IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BELLEVUE SQUARE MANAGERS, INC., a Washington corporation,	)	NO. 63516-6-I
Respondent,	)	DIVISION ONE
v.	)	
BARCELINO CONTINENTAL CORP., a California corporation,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: September 20, 2010

Leach, A.C.J. — Barcelino Continental Corporation (Barcelino) appeals the superior court's orders granting summary judgment to Bellevue Square Managers, Inc. (BSM) on its breach of lease claim, denying Barcelino's motion for reconsideration, and awarding attorney fees and costs to BSM. Because the plain terms of the lease establish that Barcelino violated the lease when it conducted a sale advertised as a "store closing sale" and that this violation entitled BSM to immediate injunctive relief, we affirm. We also affirm the award of attorney fees.

FACTS

Barcelino, a California corporation, is a fine clothing retailer. In June 1997, Barcelino expanded its business to Washington, entering into a ten-year lease with BSM for Space 143 at Bellevue Square Mall to sell men's suits,

clothing, and accessories.[1] One of the conditions of the lease, set forth in section 26, prohibited Barcelino from conducting an "auction" or a "distress sale." Violation of this section "immediately" entitled BSM to certain remedies under the lease. One remedy permitted BSM to continue the lease and obtain injunctive relief in the event further breaches were committed.

In July 1997, the parties negotiated amendments regarding general notice and cure requirements. These amendments included providing written notice to Barcelino's corporate offices in California and extending the cure period under certain sections of the lease from 10 to 20 days.

Around September 2007, the parties agreed to extend the lease to April 30, 2008, and ultimately to May 31, 2008.

On March 5, 2008, Barcelino commenced a sale, using various signs, radio commercials, and a client news release to advertise the sale. The record contains photographs of one prominently displayed sign that read, "Store Closing SALE" and "Everything Must Go 30% to 50% OFF." Another sign stated, "Inventory Blowout SALE" and "Everything Must Go 30% to 50% OFF." Barcelino also aired radio commercials advertising a "store closing sale." The news release mailed to customers similarly described the sale and explained that Barcelino planned to move to two new locations.

On March 12, 2008, BSM's attorney, David Nold, entered the store and

[1] Bellevue Square leases commercial space to over 200 tenants.

confronted Robert Browning, Barcelino's vice president and director of stores. Nold demanded that Browning remove the signs. Browning replied that he did not have the authority to do so and asked Nold to put his requests in writing so that they could be forwarded to Barcelino's corporate offices in California.

On March 13, 2008, an associate of Nold handed a Barcelino floor salesman a letter stating that "[i]n holding a 'Store Closing' sale and posting signs advertising such, [Barcelino is] in breach of the Lease pursuant to Section 26 of the Lease entitling [BSM] to immediate remedies." In the letter, BSM warned that failure to "immediately cease . . . [the] distress sale . . . will result in the immediate filing of a civil action . . . seeking a court injunction." BSM informed Barcelino that it would be requesting a temporary restraining order (TRO) in the ex parte department of King County Superior Court the next day. Attached to the letter was a copy of BSM's summons, complaint, and motion for a TRO.

On March 14, 2008, BSM filed a lawsuit against Barcelino and moved for a TRO. Browning attended this hearing, but without counsel. Judge Helen Halpert granted the TRO, conditioned on a $50,000 bond. The TRO did not contain any findings of fact or conclusions of law. Judge Halpert also scheduled a hearing on BSM's motion for a preliminary injunction for March 25, 2008.

In his declaration, Browning stated that after the TRO issued, Barcelino removed the reference to "Store Closing" in one sign but continued using the

other signs and radio advertisements. On March 17, 2008, BSM sought and obtained an order of contempt from Judge Douglas McBroom. Barcelino removed the remaining signs and discontinued the radio advertisements. The parties discussed signage allowed under the lease over the next two days but could not reach any agreement.

On March 25, 2008, Judge McBroom granted a preliminary injunction. The court's order prohibited Barcelino "from displaying any signage which has not been approved by the Plaintiff." Attached to the order was an approved sign with the words "Storewide SALE" and "Entire Stock 30% to 50% OFF." Finding of fact I in the preliminary injunction order stated, "Allowing a tenant to violate the Lease and conduct a store closing sale will result in actual and substantial injury to Plaintiff."

