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No. 75212-0-I

COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON

BTNA, LLC, a Washington limited liability company,

Respondents

v.

FORMOSA BROTHERS INTERNATIONAL LLC, a Washington limited liability company, FU MEI CHU, an individual, and JIH-CHENG CHU and LIHUI CHU, husband and wife,

Appellants.

REPLY BRIEF

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II. ARGUMENT

BTNA could not receive any of the relief it sought in its complaint at any time during the life of this case. Unless Formosa Brothers' actions met the relevant definition of unlawful detainer, BTNA's complaint was destined for dismissal. The trial court erred when it awarded attorney's fees to a party who never could have prevailed.

On March 25, Formosa Brothers tendered a check for the full amount of rent and other charges that BTNA alleged was due. CP at 183, ¶¶ 7-8. At that time, BTNA had not yet served a valid pre-eviction notice.[1] CP at 182-83 ¶¶ 1-5. Whether termed findings of fact or conclusions of law, or a mixture of both, these facts are conclusively established and cannot be challenged before this court. Even if they were subject to challenge, the evidence before this court confirms these facts. By paying rent in full before service of a valid pre-eviction notice, Formosa Brothers availed itself of the "at least one opportunity to correct a breach" that the Legislature provided to it before BTNA could pursue the

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[1] This unappealed legal conclusion is established as law of the case. In its brief, BTNA asserts that this order was "inappropriately obtained during ex parte discussions," though that claim is belied by the record. BTNA's Response Brief, at 19; *see* 4/12/16 RP at 12 ("she left and asked me to send it"). BTNA never moved to vacate, revise, reconsider, or amend the order before the trial court. *See* CR 59; CR 60; RCW 2.24.040. BTNA did not appeal or cross-appeal the order. *See* RAP 5.1. BTNA did not designate the order as error in its brief before this court. *See* RAP 10.3. For the reasons set out in Formosa Brothers' Opening Brief, BTNA cannot challenge this order for the first time in its Response Brief.

remedies of Chapter 59.12 RCW. *Hous. Auth. of Everett v. Terry*, 114 Wn.2d 558, 569, 789 P.2d 745 (1990).

A. BTNA did not and could never have obtained the relief it sought in its complaint

Unlawful detainer is defined as continuing in possession of real property while in default for non-payment of rent more than three days "after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) in behalf of the person entitled to the rent upon the person owing it." RCW 59.12.030(3). Until Formosa Brothers met the definition of unlawful detainer, the trial court could not "exercise" its jurisdiction[2] and BTNA's action must fail. *See Hous. Auth. of City of Seattle v. Bin*, 163 Wn. App. 367, 375-77, 260 P.3d 900 (2011).

Even if BTNA had properly served the March 21 notice, BTNA brought suit before waiting the required four days after service.[3] When a

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[2] BTNA devotes a section of its brief to assert that the trial court never lost subject matter jurisdiction over this matter. BTNA's Response Brief, at 16-18. This is a straw man argument. Formosa Brothers agrees the court always maintained subject matter jurisdiction. *See* Opening Brief, at 12. Rather, BTNA's substantive and procedural errors mean the trial court could not "exercise" jurisdiction and BTNA could not prove the essential elements of its case. *Hous. Auth. of City of Seattle v. Bin*, 163 Wn. App. 367, 375-77, 260 P.3d 900 (2011).

[3] CP at 183, ¶¶ 4-6, 9. This unappealed legal conclusion is established as law of the case. *See* Footnote 1. In its brief, BTNA asserts that Formosa Brothers did not raise this argument before the trial court. BTNA's Response Brief, at 19-20. Formosa Brothers raised this argument in the very first brief it filed before the trial court and the trial court

pre-eviction notice is served any other way than hand-delivery to the person obligated to perform on it, the notice must also be sent by mail and the tenant receives one additional day to comply. RCW 59.12.040. On March 21, BTNA delivered a copy to the daughter of the registered agent for Formosa Brothers, who the trial court found was not a valid agent for service. CP at 183 ¶ 6. When someone other than the "officer, agent, or person having charge of the business" is served, the notice must also be mailed. RCW 59.12.040. Therefore, Formosa Brothers had until at least March 25 to cure the alleged breach. Formosa Brothers tendered full payment that day. CP at 183 ¶ 7-8. Formosa Brothers' tender was timely.

BTNA did not attempt to deliver a three day notice again until April 15.[4] CP at 257-58. The parties agree that Formosa Brothers complied with this notice within the compliance period. *Id.* By timely complying with both notices that BTNA delivered, Formosa Brothers never entered unlawful detainer. Because Formosa Brothers was never in unlawful detainer, BTNA could never prevail in an unlawful detainer action. Granting attorney's fees to BTNA despite Formosa Brothers'

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denied issuing a writ of restitution for this reason, among many others. CP at 124, 128-31, 180-85; 4/12/16 RP at 5-9.

