FILED

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN LEPIANE and RUTH LEPIANE, husband and wife,	)	**No. 29649-1-III**
Respondents,	)	
v.	)	**Division Three**
IRREANTUM, LLC, a Washington limited liability company; MARK W. GILBERT and SUSAN G. GILBERT, husband and wife, individually and the marital community comprised thereof,	)	
Appellants,	)	
WG NISSAN, LLC, a Washington limited liability company,	)	
Defendant.	)	**UNPUBLISHED OPINION**

Siddoway, J. — Mark and Susan Gilbert and Irreantum LLC appeal the trial court's summary judgment determination that the statute of frauds did not bar John and Ruth Lepiane's action to collect unpaid rent and utilities under an assigned lease. Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

The real property at issue in this case is commercial property located on West Poplar in Walla Walla, at which auto dealerships have been operated for many years. The property was owned at all relevant times by John and Ruth Lepiane. For several years leading up to the 2008-09 time frame at issue, the property had been occupied by Irreantum LLC, which is owned by Mark and Susan Gilbert. Irreantum leased the property under an assignment of lease entered into in June 2006.

Irreantum vacated the property at the end of November 2008, a year before the end of the lease term, reportedly on account of a misunderstanding as to when the lease expired. The Lepianes were unable to re-let the property during the remainder of the lease term.

The Lepianes commenced this action against Irreantum and WG Nissan LLC, the prior lessee who had assigned its interest to Irreantum, and against the Gilberts based on their guarantee of Irreantum's lease obligations. The collection action brought to light alleged errors and deficiencies in the controlling documents that Irreantum and the Gilberts argue render Irreantum's lease obligation unenforceable under the statute of frauds.

There is no question as to the adequacy of the underlying lease under the statute of frauds. It was entered into between the Lepianes and Tri-City Nissan Inc. in 2004. Its

term was for five years commencing on December 1, 2004 and ending on November 30, 2009. Within the body of the lease, the subject property was identified as "the building and real property located at 715 West Poplar, Walla Walla, Washington, more particularly described in Exhibit A, attached hereto and made a part hereof by this reference." Clerk's Papers (CP) at 32. Exhibit A provided a full legal description of the property by lot numbers, block number, addition, city, county, and state.

Fifteen months later, Tri-City Nissan was acquired by WG Nissan LLC and on March 8, 2006, Tri-City Nissan assigned its interest in the lease to WG Nissan. Here, too, the adequacy of the legal description is not challenged. The assignment of the lease correctly described the underlying lease by its date and parties and incorporated it by reference.

Within a matter of months, WG Nissan wished to assign its interest in the lease to the Gilberts, and on June 27, 2006, the Lepianes executed a document entitled "Consent of Lessor to Assignment," in which they agreed to WG Nissan assigning the 2004 lease to Mark and Susan Gilbert subject to the Gilberts' obligation to perform the lessee's obligations and other terms. The consent also permitted assignment of the lease to Irreantum LLC, "provided that Mark W. Gilbert and Susan G. Gilbert . . . execute a personal guarantee therefor." CP at 43.

It is with this consent and an assignment of lease agreement entered into a few

days later that deficiencies with the documentation begin. Irreantum[1] points out that in describing the 2004 lease, the consent identified Tri-City Nissan as "Tri-City Nissan, *LLC*." CP at 43 (emphasis added). This was an error. Tri-City Nissan was a Washington corporation, not a limited liability company, and as noted above, was correctly identified in the lease as Tri-City Nissan Inc.

A few days later, on June 30, 2006, WG Nissan and Irreantum entered into an agreement entitled "Assignment and Assumption of Lease." Irreantum points out that in this agreement, WG Nissan LLC was identified by its correct name and was correctly identified as "Assignor," but the assignment then proceeded to describe the rights being assigned as "the Assignor's right, title, and interest in the Lease dated December 1, 2004 ("Lease"), a copy of which is attached hereto and by this reference incorporated herein, made and executed *by Assignor, as Lessee*, and John and Ruth Lepiane . . . as Lessor, leasing the premises described as 715 West Poplar Avenue, Walla Walla." CP at 62 (emphasis added). Irreantum correctly notes that WG Nissan was not the lessee under the original 2004 lease; Tri-City Nissan was. While the assignment states that a copy of the underlying lease was attached, it is undisputed that there were no attachments.

In accordance with the earlier consent by the Lepianes, the Gilberts also executed

[1] In describing the arguments and assertions of appellants Irreantum and the Gilberts hereafter, we refer to them collectively as "Irreantum."

a personal guaranty on June 30. The Gilberts point out that the guaranty misidentified Tri-City Nissan as a limited liability company, obligating them to "personally guarantee the performance of that certain Lease dated December 1, 2004 between John and Ruth Lepiane, husband and wife, as Lessors, and Tri-City Nissan *LLC*, as Lessee, and Irreantum, LLC, as Assignee." CP at 41 (emphasis added).

