

ORS 20.075
ORS Ch. 72A
ORS 90.100
ORS 90.255
ORS 90.302
attorney fees
contract interpretation
landlord's fee
lease
summary judgment

Charter v. Kearney (In re Colen)
8/26/14

Adv. #13-6109-tmr
Renn

2014 WL ?

Pre-petition, Debtors rented a manufactured home under a ten-year lease. At the same time, they entered into an agreement with the landlord for an option to purchase the manufactured home at lease's end. Both the lease and option contract referred to a \$5,000 "nonrefundable move in fee" paid by Debtors.

Approximately eleven months later, Debtors filed Chapter 7, and claimed the \$5,000 exempt under the Oregon homestead exemption as a "security deposit." The Trustee brought an action against the landlord and its principal, making three claims. The second claim was to recover the \$5,000 as an illegal fee under ORS 90.302(1). The third claim was for a declaratory judgment that but for the allegedly illegal fee, the lease was valid and retained its validity post-petition. Defendants counterclaimed for their attorney fees in defending against the second and third claims. In pre-trial proceedings, a stipulated order was entered dismissing the third claim. Defendants then moved for summary judgment on the second claim, as well as the counterclaim.

As to the second claim, the Court granted the motion. It first however, rejected Defendants' argument that Debtors' allowed exemption claim in a "security deposit," divested the Trustee of standing to pursue a claim for an illegal "fee." Then, applying the Oregon law of contract interpretation, the Court construed the lease and option as one contract, and held the option unambiguously provided that the \$5,000 fee at issue represented the consideration paid for the option to purchase the manufactured home. In the alternative, even assuming ambiguity, the uncontradicted extrinsic evidence proffered by Defendants indicated there was no genuine issue of fact as to what the \$5,000 represented. The Court further held that even assuming ORS Ch. 72A's rules as to contract construction applied, the result would not change. The Court ultimately concluded that consideration paid by an optionee did not come within the ambit of an illegal fee charged by a landlord under ORS 90.302.

On the counterclaim, the Court held that although Defendants were the prevailing parties on both the second and third claims, an award of fees under the applicable statute, ORS 90.255, was nevertheless discretionary, and required consideration of the factors set forth in ORS 20.075(1). As the record as to the applicable factors was inadequate, summary judgment was inappropriate.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)

GERALD WILSON COLEN, JR. and)
PAULA DIANNE COLEN,)
Debtors.)

Bankruptcy Case
No. 13-60563-tmr7

JOSEPH M. CHARTER, Trustee,)
Plaintiff,)

Adversary Proceeding
No. 13-6109-tmr

v.)

KEN KEARNEY and)
KEARNEY HOLDINGS, LLC,)
Defendants.)

MEMORANDUM OPINION

This matter comes before the Court on Defendants’ motion for partial summary judgment.

Procedural History:

Gerald and Paula Colen (**Debtors**) filed a Chapter 7 petition on February 27, 2013. Trustee Joseph Charter filed the instant adversary proceeding on August 20, 2013. After an unopposed motion, and order entered thereon, he filed an Amended Complaint against Kearney Holdings, LLC (**Holdings**) and Ken Kearney (**Kearney**). The Amended Complaint asserts three (3) Claims for Relief. The First Claim is to avoid the transfer of a 1999 Avion 5th Wheel trailer as actually and constructively fraudulent under 11 USC §§ 548 and 550. The Second Claim is to recover a \$5,000 “non-refundable move in fee” under the Oregon Residential Landlord and Tenant Act (**ORLTA**). The Third Claim is for a declaration that, except for the

1 unenforceable fee provision, a ten (10) year lease of a 1998 Fleetwood manufactured home (**the Fleetwood**)
2 between Debtors and Defendants, is valid and enforceable.

3 Defendants answered, denying the material allegations and alleging nine (9) affirmative defenses.
4 They also filed a Counterclaim for attorney fees incurred in defending against the Second and Third Claims.
5 Plaintiff replied to the Counterclaim denying the material allegations.