On March 31, 2008, Barcelino filed an answer, asserting multiple counterclaims. These included a claim for breach of lease in which Barcelino alleged that BSM's actions constituted "a breach of the Landlord's duty to give Barcelino an opportunity to cure any alleged breaches before declaring Barcelino to be in default." As a result of this alleged breach, Barcelino requested damages in an amount to be determined at trial.[2] Another counterclaim asserted "wrongful preliminary relief" on grounds that BSM had

[2] Barcelino claimed that, because of BSM's actions, it "was stopped from advertising its sale effectively. Sales declined sharply. Barcelino earned less revenue with which to pay the . . . rent expense."

posted only $10,000 for the TRO bond, instead of the $50,000. Barcelino asserted that, as a result, the TRO was void and requested vacation of the contempt order.

On April 21, 2008, BSM sought an order "recognizing TRO bond of $50,000." In its motion, BSM explained that, after discovering the error in the TRO bond from Barcelino's counterclaims, it "obtained a surety rider that increased the TRO bond to $50,000 and did so retroactively to March 14."

On April 28, 2008, Barcelino filed an answer with amended counterclaims and third party claims for fraud and conspiracy against Nold and Kemper Freeman, the owner of Bellevue Square. In its amended "wrongful preliminary relief" counterclaim, Barcelino asserted that the preliminary injunction was improperly granted because BSM had not shown irreparable harm.

On May 14, 2008, Barcelino requested the court to award it $50,000 from the TRO bond, to vacate the contempt order, and to dissolve the preliminary injunction. In the alternative, Barcelino asked that the court modify the preliminary injunction order by eliminating findings unsupported by evidence. At oral argument, Barcelino asserted that BSM had presented no evidence showing "actual and substantial harm" to support finding of fact I. Based upon the evidence presented, the court amended this finding to read, "Allowing a tenant to violate the Lease and conduct a store closing sale potentially could result in

actual and substantial injury to Plaintiff."[3] (Emphasis added.) Barcelino also argued that because BSM failed to post a $50,000 bond for the TRO, BSM needed to provide additional security for the preliminary injunction. The court entered an order, stating, "In order for its Preliminary Injunction to remain in effect, Bellevue Square shall post a bond of $300,000, effective retroactive to March 25, 2008, and provide proof of the filing . . . by fax no later than 5:00 p.m. on May 16, 2008."[4] The court also granted BSM's motion to recognize the $50,000 TRO bond.

On June 27, 2008, BSM moved for summary judgment, seeking dismissal of Barcelino's counterclaims and requesting attorney fees. Barcelino filed a response, asserting that issues of fact existed on the counterclaims.

On January 2, 2009, Judge McBroom denied BSM's summary judgment motion. In addition, the court granted Barcelino's motion to voluntarily dismiss its claims against Nold without prejudice and sua sponte dismissed the claims against Freeman with prejudice.

After additional discovery, BSM again moved for summary judgment on March 20, 2009. Barcelino filed a response, joining in BSM's request for the court to interpret the lease as a matter of law. Following a hearing on April 17,

[3] In amending finding of fact I, the court reviewed the declarations of Robert Dallain, BSM's vice president and general manager, Glen Bachman, vice president of operations, and Kevin Schreck, the vice president of leasing and development. The court also deleted a finding that Barcelino had violated state law by conducting the sale because the parties had not argued this issue.

[4] Barcelino originally proposed that the bond be increased to $500,000.

2009, Judge Chris Washington granted BSM's motion. The court upheld the preliminary injunctive relief granted to BSM, dismissed Barcelino's counterclaims, awarded BSM attorney fees and costs under RCW 4.84.330 in an amount to be determined at a future date, and exonerated the surety bond posted by BSM.

On April 27, 2009, Barcelino filed a motion for reconsideration, which the court denied.

On June 5, 2009, the court awarded BSM $126,757.58 in attorney fees and costs. The court entered an order with findings and conclusions supporting the award of attorney fees and costs on August 5, 2009.

STANDARD OF REVIEW

This court reviews a grant of summary judgment de novo.[5] Summary judgment is appropriate only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[6]

We review denial of a motion for reconsideration for an abuse of discretion.[7]

ANALYSIS

Lease Interpretation

[5] Hearst Commc'ns, Inc. v. Seattle Times Co., 120 Wn. App. 784, 790, 86 P.3d 1194 (2004).

[6] Hearst, 120 Wn. App. at 790.

[7] Weems v. N. Franklin Sch. Dist., 109 Wn. App. 767, 777, 37 P.3d 354 (2002).

