

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

TRIMOBA, L.L.C., and BRIAN E.	)	NO. 63728-2-I
WHITESIDE, individually and the	)	
marital community comprised of	)	
BRIAN E. WHITESIDE and CYNTHIA A.	)	
WHITESIDE,	)	
	)	
Respondents,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
AWAKE CLINIC, L.L.C., and JON K.	)	
DECKER, individually and the marital	)	
community comprised of JON K.	)	
DECKER and TAN J. DECKER,	)	
	)	
Appellants.	)	FILED: November 16, 2009

BECKER, J. — Jon K. Decker asks this court to reverse the judgment his landlord obtained against him and Awake Clinic, L.L.C. for defaulting on a lease. He contends the trial court should have entered judgment in his favor based upon breaches of the lease agreement and tortious conduct by respondents Trimoba, L.L.C., and Brian and Cynthia Whiteside. Decker, however, has not assigned error to the trial court's findings, and the findings support the court's

conclusions. We affirm.

Decker's notice of appeal was filed on July 2, 2009. Attached to it was a copy of a clerk's minute entry from King County Superior Court for June 15, 2009. The minute entry indicates that the court found Decker in default on that date when he did not appear for trial. "The court notes that Defendant Decker has not complied with prior orders to provide the Court with his address, and for mediation. The Court finds Defendant in default, and refers the case to the Chief Civil Judge for taking of formal proof."

This court advised Decker that the final order or judgment appealed from was not of record as required by RAP 5.3(a). Decker complied with the letter by filing the findings of fact, conclusions of law, and order entering judgment that were filed in the trial court on July 1, 2009. Decker designated an incomplete set of clerk's papers. He then filed a statement of arrangements stating that he did not intend to file a report of proceedings.

Decker's opening brief assigns error to the final judgment but he does not assign error to the findings of fact and conclusions of law. Based largely on Decker's failure to challenge the findings of fact, Trimoba made a motion on the merits to affirm. This court has determined that Decker's appeal should be heard by a panel of judges without oral argument.

Unchallenged findings of fact are verities on appeal. In the Matter of the Contested Election of Schoessler,

140 Wn.2d 368, 385, 998 P.2d 818 (2000). Because Decker has not assigned error to any of the findings of fact or shown them to be unsupported by substantial evidence, we accept them as true.

The trial court's findings of fact reflect the following: Decker entered into a lease agreement with Trimoba on December 15, 2007. Decker agreed to lease property in Bellevue for four years for a chiropractic business. Payments under the lease were due on the fifth day of each month, and payments made after the fifth day of the month were subject to late fees and interest. If Decker failed to pay sums due within five days following written notice of failure to pay, or if Decker vacated or abandoned the premises without prior notice, he would be considered in default. The agreement also included an attorney fees provision.

Decker paid rent and operating costs for only four months. Trimoba served Decker with a notice of default on June 21, 2007. Decker vacated the premises on June 25, 2007, without advance written notice to Trimoba.

The record indicates that Trimoba filed a complaint against Decker in King County Superior Court and that Decker answered and asserted counterclaims and third party claims against Trimoba's owners. The trial court found that Decker filed a motion in April 2009 for a protective order, asking the court to prohibit Trimoba from taking his deposition. The court denied the motion. Decker failed to attend the

scheduled deposition. Trimoba filed a motion to compel Decker's deposition, which the trial court granted. Despite having actual notice of the order compelling his attendance at a deposition on May 29, 2009, Decker disregarded the order and failed to attend the deposition and did not provide any justification or excuse.

A joint statement of evidence indicates that as of June 1, 2009, trial was set for June 8, 2009. On June 2, the court, sua sponte, ordered the parties to engage in Alternative Dispute Resolution no later than June 12, 2009, warning that if a party failed to cooperate in scheduling ADR, it could face dismissal of its claims. This order set trial for June 15, 2009. The court found that Trimoba attempted to schedule mediation, but Decker would not cooperate.

The court found that Decker received actual notice of the trial date of June 15, but did not appear for trial. The court considered whether sanctions less harsh than dismissal of his claims would be effective in resolving his noncompliance with the court's orders. Based upon Decker's previous failure to comply with the court's orders, and despite warnings that his claims could be dismissed and judgment entered against him if he did not comply, the court found that lesser sanctions would be ineffective to ensure Decker's compliance. The trial court further found that Decker breached the lease agreement, which entitled Trimoba to sums for rent, operating expenses, late fees, expenses for re-letting the premises, and interest.

Trimoba, as the prevailing party, was entitled to its attorney fees and costs. The court entered judgment against Decker and awarded Trimoba damages.

Decker appeals and assigns error to the following orders:

- I. Order Denying Motion for Default for Invalid Service
- II. Order Denying Motion for Reconsider
- III. Order to Compel
- IV. Order for Continuance of Trial Date
- V. Final Judgment

It does not appear that Decker made a post-trial motion for reconsideration. The assignment of error to “Order Denying Motion for Reconsider” apparently refers to an order filed on March 20, 2009, denying Decker’s earlier motion for a default against the Trimoba defendants for invalid service.

Under RAP 10.3(a)(4), an appellant’s assignments of error should be a “concise statement of each error a party contends was made *by the trial court*, together with the issues pertaining to the assignments of error.” (Emphasis added.) The argument section of the appellant’s brief should address the issues raised by the assignments of error. RAP 10.3(a)(6).