[4] BTNA argues that if Formosa Brothers failed to comply with this notice, BTNA could have prevailed in this unlawful detainer action. BTNA's Response Brief, at 18. BTNA cites no authority for this proposition and it is directly contrary to existing precedent. *See Comty. Invs., Ltd. v. Safeway Stores, Inc.*, 36 Wn. App. 34, 38, 671 P.2d 289 (1983) (a case that is commenced prematurely cannot later be amended to correct the deficiency).

timely tender of rent makes a mockery of the Legislature's policy of affording tenants "at least one opportunity to correct a breach" before they can be subjected to an unlawful detainer action. *Terry*, 114 Wn.2d at 569.

B. When BTNA nonsuited this case, Formosa Brothers was in the same position as if BTNA had never filed suit

For the first time on appeal,[5] BTNA proposes the rule that "The defending tenant is the prevailing party in an unlawful detainer action only if dismissal of the action left the parties in the same position as if the action had never been brought." BTNA's Response Brief, at 12, *citing 4105 1st Ave. S. Invs., LLC v. Green Depot WA Pac. Coast, LLC*, 179 Wn. App. 777, 787, 321 P.3d 254 (2014). Under the conclusively established facts of this case, Formosa Brothers is in the same position it was in when the action was commenced.

On March 25, prior to service of a valid pre-eviction notice, Formosa Brothers paid BTNA the full amount BTNA requested in its invalid notice and in its complaint. CP at 183. If nothing else happened that day, both BTNA and Formosa Brothers would be in the same position as if this action had never been brought. Specifically, BTNA would have

[5] This court does not generally consider arguments raised for the first time on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008); *Kitsap Cty. Consol. Hous. Auth. v. Henry-Levingston*, No. 47696-7-II, at *17-18 (Wash. Ct. App. Nov. 15, 2016). Before the trial court, BTNA offered no legal theory to justify an award of fees to it. CP at 254. To the extent BTNA raises a new legal theory in support of this claim, it should be rejected.

received payment for the full amount they alleged was due and Formosa Brothers would be in possession of the premises. Instead, BTNA rejected that payment and commenced this case to try and obtain both the money it previously refused to accept and possession of the premises. Presumably, BTNA took this action based on the mistaken belief that its pre-eviction notice was valid. After the April 12 ruling that its notice was invalid, BTNA served another pre-eviction notice and, this time, accepted Formosa Brothers' tender of full payment within the waiting period. CP at 257-58. BTNA then voluntarily dismissed its case, leaving BTNA with the money that it received, and rejected, before commencing the case, but without possession of the premises. In other words, BTNA failed to improve its position by bringing suit; the parties were in the same position before the case was commenced as after.

To show that it improved its position after commencing suit, BTNA relies on the fact that Formosa Brothers paid rent after delivery of the April pre-eviction notice. BTNA's Response Brief, at 14. However, BTNA does not explain how this was better than if it accepted the March 25 tender.

The source of BTNA's erroneous conclusion appears to be based on the cause of Formosa Brothers' payment of rent. In all relevant cases affirming an award of unlawful detainer attorney's fees to the landlord, the

tenant failed to comply within the compliance period. *See e.g.*, *Henry-Levingston*, No. 47696-7-II, at *18. Here, Formosa Brothers paid the full rent due within the deadline in the pre-eviction notice. CP at 183, 257-58. BTNA's lawsuit did not cause Formosa Brothers to do anything and Formosa Brothers retained possession. The Washington Legislature has directed that when the tenant complies within the pre-eviction notice period, the landlord cannot exercise the remedies in Chapter 59.12 RCW. RCW 59.12.030; *see Terry*, 114 Wn.2d at 569.

BTNA relies on *4105 1st Ave. S. Investors v. Green Depot WA Pacific Coast* to support its request for attorney's fees. BTNA's Response Brief, at 12-14. In *Green Depot*, neither party was awarded attorney's fees. *Green Depot*, 179 Wn. App. at 783. The facts of that case also show why that result was appropriate there, but inappropriate here.[6]

In *Green Depot*, the tenant successfully avoided issuing a writ of restitution at a show cause hearing, but the case was set for trial. *Id.* at 780. In other words, the tenant did not prevail at the show cause hearing, but merely showed it *may* prevail at a later date. *See id.* at 786. Green Depot's lease was scheduled to end before the parties' trial date. *Id.* at 781. After the hearing and prior to trial, the parties agreed that if Green

[6] In its review of reported unlawful detainer cases, Formosa Brothers did not find a single case where the landlord received neither possession of the premises nor a judgment yet was awarded attorney's fees.

