

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

BELLEVUE SQUARE, LLC, a)	No. 66533-2-I
Washington limited liability company,)	
)	
Respondent,)	
)	
v.)	
)	
JIMI LOU STEAMBARGE d/b/a)	
ALLUSIA, and JOHN DOE)	
STEBMBARGE, husband and wife)	
and the marital community comprised)	UNPUBLISHED OPINION
thereof,)	
)	
Appellant.)	FILED: September 24, 2012
)	

Ellington, J. — In this breach of a commercial lease case, the court granted the landlord summary judgment against the tenant, Jimi Lou Steambarge, and denied Steambarge’s motion for reconsideration. Steambarge appeals on several grounds. We affirm.

BACKGROUND

In September 2009, Steambarge, d/b/a Allusia, entered into a 20-month lease for retail space in the Bellevue Square shopping center. Among other things, the lease provides that a tenant defaults by vacating the premises or failing to timely pay rent. Within four months of signing the lease, Steambarge defaulted by failing to pay rent and other charges authorized under the lease.

Steambarge attempted to negotiate an early end to her lease and offered other “creative” suggestions.¹ Bellevue Square rejected the suggestions but offered an extended payment plan if Steambarge would sign a confession of judgment. Steambarge refused. Instead, on March 1, 2010, she sent “an official 30-Day Termination Notice of ALLUSIA’s tenancy” and “Notice of Cancellation of the Lease Agreement on the part of ALLUSIA.”² Steambarge advised that March 30, 2010 would be Allusia’s last day at Bellevue Square.

After communication with Bellevue Square’s attorney culminated in his invitation to “close the store tonight and leave as you cannot stay without paying rent,” Steambarge began removing her inventory on March 23, 2010.³ She sent her contractor to take down the store sign two days later, but he found it had already been removed. Bellevue Square later returned the sign to Steambarge in a damaged and unusable condition. On March 29, 2010, Steambarge confirmed she had completely vacated the premises.

Bellevue Square filed suit for breach of contract on April 5, 2010. Steambarge filed a pro se answer, affirmative defenses, and counterclaim. Though she failed to articulate any particular cause of action, Steambarge suggested Bellevue Square made misrepresentations to induce her to sign the lease and failed to properly inquire into her ability to meet the lease terms.⁴

¹ Clerk’s Papers at 50.

² Clerk’s Papers at 51 (emphasis omitted).

³ Clerk’s Papers at 97.

⁴ Steambarge alleged that Bellevue Square “knowingly and intentionally neglected to inquire about JIMI LOU STEAMBARGE’S and/or ALLUSIA’S past and/or

After Bellevue Square secured a replacement tenant, which began paying rent on August 23, 2010, it moved for summary judgment and dismissal of Steambarge's counterclaim.

Steambarge opposed the motion and offered two declarations: one from herself and one from her friend and contractor, Axel Duerr. Both stated their belief that Bellevue Square was the first to breach the contract, but neither specified how or when that occurred or offered any evidence to support the assertion. Steambarge did not deny that she failed to pay rent when due, terminated the lease, or vacated the premises before the end of the lease term. And she did not challenge Bellevue Square's calculation or amount of damages.

The court granted Bellevue Square's summary judgment motion in its entirety. Without inviting a response, the court also denied Steambarge's motion for reconsideration. Steambarge appeals.

DISCUSSION

Steambarge contends the court erred in granting summary judgment and denying reconsideration because she had not yet conducted discovery; that the court failed to record the summary judgment hearing and refused to allow testimony at that hearing; and because there are genuine issues of material fact as to the real party of interest, Bellevue Square's mitigation of damages, the calculation of the damages awarded to Bellevue Square.

existing business history, sales volume, financial resources, business plan, marketing plan, and/or its financial backing." Clerk's Papers at 9.

Standard of Review

“On review of summary judgment, we engage in the same inquiry as the trial court.”⁵ We consider all facts and reasonable inferences in the light most favorable to the nonmoving party, and affirm summary judgment only if, from all the evidence, reasonable persons could reach but one conclusion.⁶ The moving party has the burden to show that there is no genuine issue as to any material fact.⁷ “If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute.”⁸ 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.⁹ A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons.¹⁰

Discovery

For the first time on appeal, Steambarge contends summary judgment was improper because “she had not had the opportunity to present Interrogatories to Plaintiff, nor conduct any other of the necessary discovery.”¹¹ Steambarge explains

⁵ Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

⁶ Id.; CR 56(c).

⁷ Id.

⁸ Id. (quoting Atherton Condo. Apartment-Owners Ass’n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990)).