Irreantum and the Gilberts defended against the collection action on the basis that in light of these flawed identifications of the underlying lease, the agreements on which the Lepianes rely for their claims violate the statute of frauds. In response, the Lepianes argued that no one was confused by the misidentification of parties to the underlying lease and that the errors, being scrivener's errors, could be corrected through reformation. They also argued that even if the assignment of lease failed to comply with the statute of frauds, the parties' part performance nonetheless made the lease and guaranty obligations enforceable.

The parties filed cross motions for summary judgment on the statute of frauds issues, the only matter ultimately in dispute between them. The trial court granted summary judgment on the issue of liability in favor of the Lepianes. The parties later stipulated to the damage amount, reserving Irreantum's and the Gilberts' right to appeal liability.

Irreantum argues on appeal that the trial court erred in failing to recognize that the

statute of frauds bars the Lepianes' claims because (1) the full legal description of the subject property was not included in any of the agreements to which they are parties and (2) the legal description attached to the 2004 lease was not effectively incorporated by reference due to the documents' consistent misidentification of that lease.

ANALYSIS

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *McGowan v. State*, 148 Wn.2d 278, 289, 60 P.3d 67 (2002). This court engages in the same inquiry as the trial court in reviewing a summary judgment order, reviewing it de novo and viewing all evidence in the light most favorable to the nonmoving party. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000). No material facts are in dispute. We address the enforceability of the agreements and the effect of part performance in turn.

I

"Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." RCW 64.04.010. Every deed "shall be in writing, signed by the party bound thereby, and acknowledged." RCW 64.04.020. It is the unusually strict, but well-settled, rule in

Washington that real estate subject to a conveyance may not be identified by its street address; in the case of platted real property, a contract or agreement of conveyance must contain, in addition to the other requirements of the statute, the description of property by the correct lot number, block number, addition, city, county and state. *Martin v. Seigel*, 35 Wn.2d 223, 229, 212 P.2d 107 (1949); *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 883-84, 983 P.2d 653 (1999). Washington's real property statute of frauds requires that parties to a conveyance properly and adequately describe it, "so that courts may not be compelled to resort to extrinsic evidence in order to find out what was in the minds of the contracting parties." *Martin*, 35 Wn.2d at 228.

The requirement to properly and adequately describe the property does not require the complete legal description to appear in the body of the conveyance; the technique of incorporation by reference allows a party to satisfy the statute of frauds by several documents. The statute is satisfied if the contract or deed for the conveyance of land contains either a description of the land sufficiently definite to locate it without recourse to oral testimony, or a reference to another instrument which does contain a sufficient description. *Bartlett v. Betlach*, 136 Wn. App. 8, 14, 146 P.3d 1235 (2006) (quoting *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995)), *review denied*, 162 Wn.2d 1004 (2007). Nor is it necessarily a problem if the conveyance purports to include the incorporated document as an attachment, but, through oversight, does not. In *Knight v.*

American National Bank, 52 Wn. App. 1, 5, 756 P.2d 757, *review denied*, 111 Wn.2d 1027 (1988), for example, the description of the property covered by a lease was included in a site plan that the lease identified and indicated was attached as its exhibit B. No exhibit B was ever appended to the lease. Nonetheless, because the lease referred to the site plan, "parol evidence is not necessary to connect the two writings." *Knight*, 52 Wn. App. at 5.

This case presents a unique incorporation issue in that the underlying lease contains an adequate legal description and was intended to be incorporated by reference into the assignment, but the lease itself was misdescribed. Irreantum takes the position that because the statute of frauds generally prohibits recourse to oral testimony to locate the land, and because the assignment's attempt to identify and incorporate the lease instead describes a lease that does not exist, the link between the assignment and the underlying lease cannot be established, causing the assignment to fail.

The Lepianes contend, however, that the undisputed evidence supports reformation of the assignment to correct for minor scrivener's errors, before assessing its validity under the statute of frauds. *Berg*, 125 Wn.2d at 553-54 (contracts subject to the statute of frauds may be reformed where a scrivener's error or mutual mistake leads to the deficient description). Typically, it is the inadequate legal description itself that is reformed where the deficiency is due to a mistake by the scrivener. *Wilhelm v. Beyersdorf*, 100 Wn. App.

836, 843-44, 999 P.2d 54 (2000). But reformation is equally available to correct a deficient identification of a document that the parties intended to incorporate for its proper and adequate description of the property.