6 At a January 30, 2014, pre-trial conference, the parties agreed the Court has jurisdiction and may
7 enter a final judgment on all claims herein. There was a colloquy as to whether Plaintiff needed to join
8 Debtors as defendants on his Third Claim. The parties were given twenty-one (21) days to submit a
9 stipulation or some other document regarding case status.

10 On February 28, 2014, a stipulated order was entered, wherein the parties consented to the Court
11 entering a final judgment on all claims. The stipulated order contains a “core” finding. It dismisses the
12 Third Claim, and in light thereof, provides that Defendants’ fourth [sic] affirmative defense is rendered
13 moot.¹

14 After a failed settlement conference, Defendants filed the instant motion, seeking summary judgment
15 on Plaintiff’s Second Claim and on their Counterclaim. The motion is supported by a memorandum, concise
16 statement of material facts, and a Declaration by Ken Kearney, with attached exhibits.² Plaintiff responded
17 to the motion.³ Defendants replied. No party has requested oral argument. The motion is ripe for decision.

18 Facts:
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22 ¹ This was an inadvertent error. In actuality, the third affirmative defense was rendered moot. To
23 correct the error, the stipulated order will be amended by order entered in conjunction with resolution of the
instant motion.

24 ² All exhibits referenced herein are those submitted as attachments to Kearney’s Declaration.

25 ³ Plaintiff did not, however, respond to Defendants’ concise statement, LBR 7056-1(b)(1), or file his
26 own concise statement. LBR 7056-1(b)(2). The consequences of such failure is his deemed admission of all
the properly supported facts set forth in Defendants’ concise statement. LBR 7056-1(f).

1 Kearney is Holding's sole member and manager. On March 16, 2012, Debtors signed at least two
2 documents. One was a lease of the Fleetwood, with Holdings as landlord and Debtors as tenants (**Lease**).
3 The other was a "Lease to Purchase Option Agreement" (**Option**).

4 The Lease was for a ten (10) year term beginning April 1, 2012. It provided under the heading
5 "Rent":⁴

6 The total lease due for the term hereof is the sum of 120 consecutive monthly
7 timely lease installments of \$200.00 DOLLARS (\$24,000.00) plus a
8 **\$5,000.00 nonrefundable move in fee** payable on signing, for a total lease
9 amount of (\$29,000.00) payable on the 1st day of each month of the term after
10 receiving the nonrefundable move in fee of \$5,000.00, [i]n equal consecutive
monthly lease installments of \$200.00 DOLLARS per month, first installments
[sic] to be paid upon execution of this Agreement, the second installment to be
paid on May [] 1st., 2012.

11 Ex. D-2 at p.3 (underlined emphasis in original; bolded emphasis added). The Lease did not otherwise
12 describe the "nonrefundable move in fee." It contained an integration clause. Ex. D-2 at p.9. It also
13 included an attorney fee clause. Ex. D-2 at p.8. Under the heading "ADDITIONAL PROVISIONS;
14 DISCLOSURES," it listed various documents, including the Option. Ex. D-2 at p.10.

15 The Option allowed Debtors to purchase the Fleetwood at the end of the lease term (between March
16 1, 2022 and April 30, 2022) for \$12,500. Ex. D-3 at pp.1-2. The consideration for the option to purchase
17 was described as "**a non-refundable fee of \$5,000.**" Ex. D-3 at p.1 (emphasis added). If Debtors timely
18 exercised the option, they would be entitled to a credit of \$62.50 for every timely lease payment (120 x
19 \$62.50=\$7,500) plus the \$5,000 move-in fee, against the \$12,500 purchase price.⁵ The Option further
20 provided that if Debtors accept the Option and "pay[] all lease/rent payments on the first of the month due
21 and no late fees are assessed . . . [they] shall pay a total lease of \$29,000.00," and that if Debtors accept by

23 ⁴ The Lease contained a provision stating the descriptive headings are "for convenience of reference
24 only and they are not intended to have any effect whatsoever in determining the rights or obligations of the
25 Landlord or Tenant." Ex. D-2 at p.9.

