Not Reported in P.3d, 2012 WL 5292826 (Wash.App. Div. 1)
(Cite as: 2012 WL 5292826 (Wash.App. Div. 1))

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,
Division 1.
TBF FINANCIAL, LLC, Respondent,
v.
Boris PETRENKO, dba Petrenko Law Firm, and the marital community composed of Boris Petrenko and Jane Doe Petrenko; Konstantin Bogolyubov, and the marital community composed of Konstantin Bogolyubov and Jane Doe Bogolyubov, Appellants.

Nos. 66800–5–I, 67400–5–I.
Oct. 29, 2012.

Appeal from King County Superior Court; Honorable Richard D. Eadie, J.
Boris Petrenko, Bellevue, WA, pro se.

Andreas Kischel, Attorney at Law, Bellevue, WA, for Appellant.

Laurin Shirley Schweet, Schweet Rieke & Linde, PLLC, Seattle, WA, Zachary E. Davies, Schweet Rieke & Linde PLLC, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

LEACH, C.J.

***1** Boris Petrenko, dba Petrenko Law Firm, and Konstantin Bogolyubov appeal a summary judgment enforcing two separate **equipment lease** agreements. Although Petrenko raises many issues, we need only address his dispositive claim that the contracting parties orally modified the agreements to shorten the length of the lease terms. Because Petrenko presented evidence creating a genuine issue of material fact about an oral modification of each agreement, we reverse and remand for trial.

FACTS

On January 31, 2005, the Petrenko Law Firm signed a 60–month lease agreement with Konica Minolta Business Solutions USA Inc. for an office photocopier (lease 1). Konstantin Bogolyubov, a paralegal at the firm, executed a personal guaranty of the lease. On July 27, 2005, the law firm signed a separate 60–month lease agreement for an additional photocopy machine (lease 2). Bogolyubov did not guarantee lease 2. The agreements each contained a provision prohibiting modification "unless in writing and signed by the parties." Through a series of assignments from Konica Minolta, TBF Financial currently holds both leases.

On November 15, 2010, TBF Financial sued Petrenko and Bogolyubov in King County Superior Court, alleging they failed to make required payments. On December 14, 2010, TBF Financial filed a motion for summary judgment against both Petrenko and Bogolyubov. Petrenko presented declarations opposing the motion that stated that when the law firm received the photocopiers, the machines did not conform to Konica Minolta's representations. According to Petrenko and Bogolyubov, after they received the nonconforming equipment, they spoke on the telephone with a representative from Konica Minolta and agreed to an oral modification of the lease terms in consideration for not rejecting the delivered photocopiers. The declarations describe the pertinent telephone calls in detail. Quinton Mitchum declared that he witnessed Petrenko's telephone conversation about lease 2. TBF Financial did not controvert these conversations.

On February 4, 2011, the trial court entered partial summary judgment against both Petrenko and Bogolyubov on lease 1 and against Petrenko on lease 2, awarding damages based on the original written lease terms. After entry of a final judgment, Petrenko and Bogolyubov appeal.

STANDARD OF REVIEW

We review summary judgment orders de novo, engaging in the same inquiry as the trial court.[FN1] Summary judgment is proper if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[FN2] A genuine issue of material fact exists if reasonable minds could differ regarding the facts controlling the outcome of the litigation.[FN3] In reviewing summary judgment orders, we consider supporting affidavits and other admissible evidence based upon the affiant's personal knowledge.[FN4] "A party may not rely on mere allegations, denials, opinions, or conclusory statements but, rather must set forth specifics indicating material facts for trial." [FN5]

FN1. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003).

FN2. CR 56(c); *Michak*, 148 Wn.2d at 794–95.

FN3. *Hulbert v. Port of Everett*, 159 Wn.App. 389, 398, 245 P.3d 779, *review denied*, 171 Wn.2d 1024, 257 P.3d 662 (2011).

FN4. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn.App. 736, 744, 87 P.3d 774 (2004).

FN5. *Int'l Ultimate, Inc.*, 122 Wn.App. at 744.

ANALYSIS

***2** Viewing the facts and reasonable inferences in the light most favorable to Petrenko and Bogolyubov, we must resolve whether they raise a genuine issue of material fact regarding modification of the lease agreements.

As a preliminary matter, we address TBF Financial's claim that Petrenko failed to preserve this issue for appellate review because he failed to cite any supporting case law to the trial court.[FN6] TBF Financial does not claim that Petrenko failed to raise this issue in his response to its summary judgment motion. Indeed, Petrenko specifically argued in his response that the parties had orally modified the two agreements. We reject TBF Financial's claim.

FN6. We note that TBF Financial did not cite any case law on oral modification in either its trial court briefing or its briefing filed with this court.

Although we generally will not consider an issue raised for the first time on appeal, we will consider authority not presented to the trial court as long as it relates to the same issue presented to the trial court.[FN7]

FN7. *Walla Walla County Fire Prot. Dist. No. 5 v. Wash. Auto Carriage, Inc.*, 50 Wn.App. 355, 357 n. 1, 745 P.2d 1332 (1987).

Petrenko and Bogolyubov claim that after signing the lease agreements, they received nonconforming equipment and orally modified the terms of the leases. They state that these modifications reduced the first lease from a 60–month term to a 48–month term and reduced the second lease from 60 months to 36 months. Petrenko presented the trial court with these contentions and evidence of the oral modification. Although the court did not rule expressly on the modification issue, its judgment reflects the original written terms.

Each agreement expressly requires all modifications to be in writing and signed by the parties. Despite this clause, it is well settled in Washington that parties to a contract may modify or abrogate contract terms in any manner they choose, regardless of provisions that prohibit modification or abrogation except in a particular manner.[FN8] Indeed, Washington courts have consistently held no-oral-modification clauses unenforceable.[FN9] Petrenko presented three declarations to support his assertion, and TBF Financial did not present any controverting evidence and relied exclusively upon the agreements' modification restriction. Thus, Petrenko raised a question of fact as to the length of the leases and whether any damage award against him should be calculated based upon the original lease terms or the allegedly modified lease terms.

FN8. *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn.App. 66, 82, 248 P.3d 1067 (2011).

FN9. *Pac. Nw. Grp. A v. Pizza Blends, Inc.*, 90 Wn.App. 273, 277–78, 951 P.2d 826 (1998).

CONCLUSION

Because the appellants raised a genuine issue of material fact regarding whether they orally modified the original written lease terms, summary judgment was improper. We therefore reverse and remand for trial.

WE CONCUR: ELLINGTON, and GROSSE, JJ.

Wash.App. Div. 1,2012.
TBF Financial, LLC v. Petrenko
Not Reported in P.3d, 2012 WL 5292826 (Wash.App.

Div. 1)

END OF DOCUMENT