When faced with questions of contract interpretation, courts must "discern the intent of the contracting parties, and may consider evidence extrinsic to the contract itself for that purpose, even when the contract terms are not themselves ambiguous."[8] "If relevant, such evidence may include the subject matter of the contract, the circumstances under which the agreement was made, the parties' conduct thereafter, and the reasonableness of the interpretations urged by each."[9] But extrinsic evidence may not be used to vary, modify, or contradict the written terms, show an intention independent of the contract, or show a party's unilateral or subjective intent as to the meaning of the contract terms.[10] "Interpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence."[11]

This case requires us to interpret sections 16.1(c), 16.2, and 26 of the lease. These provisions state, in part,

> 16. TENANT'S DEFAULT
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> 1. Default. The occurrence of any one or more of the following shall constitute a default and breach of this Lease by Tenant:
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> . . . .

[8] Hearst, 120 Wn. App. at 791 (citing Berg v. Hudesman, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990)).

[9] Hearst, 120 Wn. App. at 791 (citing Berg, 115 Wn.2d at 667-68).

[10] Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

[11] Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) (citing Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc., 120 Wn.2d 573, 582, 844 P.2d 428 (1993)).

(c) Failure to Perform. Tenant's failure to observe or perform any of the covenants, conditions or provisions of this Lease to be observed or performed by Tenant (other than as described in Sections 16.1(a) and (b) above). Tenant shall cure any default under this Section 16.1(c) within ten (10) days (except as otherwise provided in this Lease) after written notice thereof by Landlord to Tenant.[12]

. . . .

2. Remedies in Default. In the event of any such default or breach by Tenant, Landlord may at any time after any applicable cure period, with or without notice or demand and without limiting Landlord in the exercise of a right or remedy which Landlord may have by reason of such default or breach.

. . . .

(b) Continue the Lease. Maintain Tenant's right to possession, in which case this Lease shall continue in effect whether or not Tenant has vacated or abandoned the Leased Premises. In such event, Landlord shall be entitled to enforce all Landlord's rights and remedies under this Lease, including the right . . . to specifically enforce Tenant's obligations hereunder and obtain injunctive relief from further defaults and breaches.

. . . .

26. NO AUCTIONS OR DISTRESS SALES. Landlord and Tenant acknowledge that Tenant's use of the Leased Premises as a continuing business in compliance with the provisions of this Lease specifically including but not limited to the terms and provisions of Article 5 above is an essential part of the bargained-for consideration of this Lease. Tenant further acknowledges that its

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[12] The lease addendum modified section 16.1(c) by extending the 10-day cure period to 20 days. The addendum also amended the written notice requirement set forth in section 30.7 by providing that "[a]ny notices required in accordance with any of the provisions herein . . . if to Tenant, shall be delivered or mailed by registered or certified mail to Tenant at [Barcelino's corporate offices in California] and if required by applicable law to Tenant at the Leased Premises." The lease originally stated that notice shall be delivered or mailed to "Tenant at the Leased Premises."

> failure to comply with the terms of Article 5, including the failure to maintain the business within the Leased Premises as a going concern, will have a material adverse impact on Landlord and the other tenants of the Shopping Center. Therefore, it is an express condition and part of the consideration of the Lease that Tenant shall not conduct or permit to be conducted any sale by auction upon or from the Leased Premises, whether the auction is voluntary, involuntary, pursuant to any assignment for the payment of creditors, or pursuant to any bankruptcy or other insolvency proceeding. No "auction," "fire," "bankruptcy," "going out of business," "lost our lease," "moving," "store closing," "smoke (or other casualty) damage," or other distress sales of any nature may be conducted on the Leased Premises. The violation of this Section shall be a material breach of this Lease and shall immediately entitle Landlord to the rights and remedies set forth in Section 16.2.

(Emphasis added.)

BSM argues that section 26 prohibited Barcelino's March 2008 sale. Barcelino responds that this section does not apply for two reasons. First, Barcelino contends that its March 2008 sale was not a "distress sale." Emphasizing that the term "distress sale" is not defined in the lease, Barcelino draws on the dictionary definitions of "distress" and "distress sale" and asserts that such a sale "must be accompanied by evidence that the tenant is not honoring or will not honor the term of its lease either because of insolvency or

financial 'distress.'"[13] Second, Barcelino suggests that extrinsic evidence shows that section 26 was not intended to apply to its March 2008 sale. Specifically, Barcelino points to the depositions of various BSM executives as evidence that BSM did not follow "standard operating procedure" by promptly filing a lawsuit and seeking injunctive relief.[14] Barcelino also points to the circumstances surrounding the closing of its women's store, Barcelino Per Donna, in Space 110 at Bellevue Square Mall in March 2008.[15] According to Barcelino, BSM negotiated directly with Barcelino about appropriate signage and did not prohibit the use of the words "store closing" on signs advertising an inventory sale that took place from January 25, 2008, until late February 2008.[16]

We agree with BSM that section 26 applies to Barcelino's sale. Section 26 expressly states, "No 'auction,' 'fire,' 'bankruptcy,' 'going out of business,' 'lost our lease,' 'moving,' 'store closing,' 'smoke (or other casualty)' damage, or other distress sales of any nature may be conducted on the Leased Premises." One

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[13] The New American Oxford Dictionary, relied on by Barcelino, defines "distress" as the "seizure and detention of the goods of another as pledge or to obtain satisfaction of a claim by the sale of goods seized." It defines "distress sale" as "a sale of goods or assets at reduced prices to raise much needed funds." The New American Oxford Dictionary (2d ed. 2005).