26 ⁵ Thus, if Debtors performed the Lease and Option without default, they would have earned as a
credit the entire \$12,500 purchase price.

1 signing the Option, they agree to pay the \$29,000.00 by first making a “**\$5,000.00 nonrefundable move in**
2 **fee payment**” and then the 120 monthly \$200 payments. Ex. D-3 at p.2 (emphasis added). It provided that
3 upon default, Holdings may terminate the Option, and, if terminated, Debtors “shall lose entitlement to any
4 refund of the [monthly] installments or nonrefundable move in fee.” Ex. D-3 at p.3. Like the Lease, it
5 contained an integration clause. Ex. D-3 at p.4.

6 Debtors paid the \$5,000 to Holdings by check on March 30, 2012, indicating “move in fee” on the
7 check’s memo line. Kearney, on behalf of Holdings, then accepted the terms of the Lease and Option. In
8 and around April 1, 2012, Debtors moved into the Fleetwood.

9 As noted above, on February 27, 2013, Debtors filed their Chapter 7 petition. On their § 521
10 statement of intention, they listed the Lease and indicated an intent to assume it under
11 § 365(p)(2). On Schedule G, they listed a “10 year lease with option to buy.” On Schedule B, they listed a
12 “deposit” with “Kearney Holdings LLC,” owned jointly with a value of \$5,000. On Schedule C, Debtor
13 Gerald Colen claimed \$2,250 and Debtor Paula Colen claimed \$2,750 of the deposit exempt under ORS
14 18.395 (the Oregon homestead exemption). On April 10, 2013, Debtors amended Schedule C to exempt a
15 “**security deposit**” of \$2,500 each, again under the Oregon homestead exemption (emphasis added). No
16 party in interest objected to either the original or amended exemption claims.

17 Debtors timely paid their \$200 monthly lease payments until they moved out of the Fleetwood on
18 March 21, 2014.

19 Summary Judgment Standards:

20 On a motion for summary judgment, the moving party has the burden to show “that there is no
21 genuine dispute as to any material fact and . . . [he] is entitled to judgment as a matter of law.” FRCP 56(a)
22 (made applicable by FRBP 7056). The substantive law governing a claim or defense determines whether a
23 fact is material. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987).
24 Material facts are such facts as might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477
25 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). “A dispute about a material fact is genuine only ‘if the
26 evidence is such that a reasonable jury could return a verdict for the nonmoving party.’”

1 FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010) (quoting Anderson, 477 U.S. at
2 248). No genuine factual issue exists for trial where a nonmoving party rests on mere allegations or denials,
3 Malmquist v. OMS Nat'l Ins., Co., 2011 WL 3298900, *3 (D. Or. June 14, 2011), or merely shows “some
4 metaphysical doubt.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct.
5 1348, 1356 (1986).

6 With regard to its own claims or defenses, i.e., those elements for which the moving party bears the
7 burden of proof at trial, the movant “must support its motion with . . . evidence-using any of the materials
8 specified in Rule 56(c)-that would entitle it to a directed verdict if not controverted at trial.” Celotex Corp.
9 v. Catrett, 477 U.S. 317, 331, 106 S. Ct. 2548, 2557 (1986) (Brennan, J.) (dissent). There must be more than
10 a “scintilla,” Anderson, 477 U.S. at 252, 106 S. Ct. at 2512, indeed the evidence must be “significantly
11 probative.” Id. at 249–250, 106 S. Ct. at 2511. If the movant makes the requisite affirmative showing, the
12 burden of production shifts to the nonmoving party to produce significant probative evidence that
13 demonstrates the existence of a “genuine issue” for trial. Intel Corp. v. Hartford Accident & Indem. Co., 952
14 F.2d 1551, 1558 (9th Cir. 1991) (quotation omitted).