Depot did not vacate at the expiration of its lease, the landlord could obtain a writ of restitution. *Id.* Green Depot vacated as agreed. *Id.* With possession no longer at issue, the landlord dismissed its case. *Id.* at 782. Green Depot requested attorney's fees as the prevailing party, and its request was denied. *Id.*

Every material fact in *Green Depot* is distinguishable from the facts of this case. In *Green Depot*, the tenant did not prevail at the show cause hearing. *Id.* at 786. There are three possible outcomes of a show cause hearing: final judgment for the landlord, final judgment for the tenant, or a ruling that there are disputed issues of material fact that require the case be set for trial. *See* RCW 59.12.130, .170; RCW 59.18.380; *Green Depot*, 179 Wn. App. at 786; *Faciszewski v. Brown*, 192 Wn. App. 441, 446, 367 P.3d 1085 (2016), *rev'd on other grounds by* No. 92978-5 (Wash Sup. Ct. Dec. 22, 2016). The *Green Depot* trial court ruled that there were disputed material facts as to who would prevail and that the case required trial. *Green Depot*, 179 Wn. App. at 786. Either party could have won at trial. *See id.* Here, the court ruled that BTNA neither served a valid pre-eviction notice nor complied with the time and manner requirements of unlawful detainer. CP at 182-83. There was not a material dispute of fact requiring trial. The court did not delay ruling on

the March 21 pre-eviction notice, it ruled that the notice was invalid and unenforceable.

The issues of possession and payment of rent are likewise distinguishable from *Green Depot*. There, the parties stipulated that the tenant would vacate at the expiration of the lease, which occurred while the case was pending and prior to trial. *Green Depot*, 179 Wn. App. at 781. Green Depot then surrendered possession consistent with both the lease and the parties' stipulated settlement. *Id.* at 782. Under the stipulation, if Green Depot had not vacated, the landlord would have been entitled to a writ of restitution. *Id.* That was not the case here. BTNA and Formosa Brothers did not reach any type of settlement. Instead, BTNA chose to serve a new pre-eviction notice and, it is undisputed, the tenant complied on time and in full. CP at 257-58. If this court were to rule that BTNA is the prevailing party because Formosa Brothers' paid rent *during the compliance period* of the second pre-eviction notice, then over 100 year old Legislative policy that every tenant is entitled to "at least one opportunity to cure the breach" would have no meaning. *Terry*, 114 Wn.2d at 569.

The tenant in *Green Depot* failed to timely pay rent after service of a valid pre-eviction notice, which did not happen here. At the time of the show cause hearing, it was still in dispute whether the tenant owed rent,

and how much. *Green Depot*, 179 Wn. App. at 779-81. After the parties entered a stipulation resolving the issue of possession, the landlord reserved its claim for unpaid rent for a separate civil suit for breach of contract. *Id.* at 780. In the life of the unlawful detainer, the rent issue was never resolved. *Id.* at 782. In this case, Formosa Brothers paid all the rent due, twice, within the statutory deadline to pay. CP at 183, 257-58. On appeal, it is undisputed that Formosa Brothers fully and timely complied with both notices. *Id.*

These differences explain why the ruling on prevailing party in *Green Depot* is distinguishable from the correct ruling here. In *Green Depot*, the landlord voluntarily dismissed its case and did not seek attorney's fees, i.e. its position was that neither party prevailed. There, the court ruled that neither party prevailed because of the stipulation, because there was never a ruling on whether the tenant was in unlawful detainer, because the issue of rent was not resolved, and because the tenant gave up possession during the case. The parties in this case did not settle, the court ruled that Formosa Brothers was never in unlawful detainer, Formosa Brothers retains possession of the premises to this day, and BTNA sought attorney's fees below even though it did not get anything out of the lawsuit.

The facts in this case more closely follow those in *Council House*, *Soper*, and other cases cited by BTNA where the tenant obtained a beneficial ruling and retained possession. In *Council House*, as here, the tenant kept possession of the property after the case was dismissed. *Council House*, 136 Wn. App. 153, 157, 147 P.3d 1305 (2006). On appeal, the court ruled that it was error to deny Council House's request for attorney's fees. *Id.* at 162-63. In *Council House*, as here, the tenant retained possession of the property and the court did not order the tenant to do anything. *Id.* In both cases, the tenant was in as good a position at the end of the case as it was at the beginning.

The facts in *Soper* also support Formosa Brothers' request for fees. In *Soper*, the tenant obtained an order that the landlord's pre-eviction notice was legally invalid. *Soper v. Clibborn*, 31 Wn. App. 767, 767, 644 P.2d 738 (1982). So did Formosa Brothers. CP at 183. The difference between the cases is that the *Soper* court dismissed the complaint at the same time, while here the court allowed BTNA's case to continue without any legal basis to do so. *Compare id.* with *Soper*, 31 Wn. App. at 767. On appeal, the court determined that the tenant was the prevailing party and should receive its reasonable attorney's fees. *Soper*, 31 Wn. App. at 770. The *Soper* court correctly determined that the tenant is the prevailing

party when the court enters an order that the landlord's notice is defective. The trial court here should be reversed for failing to follow that principal.

