

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PETER J. LANGE,)	
)	No. 63928-5-I
Appellant,)	
)	DIVISION ONE
v.)	
)	
FRANCIS S. WHELAN,)	
)	
Respondent,)	
)	
and any and all other occupants,)	UNPUBLISHED OPINION
)	
Defendants.)	FILED: <u>September 7, 2010</u>

Spearman, J.--Peter Lange appeals rulings of the superior court which found that the eviction summons served in this case was defective; that the unlawful detainer action should be dismissed without prejudice; that the eviction was retaliatory; that respondent Francis Whelan was entitled to an award of attorney fees; that Lange violated CR 11; and that Lange's motion to censure and for sanctions was improperly noted and should not be heard. We affirm the superior court's finding of a defective summons, but hold that such a finding deprived the court of subject matter jurisdiction. Accordingly, we vacate the order of the superior court awarding attorney fees and the ruling that the eviction was retaliatory. We remand for the entry of findings of fact regarding the court's

conclusion that Lange violated CR 11. We affirm the superior court's refusal to hear the motion to censure and for sanctions, and decline to award attorney fees on appeal.

FACTS

Francis Whelan rented a two-bedroom house in Seattle from Peter Lange. The rental agreement period was from May 1, 2004 to April 30, 2005, and indefinitely thereafter. The rental agreement prohibited subleasing. At some point Whelan permitted three other individuals to move into the house and share the rent.

On March 22, 2009, Lange was informed that tiles were coming loose in the bathroom. Lange inspected the bathroom to confirm the defects and made repairs, though the date of completion is unclear. At the beginning of April, Lange received a rental payment from Whelan that was approximately \$275 less than the monthly rent of \$950. Whelan explained in a letter that he deducted money for the nine days he could not use the shower because Lange had failed to perform repairs in a timely fashion. Approximately three days after receiving Whelan's letter, Lange sent Whelan legal documents to terminate the lease, pay or vacate the unit, and for unlawful detainer. By April 30, Whelan had not vacated. Lange served a summons and complaint for unlawful detainer on May 1 and, acting pro se, began eviction proceedings. Among the stated grounds for eviction were non-payment of rent, failure to maintain premises, painting without

consent, introduction of additional occupants without consent, and destruction of parts of the residence. Whelan alleged defective service of the summons and complaint as well as retaliatory eviction.

On May 20, 2009, Commissioner Eric Watness presided over a show cause hearing in this case. He found that Lange had failed to certify the summons and complaint, and to provide proper proof of service. The commissioner did not reach the merits of the case and set another hearing for May 29.

At the May 29 hearing, Commissioner Nancy Bradburn-Johnson dismissed Lange's claims of unlawful detainer without prejudice due to defects in the summons. At the hearing, she explained to Lange:

You have a problem here frankly with your pleadings and the problem is that you served a defective summons. Your summons is not sufficient for what you were trying to do here. You used an old summons and I'm not sure where you got it but the summons does not include, there has to be a specific date here. It's not good enough. This is an old one that says seven days from date of service [that] used to be fine. But not anymore. The law changed about a year ago and it requires also that you include information about how you can [be] reached by fax, if you have a fax number. Now you may not. Most private individuals do not. But this summons is completely defective. And on that basis alone this action fails.

In her oral ruling, Commissioner Bradburn-Johnson awarded reasonable costs and attorney fees to Whelan based on a provision in the rental agreement and under the Residential Landlord-Tenant Act. The written order issued at the hearing further states that the eviction was retaliatory in nature, and that

attorney fees were awarded to Whelan under section 12 of the lease, under the provisions of the Residential Landlord-Tenant Act of 1973, ch. 59.18 RCW, and for Lange's violation of CR 11.

A hearing to determine the amount of attorney fees to be awarded was held before Commissioner Donald Haley on July 7. He awarded \$6,450. Also at this hearing, Lange attempted to argue his motion to censure Whelan's attorney and for sanctions. However, the court declined to hear the motion because it was "not properly reported."¹

Lange appeals from the orders entered by the trial court on May 29 and July 7, 2009.

DISCUSSION

Lange argues that the trial court erred in finding the summons defective, finding the eviction retaliatory, awarding attorney fees to Whelan, finding Lange in violation of CR 11, and refusing to hear his motion to censure and for sanctions. We affirm the superior court's finding that the summons was defective. However, we hold that where the summons was defective, the superior court lacked subject matter jurisdiction, and therefore we vacate that portion of the order finding that Lange committed a retaliatory eviction and awarding attorney fees. We remand to the superior court for the entry of findings of fact regarding its conclusion that Lange violated CR 11. We affirm the superior

¹ Whelan explained that this motion was not heard by the trial court because Lange failed to note the motion on the docket and to provide working papers to the court. Lange does not dispute this characterization in the relevant section of his brief.

court's decision not to hear Lange's motion to censure and for sanctions. We decline to award attorney fees on appeal.

Defective Summons

We begin with the issue of the defective summons. Appellant Lange contends that his summons contained the basic information required under RCW 59.18.365. He further argues that the summons was accepted at the first show cause hearing and that it should not have been found defective at a subsequent hearing. Finally, he argues that Whelan did not object to the form of the summons in his answer or at the first show cause hearing.