15 With regard to a motion attacking the opposing party's claims or defenses, i.e., those for which the
16 nonmovant has the burden of proof at trial, and assuming sufficient time for discovery, the movant may
17 discharge his Rule 56 burden in two ways. He may submit evidence affirmatively negating elements of the
18 nonmoving party's claims or defenses (method one), or he may affirmatively demonstrate (other than by a
19 conclusory statement) that the nonmoving party's evidence is insufficient to establish an essential element of
20 its claim (method two), Celotex, 477 U.S. at 331, 106 S. Ct. at 2557 (Brennan, J) (dissent), as there is “no
21 express or implied requirement . . . that the moving party support its motion with affidavits or other similar
22 material *negating* the opponent's claim.” Id. at 323, 106 S. Ct. at 2553 (majority opinion) (emphasis in
23 original). Once the moving party has met its burden of production under either method,⁶ the burden shifts to
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25 ⁶ If the moving party attempts to use method two, the nonmoving party may also call the court's
26 attention to evidence already in the record that the movant has overlooked or ignored. In that event, the

(continued...)

1 the nonmoving party to produce “evidence sufficient to sustain a jury verdict on those issues for which it
2 bears the burden at trial.” Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1435 (9th Cir. 1995)
3 (internal quotation omitted). “[E]vidence of an essential element is sufficient to defeat summary judgment
4 only if a jury reasonably could infer from that evidence the existence of that element.” Miller v. Gilliam (In
5 re Gilliam), 2012 WL 1191854, *7 (9th Cir. BAP April 6, 2012). The evidence must be significantly
6 probative. Anderson, 477 U.S. at 249-250, 106 S. Ct. at 2511. And, when the nonmoving party's claims are
7 factually implausible, that party must “come forward with more persuasive evidence than otherwise would
8 be necessary.” LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1137 (9th Cir. 2009) (quoting Blue Ridge
9 Ins. Co. v. Stanewich, 142 F.3d 1145, 1149 (9th Cir. 1998)).

10 All reasonable doubts as to the existence of genuine issues of material fact should be resolved against
11 the moving party, Crosswhite v. Jumpking, Inc., 411 F. Supp.2d 1228, 1230 (D. Or. 2006), and all rational or
12 reasonable inferences drawn from the underlying facts must be viewed in the light most favorable to the
13 nonmoving party. T.W. Elec. Serv., 809 F.2d at 631. “When different ultimate inferences can be reached,
14 summary judgment is not appropriate.” Simone v. Manning, 930 F.Supp. 1434, 1436 (D. Or. 1996). In
15 deciding a motion for summary judgment, the court should neither make credibility determinations, nor
16 weigh the evidence. Anderson, 477 U.S. at 255, 106 S. Ct. at 2513.

17 Discussion:

18 Defendants seek summary judgment on Plaintiff’s Second Claim as well as their Counterclaim.

19 Second Claim:

20 The Second Claim is brought under ORLTA. More particularly, it is based on ORS 90.302(1),⁷
21 which provides:

22 _____
23 ⁶(...continued)
24 moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is
25 only by attacking the entire record allegedly supporting the nonmoving party that a moving party satisfies
26 Rule 56's burden of production. Celotex, 477 U.S. at 332, 106 S. Ct. at 2557 (Brennan, J.) (dissent).

⁷ Under ORS 90.125(2), “any right or obligation declared by . . . [the ORLTA] is enforceable by
action unless the provision declaring it specifies a different and limited effect.”

1 A landlord⁸ may not charge a fee⁹ at the beginning of the tenancy¹⁰ for an
2 anticipated landlord expense and may not require the payment of any fee
3 except as provided in this section.¹¹ A fee must be described in a written rental
4 agreement.¹²

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7 ⁸ In pertinent part:

8 “Landlord” means the owner, lessor or sublessor of the dwelling unit or the
9 building or premises of which it is a part.

