided for a five-year term beginning on September 1, 2007. Chung agreed to pay an initial base rent of \$2,216.67<sup>1</sup> per month and NNN charges<sup>2</sup> of \$408.33 per month. The lease required

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<sup>1</sup> The lease specified that the base rent would increase by three percent every 12 months.

<sup>2</sup> “NNN” is the industry term for a “triple-net” lease, by which a tenant pays a pro rata share of the landlord’s operating expenses, including taxes, insurance, and common area maintenance.

payment of the NNN charges beginning on September 1, 2007, but did not obligate Chung to start paying base rent until December 1, 2007. The lease stated that Chung accepted the property in “as-is” condition. It restricted the tenant’s remedies for the landlord’s default: “In no event shall Tenant have the right to terminate this Lease as a result of Landlord’s default and Tenant’s remedies shall be limited to damages and/or an injunction; and in no case may the Tenant withhold rent or claim a set-off from rent.”

Chung paid the NNN charges for September, October, and November 2007, changed the locks on the doors, installed a sign, and engaged a contractor to construct tenant improvements to the property. However, Chung became dissatisfied with what he believed to be a failure on the part of New Grace to make other improvements and withheld payment of both rent and NNN charges starting in December 2007. Following multiple notices to pay or vacate the property, New Grace terminated the lease, took possession of the leased property, and filed a complaint for breach of contract.

After extensive discovery, New Grace moved for summary judgment, asserting that Chung’s nonpayment of rent constituted default under the terms of the lease. Chung filed an 18-page unsworn response and 98 pages of supporting exhibits, claiming that he was entitled to withhold rent payments because New Grace

had not delivered the property in the condition he expected. In reply, New Grace moved to strike all of Chung's exhibits because they were hearsay and not authenticated. The trial court struck Chung's exhibits and granted summary judgment in favor of New Grace in the amount of \$98,315.87 plus costs of \$638.38 and attorney fees of \$15,851.50. When the trial court denied Chung's motion for reconsideration, it clarified its order granting summary judgment:

The Court made its ruling on alternative grounds. It is true that the Court found that the Defense had failed to present documents in the form required by CR 56. However, the Court went on to state that even assuming the documentation was proper, the Defense would still lose on the merits—essentially, that there were no genuine issues as to any material facts and that the Plaintiff was entitled to judgment as a matter of law.

Chung timely appeals, arguing that the trial court erred in striking the exhibits to his response and that he raised genuine material issues of fact precluding summary judgment.

#### STANDARD OF REVIEW

We review de novo both the decision to strike Chung's exhibits and the grant of summary judgment.<sup>3</sup> We consider all facts and reasonable inferences in the light most favorable to the nonmoving party and affirm summary judgment only when the

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<sup>3</sup> Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (“The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.”).

evidence presented demonstrates no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.<sup>4</sup> The moving party has the initial burden to show that there is no genuine issue as to any material fact.<sup>5</sup> “If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute.”<sup>6</sup> If the nonmoving party fails to do so, then summary judgment is appropriate.

We review the denial of a motion for reconsideration for abuse of discretion.<sup>7</sup> A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons.<sup>8</sup>

## DECISION

### *Motion to Strike*

The trial court did not err when it granted New Grace’s motion to strike. CR 56(e) requires that all affidavits in support of or in response to a motion for summary judgment be (1) made on personal knowledge, (2) set forth such facts as would be admissible in evidence, and (3) show affirmatively that the affiant is competent to

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<sup>4</sup> Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

<sup>5</sup> Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

<sup>6</sup> Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (quoting Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990)).

<sup>7</sup> Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

<sup>8</sup> State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

testify to the matters stated therein.<sup>9</sup> A party must provide evidence authenticating or identifying a document before a court can admit it as evidence.<sup>10</sup> A party satisfies this requirement with “evidence sufficient to support a finding that the matter in question is what its proponent claims,” such as the testimony of a witness with knowledge that the document is what it claims to be.<sup>11</sup> The trial court may not consider inadmissible evidence when deciding a motion for summary judgment.<sup>12</sup>

Chung claims that the trial court struck his exhibits solely because he did not include the phrase “under penalty of perjury” or similar language in his responsive pleading. He asserts, with no confirming record, that he orally attested to the exhibits’ authenticity at the summary judgment hearing. He contends that he should not be penalized for this failure because, in his native Korea, his signature on a document would constitute adequate proof of the truth of its contents. We need not reach this argument because Chung’s response does not provide an adequate foundation for admission of the attached exhibits. The majority of Chung’s exhibits consisted of faxes, e-mails, or other documents from New Grace’s property manager, leasing agent, and attorney, as well as the City of Lynnwood.<sup>13</sup> Chung’s response

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<sup>9</sup> CR 56(e).