Rather than showing how the trial court erred, Decker alleges numerous procedural errors, rule violations, and false statements by Trimoba. For example, he argues that his motion for default should have been granted because Trimoba’s answer to his

counterclaims and third party complaint was not hand-delivered to him, contrary to a declaration filed by Trimoba's counsel. In other words, he complains that Trimoba failed to properly serve its answer. The trial court, however, denied Trimoba's motion for default after finding that Trimoba had properly filed and served its answer. The court further found:

3. This motion was previously brought and denied.\*

\* This motion brought by defendant/counterclaim plaintiff is without legal basis or factual foundation and therefore in violation of Civil Rule 11. The motion is the same motion brought before another judge of this Court and violates KCLCR 7(b)(7). Sanctions are imposed against Jon Decker in the amount of \$250.00 payable to plaintiff's counsel within thirty (30) days of this Order.<sup>[1]</sup>

"If the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding." RAP 9.2(b). Decker has failed to point to evidence in the record showing that the trial court erred by denying his motion for default.

Decker has also failed to show how the court erred in entering judgment against him, given the unchallenged findings and conclusions. The court found that: (1) Decker was obligated to pay rent and operating costs no later than the fifth of each month throughout the four-year term of the lease; (2) paragraph 21 of the lease provided that failure to make payments as required and vacating the

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<sup>1</sup> Clerk's Papers at 13.

premises without written notice constituted default; (3) the party who prevails in a dispute under the lease was entitled to attorney fees and costs; (4) Decker breached the lease by failing to make the required payments and vacating the premises without first giving Trimoba written notice; (5) Trimoba mitigated its damages by finding a new tenant; (6) Trimoba incurred damages for unpaid rent and operating expenses and costs to re-let the space; (7) Decker failed to comply with court orders regarding discovery and scheduling without reasonable justification or excuse; (8) because Decker refused to comply with the court's order compelling his attendance at a deposition, Trimoba was unable to prepare a defense to his claims; (9) lesser sanctions than dismissal with prejudice would not ensure Decker's compliance with the court's orders; and (10) the rate billed and time spent by Trimoba's attorneys was reasonable in light of the issues involved, the amount at stake, and Decker's conduct in filing frivolous pleadings, ignoring court orders, and refusing to cooperate in discovery, ADR, case scheduling, and trial preparation.

Based upon its findings, the trial court concluded that: (1) the lease was a valid and legally binding contract; (2) a party seeking to recover damages for breach of contract has the burden to prove that all conditions precedent or concurrent to the other party's duty to perform have been fulfilled; (3) the lease agreement required Decker to make timely payments of rent and operating costs monthly and to remain in

possession of the premises throughout the terms of the agreement; (4) Decker breached paragraph 21(a) of the lease by not making payments when due beginning in June 2007 and breached paragraph 21(b) by abandoning the premises “on or about June 25, 2007” without providing advance written notice of his intent to vacate, and the breaches were material because they substantially defeated the purpose of the contract; (5) Decker was in default of his obligations to Trimoba as a result of his breaches and, pursuant to paragraph 22 of the lease, Trimoba was entitled to recover damages for lost rent and operating expenses, late fees, and expenses incurred in re-letting the premises; (6) Trimoba used reasonable efforts and fulfilled its obligation to minimize its losses by re-letting the premises within a reasonable amount of time; and (7) Trimoba was entitled to recover its actual damages during the period when the premises were vacant, and expenses reasonably incurred to avoid additional losses incurred by Decker's breach, including rent, operating expenses, late fees, expenses for re-letting the premises, and interest, minus Decker's pre-paid deposit.

The trial court also concluded that, because Decker did not appear for trial, there was no evidence to support his counterclaims, third-party claims, or his affirmative defenses and, therefore, Trimoba and the Whitesides were not liable to Decker for any contract breaches or tort damages. Furthermore, Decker's non-compliance with the



court's discovery and scheduling orders and failure to attend trial were without reasonable excuse or justification and, therefore, were willful and deliberate. The court considered lesser sanctions than dismissal with prejudice, but found that none would be effective in ensuring Decker's compliance. As a sanction for Decker's non-compliance and the lack of evidence in support of Decker's claims, the court concluded that his claims, counterclaims, and affirmative defenses were barred.

Because Trimoba was the prevailing party as defined by statute and by the lease agreement, the court concluded that Trimoba was entitled to recover its reasonable attorney fees and costs. The court, therefore, entered judgment in favor of Trimoba in the principal amount of \$37,270.96, plus \$7,068.25 in prejudgment interest, and reasonable attorney fees of \$24,173.50, plus costs of \$570.00. The damages awarded bear interest at the statutory post-judgment rate of 12 percent per annum.

Because Decker did not assign error to the trial court's findings and conclusions, and did not appear for trial where he would have had the opportunity to present evidence disputing Trimoba's allegations and to complain about the procedural errors he raises in this appeal, he is not entitled to relief on appeal.

Trimoba asks for an award of its reasonable attorney fees on appeal under RAP 18.1 and RCW

4.84.330. When a lease or other contract provides for an award of attorney fees to the prevailing party in an action to enforce the terms of the lease, the prevailing party on appeal is also entitled to an award of attorney fees. Quality Food Centers v. Mary Jewell T, LLC, 134 Wn. App. 814, 818, 142 P.3d 206 (2006). Trimoba's request for its reasonable attorney fees on appeal is granted subject to compliance with RAP 18.1.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, A.C.J.

Appelwick, J.