10 ORS 90.100(22) (2011) (renumbered ORS 90.100(24), effective June 18, 2013. Or Laws 2013, ch. 443, § 1).

11 “Dwelling unit” means a structure or the part of a structure that is used as a
12 home, residence or sleeping place by one person who maintains a household or
13 by two or more persons who maintain a common household.

14 ORS § 90.100(11) (2011) (renumbered ORS 90.100(12), effective June 18, 2013. Or Laws 2013, ch. 443, §
15 1).

16 ⁹ “‘Fee’ means ‘a nonrefundable payment of money.’” ORS 90.100(15) (2011) (renumbered ORS
17 90.100(16), effective June 18, 2013. Or Laws 2013, ch. 443, § 1).

18 ¹⁰ ORLTA does not define “tenancy.” However, “tenant” in pertinent part, “[m]eans a person,
19 including a roomer, entitled under a rental agreement to occupy a dwelling unit to the exclusion of others.”
20 ORS 90.100(45)(a)(A) (2011) (renumbered ORS 90.100(47)(a)(A), effective June 18, 2013. Or Laws 2013,
21 ch. 443, § 1).

22 ¹¹ Defendants concede the statute does not list a “move in fee” as a permitted fee. See ORS 90.302(2)
23 (2011); ORS 90.302(2),(3) (2013) (amending list of permitted fees, effective Jan. 1, 2014. Or Laws 2013,
24 ch. 294, § 8). However, they dispute the \$5,000 “fee” at bar comes within the statute’s ambit.

25 ¹² “Rental agreement” means all agreements, written or oral, and valid rules and
26 regulations adopted under ORS 90.262 or 90.510 (6) embodying the terms and
conditions concerning the use and occupancy of a dwelling unit and premises.
“Rental agreement” includes a lease. A rental agreement shall be either a
week-to-week tenancy, month-to-month tenancy or fixed term tenancy.

ORS § 90.100(36) (2011) (renumbered ORS 90.100(38), effective June 18, 2013. Or Laws 2013, ch. 443, §
1).

1 Defendants first attack Plaintiff's standing, reasoning that by virtue of Debtors' un-objected-to
2 exemption, even assuming the Second Claim has merit, it is no longer estate property but rather has re-vested
3 in Debtors.

4 The Second Claim is for recovery of an allegedly illegal fee. Debtors, on the other hand, claimed the
5 Oregon homestead exemption in a security deposit, presumably under the authority of Sticka v. Casserino (In
6 re Casserino), 379 F.3d 1069, 1074-1075 (9th Cir. 2004). The Lease, however, nowhere refers to a "security
7 deposit." Of equal import, under the ORLTA, a "security deposit" and "fee" are mutually exclusive. ORS
8 90.100(39) (2011).¹³ Thus, Debtors' exemption in a \$5,000 "security deposit," does not preclude Plaintiff
9 from recovering a \$5,000 "fee."

10 Defendants next ask the Court to construe the Lease and Option as unambiguously recognizing the
11 \$5,000 as consideration for the purchase option, as opposed to a landlord's fee. In the alternative, even if
12 what the \$5,000 encompasses is ambiguous, they argue they've submitted sufficient uncontradicted extrinsic
13 evidence to resolve the ambiguity in their favor. Plaintiff argues the Lease and Option are ambiguous, and,
14 while proffering no extrinsic evidence himself, argues the evidence adduced by Defendants is insufficient to
15 carry their summary judgment burden.