[14] Barcelino primarily relies on the depositions of Kemper Freeman and Robert Dallain.

[15] Barcelino Per Donna opened in 2006. Although BSM claims that the Barcelino Per Donna lease did not contain a provision analogous to section 26, the record does not include a copy of that lease.

[16] Browning stated in his declaration that Glen Bachman gave him the choice of moving back a "Store Closing" sign that was placed in the front of the store or leaving it in place but removing the words "Store Closing." Browning removed "Store Closing" from the sign.

of the signs used by Barcelino for its March 2008 sale contained the words "Store Closing SALE." The radio commercials and client news release similarly advertised the sale. In fact, the release further explained that Barcelino "has lost its Lease and will be closing our Bellevue Square Men's location. . . . Our new vision calls for two luxury men's boutiques, first in Downtown Seattle, in a location soon to be disclosed, and then a flagship store in 2009 in a premier luxury shopping venue on the Eastside." Barcelino's March 2008 sale was therefore advertised as a "store closing," "has lost its lease," or "moving sale"—all of which qualify as a "distress sale" under the plain words of section 26. In an attempt to avoid this plain language, Barcelino improperly relies on extrinsic evidence to show its subjective intent as to the meaning of "distress sale."

Barcelino next argues that even if its March 2008 sale was a "distress sale," section 26 required BSM to provide written notice to its corporate offices in California and a 20-day cure period before seeking injunctive relief. In support of this argument, Barcelino relies on section 16.1(c). Barcelino emphasizes that this section applies when a tenant fails to perform "any" conditions of the lease and thus imposes notice and cure requirements for section 26 breaches. Barcelino asserts that, at the very least, section 16.1(c) creates an ambiguity that should be construed in its favor.

This argument fails. Section 26 specifically prohibits "distress sales" and

expressly states that BSM is "immediately" entitled to the "rights and remedies" of section 16.2. Section 16.1(c) is not relevant. Even if it were, section 26, as the more specific provision, controls in this situation.[17] Thus, the general notice and cure requirements of section 16.1(c) do not apply to section 26 breaches. This reading is further supported by the fact that other sections of the lease provide cure periods of different lengths. For example, section 16.1(b) provides a five-day cure period when a tenant fails to pay rent.[18] Finally, section 16.1(c) contains language qualifying its cure requirement by stating that a tenant shall cure the default within 10 days "except as otherwise provided in this Lease."[19]

Barcelino suggests that section 16.2 also supports its reading of section 26. Barcelino focuses on the prefatory language in section 16.2 stating that the landlord may at any time pursue remedies under that section "after any applicable cure period." This language undermines, rather than supports, Barcelino's argument since it reinforces that certain sections of the lease have different cure periods. Moreover, section 26 expressly incorporates the "rights and remedies" of section 16.2, not the entire section.

In sum, section 26 prohibited Barcelino's March 2008 sale and authorized

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[17] See Wright v. Safeco Ins. Co. of Am., 124 Wn. App. 263, 277, 109 P.3d 1 (2004) ("In insurance contracts, as in other contracts, specific provisions control over general provisions." (citing Foote v. Viking Ins. Co. of Wis., 57 Wn. App. 831, 834, 790 P.2d 659 (1990))).

[18] The addendum modified section 16.1(b) by extending the three-day cure period to five days.

[19] This qualifying language immediately precedes the words "after written notice," so it arguably does not apply to the notice requirement.

BSM to immediately seek injunctive relief. The court properly granted summary judgment to BSM and denied Barcelino's motion for reconsideration.

Wrongful Preliminary Relief Claim

Despite the lease provision expressly entitling BSM to seek injunctive relief for a breach of section 26, Barcelino suggests several reasons why the superior court erred in holding that BSM's "preliminary relief was correctly and properly entered." Barcelino contends that (1) the TRO, contempt order, and preliminary injunction violated CR 52 and 65, (2) BSM failed to prove actual and substantial harm, and (3) BSM had an adequate remedy at law under section 16.2(b) of the lease. But even if the TRO, contempt order, and preliminary injunction were wrongfully issued, it is unclear how Barcelino's "wrongful preliminary relief" claim relates to the relief it requests on appeal.