Whether the summons was defective under RCW 59.18.365 is an issue of statutory interpretation. Therefore, we review the trial court's finding de novo. Hous. Auth. of City of Pasco & Franklin County v. Pleasant, 126 Wn. App. 382, 387, 109 P.3d 422 (2005) (citing Hartson P'Ship v. Goodwin, 99 Wn. App. 227, 231, 991 P.2d 1211 (2000)). Under the statute, a summons for an unlawful detainer action must substantially follow the form set forth therein. See RCW 59.18.365. The sample form prescribes an explicit statement of the date and time by which a response is due. As Commissioner Bradburn-Johnson found, Lange's summons was defective, in part, because it did not include an explicit date and time by which Whelan had to respond. Instead, it stated that Whelan was required to respond "within seven (7) days after the service of this Summons, excluding the day of Service."

Additionally we note that, under RCW 59.18.365, a tenant must be

informed that acceptable methods of responding to an unlawful detainer summons include by mail or facsimile. Truly v. Heuft, 138 Wn. App. 913, 915, 158 P.3d 1276 (2007); see also Hous. Auth. of Everett v. Kirby, 154 Wn. App. 842, 846–48, 226 P.3d 222 (2010) (court lacked subject matter jurisdiction because summons stated that tenant could respond only by personal delivery). Lange’s summons stated that Whelan was required to respond “by serving a copy upon” Lange, and did not mention service by mail or facsimile. For these reasons, the superior court properly found the summons served by Lange to be defective.

Lange’s arguments that the summons became “acceptable” to the court at the first show cause hearing and that Whelan did not object to the form of the summons in his answer or before Commissioner Watness at the first hearing are without merit. First, there is no indication in the record that Commissioner Watness addressed the issue of whether the summons was defective. The commissioner’s only determination was that Lange’s service was improper. Second, Whelan’s failure to object to the defective summons is of no assistance to Lange. As discussed below, the defective summons deprived the court of subject matter jurisdiction. It is well established that where a court is without subject matter jurisdiction, it cannot be conferred by consent, waiver, or estoppel. Rust v. W. Wash. State College, 11 Wn. App. 410, 419, 523 P.2d 204 (1974).

Lack of Jurisdiction

In an unlawful detainer action, any noncompliance with the statutory

method of process prevents the superior court from acquiring subject matter jurisdiction. Lack of such jurisdiction renders the court powerless to pass on the merits of the case. Hous. Auth. of Everett v. Kirby, 154 Wn. App. at 850 (citing Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County, 135 Wn.2d 542, 556, 958 P.2d 962 (1998)).

In this case, Appellant failed to comply with the statutory method of process because he did not include an explicit date and time by which Whelan had to respond and because he did not apprise Whelan of the statutorily acceptable methods of response. Accordingly, the court lacked subject matter jurisdiction. In its absence the court could not reach the merits of the case and determine who the prevailing party was under the rental agreement or whether Lange's action was retaliatory under the Residential Landlord-Tenant Act. Thus, to the extent the court relied on these grounds to award costs and attorney fees it was error. Therefore, we vacate that portion of the order finding a retaliatory eviction and the court's award of attorney fees pursuant to the Residential Landlord-Tenant Act and the rental agreement.

The superior court's lack of subject matter jurisdiction, however, does not impair its authority to impose sanctions pursuant to CR 11 because to do so is not a judgment on the merits of the case. Biggs v. Vail, 124 Wn.2d 193, 198, 876 P.2d 448 (1994). It is the determination of a collateral issue: whether the attorney or party has abused the judicial process. Id. (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447 (1990)). In making this determination, the

court must specify the sanctionable conduct in its order. “The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or that paper was filed for an improper purpose.” Biggs, 124 Wn.2d at 201 (emphases in original).

In this case, the court failed to make either finding. The order simply states, in conclusory terms, “Plaintiff’s eviction is found to be retaliatory.” Without a factual basis, this is insufficient to support a finding of a CR 11 violation. Nor is the court’s award of attorney fees as a sanction for violating CR 11 sustainable, because it fails to indicate that it is limited only to fees incurred in responding to the sanctionable conduct. Biggs, 124 Wn.2d at 202. Accordingly, we vacate the court’s award of attorney fees on this ground as well.

The case is remanded for entry of specific findings as to what conduct by Lange, if any, violated CR 11 and, if necessary, to impose an appropriate sanction which may include the amount of the attorney fees Whelan incurred in responding to the sanctionable conduct.

Motion to Censure and for Sanctions

Finally, Lange argues that the trial court erred in refusing to hear his motion to censure Whelan’s attorney and for sanctions at the July 7 hearing. A decision regarding whether or not to hear a motion for sanctions is reviewed for abuse of discretion. Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). An abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable grounds or for

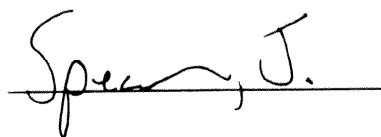
untenable reasons. A discretionary decision rests on untenable grounds or is based on untenable reasons if the trial court relies on unsupported facts or applies the wrong legal standard. The court's decision is manifestly unreasonable if, despite applying the correct legal standard to the supported facts, the court adopts a view that no reasonable person would take. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Because it appears undisputed that Lange's motion was not properly noted, we conclude that Commissioner Haley did not abuse his discretion when he declined to hear the motion.

Attorney Fees Requested on Appeal

Whelan requests attorney fees and costs incurred on appeal in the amount of \$4,529.88. Lange, who is pro se, requests that costs on appeal be awarded to him.

A party on appeal is entitled to attorney fees where applicable law authorizes the award. RAP 18.1(a). The only basis for the claim for attorney fees on appeal in this case is the parties' rental agreement. Having concluded that the trial court was without subject matter jurisdiction and without authority to consider the merits of the case, this court has no grounds upon which to award attorney fees on appeal. The requests are denied.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.



WE CONCUR

Schivella, J.

Cox, J.