16 The Lease and Option are contracts, and as such are subject to ordinary rules of contract construction.
17 Koch v. Spann, 193 Or. App. 608, 613, 92 P.3d 146, 149 (2004). A preliminary issue is whether the Lease
18 and Option should be construed as a single document. The Lease in fact lists the Option, and at ¶ 15, the
19 Option specifically references the Lease. "Where a written instrument refers in specific terms to another
20 writing, the other writing is a part of the contract." Hous. Auth. of Jackson Cnty. v. Gates, 246 Or. App. 521,
21 525, 267 P.3d 169, 170 (2011) (internal quotation omitted). Even absent these provisions:

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23 ¹³ ORS 90.100(39) (2011) (renumbered ORS 90.100(41), effective June 18, 2013, Or. Laws 2013, ch.
24 443, § 1), provides:

25 "Security deposit" means a refundable payment or deposit of money, however
26 designated, the primary function of which is to secure the performance of a
rental agreement or any part of a rental agreement. "Security deposit" does not
include a fee. (emphasis added).

1 Under Oregon law, one document need not expressly incorporate the other
2 by reference if the connection between them is unmistakable. Oregon courts
3 have identified three factors that, when present together, demonstrate that
4 multiple documents should be construed as a single contract: (1) the documents
are made by the same parties; (2) the documents are executed at or about the
same time; and (3) the documents are part of the same transaction.

5 Arnett v. Bank of Am. N.A., 874 F. Supp. 2d 1021, 1030 (D. Or. 2012) (internal citations and quotations
6 omitted). The Lease and Option meet all three prongs. The Court will thus construe the two documents
7 together.

8 Under Oregon law:

9 To resolve a dispute over the meaning of a contractual provision, this court
10 first considers the text of the disputed provision in the context of the contract
11 as a whole to determine whether the disputed provision is ambiguous. A
12 contractual provision is ambiguous if its wording can, in context, reasonably be
13 given more than one plausible interpretation. Whether a provision is
14 ambiguous is a question of law, as is the meaning of an unambiguous
provision. The court must, if possible, construe the contract so as to give effect
to all of its provisions. If the meaning of the provision is clear from the text
and context, then the analysis ends.¹⁴ If the provision is ambiguous, the court
moves to the second step of the analysis, which is to consider other [extrinsic]
evidence of the parties' intent.

15 Williams v. RJ Reynolds Tobacco Co., 351 Or. 368, 379-380, 271 P.3d 103, 109 (2011) (internal citations
16 and quotations omitted). If the ambiguity cannot be resolved by examining extrinsic evidence, the court
17 resorts to maxims of construction. Yogman v. Parrott, 325 Or. 358, 364, 937 P.2d 1019, 1022 (1997).

18 The Court's task is to determine what the \$5,000 represents.¹⁵ Examining the text and context, the
19 Lease refers to it as a "nonrefundable move in fee" which is part of the "total lease amount of (\$29,000.00)."
20 Ex. D-2 at p.3. It does not otherwise define it. Likewise, the Option refers to it variously as a

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22 ¹⁴ In addition to the text and context, the court may consider extrinsic evidence of "the circumstances
23 underlying the formation of . . . [the] contract" to determine if an ambiguity exists. Wood Park Terrace
24 Apartments Ltd. v. Tri-Vest, LLC, 254 Or. App. 690, 693 n.3, 297 P.3d 494, 496 (2013); Malmquist, 2011
25 WL 3298900 at *5 (citing, Batzer Constr. v. Boyer, 204 Or. App. 309, 129 P.3d 773 (2006)) (emphasis
26 added). Here, none of the parties rely on extrinsic evidence for this purpose. [Footnote added to original].

¹⁵ There is no dispute the \$5,000 referenced in both the Lease and Option refers to the same amount.
That is, the parties agree there was no requirement to pay \$5,000 under the Lease and an additional \$5,000
under the Option.