<sup>10</sup> ER 901(a).

<sup>11</sup> ER 901(a), 901(b)(1).

<sup>12</sup> King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County, 123 Wn.2d 819, 826, 872 P.2d 516 (1994).

<sup>13</sup> The remainder of Chung’s exhibits were letters, faxes, or e-mails that he

does not show that he has personal knowledge about the authenticity of these documents, nor did he submit an affidavit from anyone who did. The exhibits were properly stricken. Apart from these unauthenticated documents, Chung supports his claim of a genuine issue of material fact by argument alone. Mere allegations or conclusory statements of fact, unsupported by evidence, do not sufficiently establish a genuine issue.<sup>14</sup>

Chung argues for the first time on appeal that the trial court should have granted him a continuance to allow him to bring his response into compliance with CR 56(e). But Chung did not request a continuance. When a party does not clearly request a continuance, the superior court does not err in deciding a summary judgment motion based on the evidence before it.<sup>15</sup>

*Summary Judgment*

Chung argues that genuine issues of material fact existed to preclude summary judgment. We agree with the trial court that Chung's exhibits, if admitted, do not show a genuine issue of material fact.

The lease is clear and unambiguous. It identified September 1, 2007, as the

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himself sent to New Grace's president and property manager, as well as a bill from a sign installation company and some unidentified photographs.

<sup>14</sup> Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

<sup>15</sup> Bldg. Indus. Ass'n of Wash. v. McCarthy, 152 Wn. App. 720, 743, 218 P.3d 196 (2009).

commencement date. It required Chung to pay a monthly base rent and NNN charges. The lease states twice that Chung accepted the property in "as-is" condition:

**5.4 Condition of Premises.** Tenant has inspected the plumbing, lighting, air conditioning, heating, windows, interior walls, flooring and all other elements of the Premises prior to execution of this Lease. Based upon that inspection, Tenant accepts the Premises "as is" in the absence of any material change in its condition prior to the Commencement Date or the date the Tenant takes possession of the Premises, whichever is earlier. Tenant acknowledges that neither Landlord nor Landlord's agent has made any representation or warranty as to the present or future suitability of the Premises for the conduct of Tenant's business.

**30. Condition of Space.**

Tenant shall take the space in the [sic] "**AS-IS**" condition. Landlord shall not be called upon to make any repairs/replacements or improvements to the space whatsoever.

Chung also agreed that nonpayment of rent constituted default and a breach of the lease. Finally, the lease contained a provision limiting Chung's remedies in the event of a breach by New Grace:

In no event shall Tenant have the right to terminate this Lease as a result of Landlord's default and Tenant's remedies shall be limited to damages and/or an injunction; and in no case may the Tenant withhold rent or claim a set-off from rent.

Chung does not dispute his failure to pay rent or NNN charges after November 2007. Chung defends solely on the basis that New Grace did not deliver the property to him in what he believed to be "as is" condition. But the lease

specifically limited Chung's remedies in the event of breach to damages or specific performance. It expressly prohibited the withholding of rent. Under the terms of the lease, Chung's nonpayment constituted default and breach. The trial court did not err when it granted summary judgment.

*Attorney Fees*

On appeal, New Grace requests attorney fees under the lease. A contractual provision for attorney fees at trial supports an award of attorney fees on appeal.<sup>16</sup>

Paragraph 24.14 of the lease states,

In the event any action or proceeding is brought by either party against the other arising out of or in connection with this Lease, the prevailing party shall be entitled to recover its cost[s], including, but not limited to, reasonable attorney's and accountant's fee [sic], incurred in such action or proceeding, including any appeal.

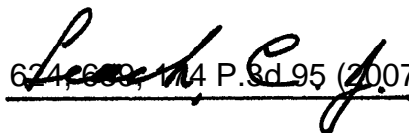
Accordingly, we grant New Grace's request for fees, upon compliance with RAP 18.1(d).

CONCLUSION

We affirm the superior court's order striking Chung's exhibits and granting summary judgment in favor of New Grace. We grant New Grace's request for attorney fees incurred in defending this appeal.

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<sup>16</sup> IBF, LLC v. Heuft, 141 Wn. App. 624, 633, 44 P.3d 95 (2007).





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WE CONCUR:

*Spears, J.*

*Schiveller, J.*