Barcelino challenges the superior court's dismissal of its breach of contract counterclaim. Following the above analysis, Barcelino's interpretation of the lease is incorrect, and the superior court properly dismissed Barcelino's counterclaim. Barcelino also challenges the court's award of fees and costs to BSM. As discussed below, the court properly awarded BSM attorney fees and costs. The court also properly rejected Barcelino's request to reduce the amount of the award. Moreover, the reasons supporting Barcelino's relief are only tangentially related to the "wrongful preliminary relief" claim since Barcelino only objected to fees BSM incurred in its efforts to correct the TRO bond. Because it

is unclear how Barcelino's "wrongful preliminary relief" claim relates to the relief it seeks, we do not consider this claim.

Attorney Fees

Barcelino challenges the superior court's award of fees under the lease and RCW 4.84.330. Whether a party is entitled to attorney fees is an issue of law reviewed de novo.[20] We review the reasonableness of a fee award for an abuse of discretion.[21]

The lease expressly provided for recovery of attorney fees and costs by the prevailing party in an action brought under the lease, and BSM prevailed below.[22] Similarly, RCW 4.84.330 states that where a contract provision allows for the awarding of attorneys fees and costs to one of the parties, "the prevailing party . . . shall be entitled to reasonable attorneys fees in addition to costs and necessary disbursements." Thus, the court properly awarded BSM attorney fees and costs under the lease and RCW 4.84.330.

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[20] Taliesen Corp. v. Razore Land Co., 135 Wn. App. 106, 141, 144 P.3d 1185 (2006).

[21] Taliesen, 135 Wn. App. at 141.

[22] Section 16.3 provides in part,

> Legal Expenses. If either party is required to bring or maintain any action . . . or otherwise refers this Lease to an attorney for the enforcement of any of the covenants, terms or conditions of this Lease, the prevailing party, or the non-breaching party if no action is filed or no decision rendered regarding the merits of the action, shall, in addition to all other remedies provided herein, receive from the other party all the costs (including reasonable attorneys' fees) incurred in the enforcement of the covenants, terms and conditions of this Lease.

With respect to the amount of the award, Barcelino requested an award reduction based on the following reasons: (1) the award included fees incurred for Nold's efforts to correct the TRO bond; (2) the award included fees incurred for time spent on motions to dismiss Barcelino's third party claims against Nold and Freeman; (3) the award included fees incurred for work on unsuccessful motions, such as BSM's attempt to obtain a protective order to prevent Freeman's deposition and BSM's first summary judgment motion; (4) BSM listed charges for two unidentified persons; (5) costs were awarded for tasks such as taking depositions that were not used to support BSM's second summary judgment motion; (6) the hourly rates of BSM's counsel were unreasonable; and (7) the time spent by BSM's counsel was unreasonable.

The superior court entered four findings of fact. In finding of fact 1, the court cited the section of the lease authorizing an award of fees and costs to the prevailing party. In finding of fact 2, the court found that the hourly rates of BSM's counsel were reasonable. In finding of fact 3, the court stated,

> In light of [the time] entries [provided by Nold & Associates], and the history and work performed in this case as set forth in detail in the Declaration of David Nold, the Court finds that the number of hours of work conducted and the rates charged per hour were reasonable in securing a successful result for Bellevue Square.

Finally, in finding of fact 4, the court determined that BSM had incurred $116,140.00 in fees and $10,617.58 in costs for a total amount of $126,757.58. While these findings may not fully address the issues raised by Barcelino, we

cannot say that the court abused its discretion.

On appeal, both parties request attorney fees under the lease and RAP 18.1. RAP 18.1 provides for attorney fees to the prevailing party if there is a basis for doing so. A contractual provision for attorney fees at trial supports an award of attorney fees on appeal.[23] Accordingly, we grant BSM's request for fees, upon compliance with RAP 18.1(d), and deny Barcelino's request.

CONCLUSION

The superior court correctly held that, under a plain reading of the lease, Barcelino violated section 26 when it conducted a sale advertised as a "store closing sale" and that this violation entitled BSM to immediate injunctive relief. The court also properly awarded attorney fees and costs to BSM.

Affirmed.

Leach, A.C.J.

WE CONCUR:

Ellington, J.

Cox, J.

[23] IBF, LLC v. Heuft, 141 Wn. App. 624, 639, 174 P.3d 95 (2007).