A party seeking reformation must establish by clear and convincing evidence facts that warrant allowance of the remedy. *Saterlie v. Lineberry*, 92 Wn. App. 624, 628, 962 P.2d 863 (1998). The party seeking reformation need only show that the parties had agreed to accomplish a particular object by the instrument and that the instrument, as executed, is insufficient to execute their intention. *Id.*

In deciding the cross motions for summary judgment, the trial court had before it the 2004 lease between the Lepianes and Tri-City Nissan, which contained an adequate legal description. Mr. Lepiane identified it as the underlying lease intended to be assigned to, and assumed by, Irreantum in June 2006. While Irreantum posited the theoretical possibility of a different lease (a hypothetical lease to Tri-City Nissan *LLC*) in arguing the statute of frauds issue, it offered no evidence to counter the Lepianes' proof that the West Poplar property was subject to the 2004 lease in June 2006 and it was therefore the only lease to which the assignment and associated documents could refer. From this undisputed evidence, the trial court could find that there was no genuine issue of fact that reference in the parties' agreements to Tri-City Nissan LLC was a scrivener's error and an intended reference to Tri-City Nissan Inc.; that reference in their agreements

to "the Lease dated December 1, 2004 . . . made and executed by Assignor, as Lessee, and John and Ruth Lepiane, husband and wife, as Lessor," was a scrivener's error and an intended reference to the 2004 lease under which Tri-City Nissan Inc. was lessee; and that the agreements should be reformed to reflect these corrections. Thus reformed, the reference to the 2004 lease in the assignment was a sufficient incorporation of its adequate legal description, notwithstanding the parties' failure to attach it.

II

Even if the parties' agreements were inadequate under the statute of frauds, the equitable doctrine of part performance would remove the assignment from the statute's operation. "A lease that is deficient under the statute of frauds for lack of a legal description may nevertheless be saved by part performance." *Losh Family, LLC v. Kertsman,* 155 Wn. App. 458, 465, 228 P.3d 793 (2010). The three factors or elements examined to determine if there has been part performance of the agreement so as to take it out of the statute of frauds are (1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract. *Berg*, 125 Wn.2d at 556. In addition, where specific performance of the agreement is sought, the contract must be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract. *Id.*

The Lepianes presented undisputed evidence that Irreantum paid rent, utilities and property taxes for more than two years. The sufficiency of that part performance presented no issues of credibility. The trial court's grant of summary judgment was based in part on its conclusion that "[t]here certainly was part performance herein." CP at 98. Irreantum argues that there is no evidence of its making improvements on the property, however, and that we should reject the authority cited by the Lepianes—the opinion of Division One of our court in *Ben Holt Industries, Inc. v. Milne*, 36 Wn. App. 468, 675 P.2d 1256 (1984)—that the making of improvements is not essential to a finding of part performance. Reply Br. of Appellants at 6-8.

But controlling decisions of our Supreme Court similarly hold that it is not essential that a party arguing part performance prove that it has made improvements to the property. The court has never set forth a rigid requirement that even two of the three factors be present, although usually where part performance is found, two of the three factors are present. *Berg*, 125 Wn.2d at 557-58. Rather, "'the court's overriding concern is precisely directed toward and concerned with a quantum of proof certain enough to remove doubts as to the parties' oral agreement.'" *Id.* at 558 (emphasis omitted) (quoting *Miller v. McCamish*, 78 Wn.2d 821, 828-29, 479 P.2d 919 (1971)). Where relief is granted from the statute of frauds, it is for "'the specific reason that to enforce the statute would be to defeat the very purpose for which it was enacted—*i.e.*, the prevention of

fraud arising from uncertainty inherent in oral contractual undertakings.'" *Id.* (emphasis omitted) (quoting *Miller*, 78 Wn.2d at 829). Ultimately, the three factors "serve an evidentiary function allowing the court to be certain the contract existed and its terms." *Losh*, 155 Wn. App. at 466 (citing *Miller*, 78 Wn.2d at 826).

As a general rule, the presence of all three factors presents a "strong case for the application of the part performance doctrine." *Pardee v. Jolly*, 163 Wn.2d 558, 567, 182 P.3d 967 (2008). "The making of substantial and valuable improvements [to the leased property] is the strongest factor, while payment alone is the weakest." *Losh*, 155 Wn. App. at 467 (citation omitted). However, the "existence of improvements [is] not essential to proving part performance so long as the acts relied upon to prove part performance unmistakably point to the existence of the claimed agreement." *Id*. The crucial inquiry is whether the facts establish that "'the parties acted upon the instrument as a lease.'" *Id.* at 466 (quoting *Tiegs v. Watts*, 135 Wn.2d 1, 16, 954 P.2d 877 (1998)).

The evidence that Irreantum took exclusive possession of the property and performed its obligations to pay rent, property taxes, and utilities up until the end of November 2008 is sufficient evidence of part performance under controlling cases. Irreantum errs in arguing that it is not.

III

The Lepianes seek an award of their attorney fees incurred on appeal. RAP

18.1(a) authorizes an award of fees on appeal if provided for by applicable law. Attorney fees may be awarded if authorized by contract. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993).

The assigned lease agreement provides that in "any action brought by way of enforcement or interpretation of this lease . . . the prevailing party hereunder shall be entitled to a reasonable sum for and as attorney fees and costs incurred." CP at 34. The Lepianes have prevailed.

We affirm the trial court's order and judgment and award the Lepianes their attorney fees on appeal upon compliance with RAP 18.1(d).

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Korsmo, A.C.J.

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Brown, J.