1 “nonrefundable fee,” Ex. D-3 at p.1, and a “nonrefundable move in fee,” Ex. D-3 at pp.2-3, and like the
2 Lease, includes it in the “total lease of \$29,000.” Ex. D-3 at p.2. What then does the term “nonrefundable
3 move in fee” signify in both documents? The Court believes ¶ 3 of the Option, Ex. D-3 at p.1, answers the
4 question unambiguously. It states in relevant part: “As consideration for this Option to Purchase
5 Agreement, the Buyer/Tenant/Grantee shall pay the Seller/Landlord/Grantor a nonrefundable fee of \$5,000.”
6 This clearly reflects the parties’ intent that the \$5,000 represents the consideration given by Debtors for the
7 option to purchase the Fleetwood. Even assuming arguendo, the Lease and Option conflict on this issue, ¶
8 15 of the Option resolves any ambiguity in Defendants’ favor. It provides that “[i]n the event a conflict
9 arises between the terms and conditions of the Lease Agreement and the Option to Purchase Agreement, the
10 Option to Purchase Agreement . . . shall control.” Ex. D-3 at p.4.

11 Finally, even were the Court to conclude the term “nonrefundable move in fee” is in fact ambiguous,
12 the extrinsic evidence proffered, Yogman, 325 Or. at 363–364, 937 P.2d at 1022, in all material respects
13 supports a finding the parties intended the \$5,000 as the consideration paid for the right to purchase the
14 Fleetwood.¹⁶ See Kearney Declaration and exhibits thereto.¹⁷

16 ¹⁶ Even when a contractual term is ambiguous, the court may grant summary judgment if the movant
17 adduces significantly probative extrinsic evidence of the parties’ intent, and the nonmovant neither produces
18 nor points to, any competing extrinsic evidence supporting resolution of the ambiguity in the nonmovant’s
19 favor. Dial Temp. Help Serv., Inc. v. DLF Int’l, Inc., 255 Or. App. 609, 612, 298 P.3d 1234, 1236 (2013).

20 ¹⁷ None of the parties have pled or argued the applicability of ORS Ch. 72A. That chapter allows
21 evidence as to “course of dealing,” “usage of trade,” and “course of performance” (collectively, **the UCC
22 factors**), see ORS 71.3030(1)-(3) (defining same), to explain the terms of certain leases. ORS 72A.2020(1);
23 ORS 71.3030(4).

24 Chapter 72A complements, rather than supersedes, Oregon’s consumer protection statutes. ORS
25 72.1040(1)(c), (2). It applies to any transaction that creates a “lease.” ORS 72A.1020. “Lease” means “a
26 transfer of the right to possession and use of goods for a term in return for consideration.” ORS
72A.1030(1)(j). “Goods” in relevant part, means “all things that are movable at the time of identification to
the lease contract.” ORS 72A.1030(1)(h). Assuming the Fleetwood constituted “goods,” see ORS
79.0102(1)(qq)(A),(B)(v) (defining “goods” within the Article 9 context, to include “manufactured
structure”); ORS 79.0102(1)(zz)(incorporating definition of “manufactured structure” set forth in ORS
446.561), the Court may consider the UCC factors, along with text and context, in the first level of its

(continued...)

1 The next step in the analysis is to determine whether charging \$5,000 for the right to purchase the
2 Fleetwood, is an illegal “fee” under ORS 90.302(1). In that regard, it is apparent the \$5,000 is not being
3 charged by a “landlord” in a “rental agreement,” see ORS 90.100(22), (36) (2011), but rather by an optionor
4 in an option contract. In fact, the \$5,000 has nothing to do with the “dwelling unit[’s]” “use and occupancy,”
5 see ORS 90.100(36) (2011), but rather, concerns the right to purchase it. Put another way, if the Option
6 didn’t exist, neither would the nonrefundable move in fee. The \$5,000 is therefore not a “fee” within the
7 contemplation of ORS 90.302(1). Summary judgment in Defendants’ favor on the Second Claim is thus
8 appropriate.

9 Counterclaim:

10 Defendants seek summary judgment on the Counterclaim for attorney fees incurred in defending
11 against the Second and Third Claims. They rely both on the attorney fee clause in the Lease, and on ORS
12 90.255.