C. Determination of a prevailing party, entitlement to fees, and the amount of any fees award are all properly before this court

BTNA raises several issues regarding the timeliness and scope of this appeal. Each of those arguments misreads the controlling law on the issue.

i. Formosa Brothers filed two separate, timely notices of appeal

In its brief, BTNA reasserts its motion to dismiss this appeal. Though those issues were separately briefed by the parties, Formosa Brothers summarizes its position here.

An aggrieved party timely files notice of appeal when the notice is served and filed within 30 days of the later of (1) entry of an appealable order or (2) an order denying reconsideration of an appealable order. RAP 5.2(a), (b). Timely appeal of a final order brings up for review all interlocutory orders that prejudicially affect the appealable order. RAP 2.4(b). A timely notice of appeal also brings up for review any subsequent order awarding attorney's fees. RAP 2.4(g).

The deadline for Formosa Brothers to file notice of appeal was July 11, 2016. RAP 5.2(a), (b). This is the first court day 30 or more days after reconsideration of the final judgment was denied on June 9. Timely

appeal of this order brings up for review all prior, interlocutory orders and any subsequent orders on attorney's fees. RAP 2.4(b), (g). Formosa Brothers filed and served its Amended Notice of Appeal on June 23, only 14 days after entry of the "order deciding a timely motion for reconsideration" of the final order. RAP 5.2(b). Formosa Brothers' appeal was timely.

ii. The RAP 2.4(b) exception regarding "decision relating to attorney fees and costs" refers to the determination of the *amount* of costs, not determination of a prevailing party

A timely appeal of a final judgment brings up for review all prior orders that prejudicially affect review of the order designated in the notice of appeal. RAP 2.4(b). However, there is an exception to this rule that provides that a "decision relating to attorney fees and costs" does not bring up for review prior, appealable orders that were not themselves timely appealed. *Id.* This exception is interpreted to mean that an appeal of the decision as to the *amount* of attorney's fees and costs does not bring up for review a prior, non-appealed final judgment. *Carrara, LLC v. Ron & E Enters., Inc.*, 137 Wn. App. 822, 826, 155 P.3d 161 (2007).

In *Carrara*, on July 8, the court entered an order that determined a prevailing party. *Id.* at 824. On August 9, the trial court entered an order determining the amount of attorney's fees and costs it would award. *Id.*

On September 22, the court entered final judgment on that award. *Id.* at 824-25. On October 21, the judgment debtor filed notice of appeal. *Id.*

The judgment creditor moved to dismiss review of the July 8 and August 9 orders determining a prevailing party because the notice of appeal came more than 30 days after those orders were entered. *Id.* The court ruled that RAP 2.4(b) limited their review to whether the amount of fees awarded was proper because that was the only order entered within 30 days of the notice of appeal. *Id.* at 826.

Unlike the parties in *Carrara*, Formosa Brothers did file a notice of appeal within 30 days of entry of the order determining a prevailing party. The original notice of appeal came only two days after the order determining BTNA was the prevailing party. Filing appeal of this order is exactly what the *Carrara* court recommended to obtain review of the determination of a prevailing party. *Id.* at 826 (explaining the deadline to appeal an order determining the prevailing party). The amended notice came only 14 days after the order denying reconsideration of that order. Both were timely.

The order on who prevailed in this case is subject to review. The Rules of Appellate Procedure limit the scope of appeal when the order designated only determines the *amount* of fees awarded. *Carrara*, 137 Wn. App. at 826; RAP 2.4(b). Formosa Brothers filed two timely notices

of appeal of the order determining a prevailing party. Had Formosa Brothers appealed the orders on the amount of fees only, review would be limited as it was in *Carrara*, but that is not the only order designated in any of Formosa Brothers' notices of appeal. This court should review this case on the merits.

III. CONCLUSION

The Washington Legislature has afforded tenants an opportunity to cure lease violations and avoid unlawful detainer within a fixed amount of time. When a tenant does this, the court cannot grant the landlord any relief in unlawful detainer. Formosa Brothers took advantage of this opportunity and paid its rent after notice, avoided judgment, and retained possession. Formosa Brothers should be the prevailing party.

Respectfully submitted this 22nd day of December, 2016.

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Certificate of Service

I hereby certify that on December 22, 2016, I caused to be served the foregoing on the following parties by delivering to the following address:

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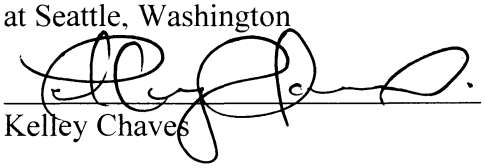

Kelley Chaves