⁹ Rivers v. Washington State Conf. of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

¹⁰ State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

¹¹ Br. of Appellant at 20.

that she was unprepared to respond to Bellevue Square's motion for summary judgment because, without benefit of counsel, she assumed she could lay out her case at trial, relying on the testimony of witnesses from Bellevue Square.¹²

We have no doubt that Steambarge was at a significant disadvantage without an attorney. Nevertheless, the failure to present an argument to the trial court precludes its review on appeal.¹³ Steambarge never requested additional time to conduct discovery. Steambarge's frustration at not having the jury trial she expected is not a basis to reverse the judgment.

Record of Proceedings

Steambarge cites RCW 2.32.180 and RCW 2.32.050 for the proposition that we must reverse the judgment because the superior court failed to record the summary judgment hearing. But these statutes deal with the power and duty of court clerks, not when or how such power shall be exercised.

Even if the court had a duty to make an audio recording of the summary judgment hearing (a proposition we do not accept), Steambarge does not explain how she was prejudiced by its absence. She asserts a record of the proceedings would have allowed her to "attach supporting details to the errors assigned,"¹⁴ but gives no

¹² Steambarge also repeatedly claims, without any reference to the record, that Bellevue Square "purposely sheltered and removed" its agent Stephanie Neil from "the formula." See Br. of Appellant at 20; Reply Brief at 5. Steambarge does not explain this claim or suggest she made any attempt through discovery to elicit evidence from Neil.

¹³ In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) (pro se litigants held to same standards as attorneys); Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008).

¹⁴ Br. of Appellant at 12.

indication what those details would show.

Issues of Fact

Steambarge argues summary judgment was improper because there are several genuine issues of material fact. We disagree.

She contends there is a question of fact about the “real party in interest,” citing a portion of the lease contract that she interprets as identifying Kemper Development Company, rather than Bellevue Square, LLC, as the landlord.¹⁵ But the provision to which she refers has to do with the insurance she was required to carry, and states, “Landlord, Kemper Development Company and any other parties in interest designated by Landlord, shall be named as an additional insured.”¹⁶ Steambarge reads “Kemper Development Company” to clarify the term “landlord,” but the provision merely identifies those required to be named additional insureds: the landlord (clearly identified on page one of the contract as Bellevue Square, LLC),¹⁷ Kemper Development Company, and any other parties designated by Bellevue Square. There is no question of fact about the real parties in interest.

Steambarge also contends there is a question of fact about whether Bellevue Square made material misrepresentations to fraudulently induce her to sign the lease. To establish a claim of fraud, Steambarge would have to plead nine elements with specificity and prove them by clear, cogent and convincing evidence.¹⁸ In this case,

¹⁵ Br. of Appellant at 27.

¹⁶ Clerk’s Papers at 37.

¹⁷ See Clerk’s Papers at 20 (“LANDLORD: Bellevue Square, LLC, a Washington limited liability company”).

¹⁸ CR 9(b); Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).

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she would have to show that Bellevue Square knowingly made false representations of

material fact with the intent that Steambarge rely on the misrepresentations in signing the lease, that she was unaware the representations were false, that she rightfully relied on the truth of the representation, and that she suffered damages as a result.¹⁹ Steambarge pleaded none of these elements with specificity.

On appeal, she points to marketing materials provided her by Bellevue Square agent Stephanie Neil, and she asserts that Neil made certain representations about expected sales volume. But Steambarge supplies no evidence that the information Neil provided was false, that Bellevue Square knew that it was false, or that she had a right to rely on sales projections as a promise of her store's success. Not only does the lease contain no such assurances, it explicitly disclaims any.²⁰ Because Steambarge has made no prima facie case of fraud, summary judgment was appropriate.²¹

Steambarge also argues there is a question of fact about whether Bellevue Square properly mitigated its damages. The basis for this argument appears to be the fact that Bellevue Square allowed the replacement tenant 60 days free of rent to build its store. Though Steambarge was offered a similar concession of 15 days free rent,

¹⁹ Stiley, 130 Wn.2d at 505 (nine elements of fraud are "(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff").

²⁰ Clerk's Papers at 40 ("It is understood that there are no oral or written agreements or representations between Landlord and Tenant affecting this Lease and that this Lease supersedes and cancels any and all previous negotiations, arrangements, representations, agreements and understandings, if any, made by or between Landlord and Tenant with respect to the subject matter thereof, and none thereof shall be used to interpret, construe, supplement or contradict this Lease.").

²¹ Steambarge makes no argument on appeal with respect to her claims for negligent misrepresentation.