13 ORS 90.255 provides:

14 In any action on a rental agreement or arising under this chapter, reasonable
15 attorney fees at trial and on appeal may be awarded to the prevailing party
16 together with costs and necessary disbursements, notwithstanding any
17 agreement to the contrary. As used in this section, “prevailing party” means
18 the party in whose favor final judgment is rendered. (emphasis added).

19 Both the Second and Third Claims are brought under ORLTA. As such, the Court need not consider
20 an award of fees under the Lease’s attorney fee clause because ORS 90.255 subsumes the field. LeBrun v.
21 Cal-Am Prop., Inc., 197 Or. App. 177, 183-184, 106 P.3d 647, 652 (2005). The statute allows fees to the
22 “prevailing party.” Because Plaintiff has dismissed the Third Claim, Defendants are the prevailing parties
23 thereon. Brennan v. La Tourelle Apartments, 184 Or. App. 235, 244-245, 56 P.3d 423, 428-429 (2002).
24 Likewise, grant of summary judgment on the Second Claim makes Defendants prevailing parties as to it.

25 ¹⁷(...continued)

26 analysis. Peace River Seed Co-Operative, Ltd. v. Proseeds Marketing, Inc., 355 Or. 44, 67, 322 P.3d 531,
544 (2014). Here, all evidence of the UCC factors is either neutral as to, or supports, the Court’s conclusion
that the \$5,000 unambiguously represents the consideration paid for the right to purchase the Fleetwood.

1 However, an award of fees under the statute is discretionary. Barbara Parmenter Living Trust v. Lemon, 345
2 Or. 334, 339-341, 194 P.3d 796, 799-800 (2008). In determining whether to award fees under ORS 90.255,
3 the court must consider the factors set forth in ORS 20.075(1).¹⁸ Id. Here, there is an insufficient record to
4 determine if an attorney fee award is merited under the applicable statutes. Summary judgment on the
5 Counterclaim is thus inappropriate.

6 Conclusion:

7 The Court will grant Defendants' motion as to the Second Claim. It will delay entering formal
8 judgment thereon until the First Claim is resolved. The Court will deny Defendants' motion as to the
9 Counterclaim. However, it will enter an order that for purposes of ORS 90.255 and the Counterclaim,
10 Defendants are the prevailing parties on the Second and Third Claims. Determination of whether and, if so,

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12 ¹⁸ ORS 20.075(1) provides:


13 (1) A court shall consider the following factors in determining whether to
14 award attorney fees in any case in which an award of attorney fees is
15 authorized by statute and in which the court has discretion to decide whether to
award attorney fees:

- 16 (a) The conduct of the parties in the transactions or occurrences
17 that gave rise to the litigation, including any conduct of a party
that was reckless, willful, malicious, in bad faith or illegal.
18 (b) The objective reasonableness of the claims and defenses
asserted by the parties.
19 (c) The extent to which an award of an attorney fee in the case
20 would deter others from asserting good faith claims or defenses
in similar cases.
21 (d) The extent to which an award of an attorney fee in the case
22 would deter others from asserting meritless claims and defenses.
23 (e) The objective reasonableness of the parties and the diligence
of the parties and their attorneys during the proceedings.
24 (f) The objective reasonableness of the parties and the diligence
of the parties in pursuing settlement of the dispute.
25 (g) The amount that the court has awarded as a prevailing party
fee under ORS 20.190.
26 (h) Such other factors as the court may consider appropriate
under the circumstances of the case.

1 how much attorney fees will be awarded will be made pursuant to Defendants' application under LBR 9021-
2 1(c) following the First Claim's resolution.

3 This Opinion constitutes the Court's findings of fact and conclusions of law under FRBP 7052. They
4 shall not be separately stated. An Order consistent herewith shall be entered.

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THOMAS M. RENN
Bankruptcy Judge