73427-0

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No. 73427-0-I

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

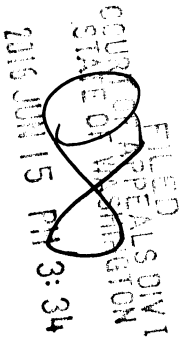
LSF Structures LTD, a foreign corporation; and Lightweight Steel Framing 2007 LTD, a Washington corporation,

Appellant,

v.

W.G. Clark, CM, Inc. a Washington corporation, and Brix Condominium, LLC, a Washington limited liability company, et al,

Respondents.



RESPONSE BRIEF OF RESPONDENTS

Attorneys for Respondents

JAMESON BABBITT STITES & LOMBARD, P.L.L.C.
Matt Adamson, WSBA 31731
801 Second Avenue, Suite 1000
Seattle, Washington 98104-4001
Telephone: 206 292 1994
Facsimile: 206 292 1995
madamson@jbsl.com

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INTRODUCTION

In the parties' construction subcontract, appellant LSF agreed "not to file any claim in mediation, arbitration, or litigation, until thirty (30) days after having submitted its full claim in writing ... along with detailed cost documentation and all points of argument in Subcontractor's favor." Ironically, LSF agreed to this as part of "acknowledge[ing] its responsibility to cooperate .. in avoiding unnecessary arbitration or litigation."

LSF filed a lawsuit in August 2009 (the "2009 Lawsuit") against respondents Brix Condominium LLC and W.G. Clark (collectively "Brix"). The 2009 Lawsuit was dismissed because LSF failed to satisfy the condition precedent prior to filing.

Rather than satisfy the condition, LSF appealed. This Court dismissed the appeal because a dismissal without prejudice is not appealable. As this Court noted in its dismissal order: "The complaint can be refiled if and when LSF satisfies the condition precedent." That was in April of 2012.

On July 28, 2014, LSF re-filed its 2009 complaint. However, it had made no new efforts to satisfy the condition precedent. The new complaint was almost identical to the complaint in the 2009

Lawsuit. The new complaint also sought a "judgment in an amount to be proven at trial (or arbitration)."

Brix again moved to dismiss based on the failure to satisfy the condition precedent. In its attempt to avoid dismissal, LSF presented the exact same evidence that it had presented in opposition to the dismissal of its 2009 Lawsuit. On April 10, 2015, unsurprisingly, the trial court again dismissed LSF's complaint for failure to satisfy the condition precedent.

This time, the trial court dismissed the complaint with prejudice. This is because, by the time of the dismissal, the statute of limitations had run on LSF's claims.

LSF has again appealed, and now, over a year later, has finally filed its opening brief. LSF's appeal is based on facts that simply did not occur, and a misrepresentation of the trial court's ruling. Brix never refused to arbitrate, and the complaint was not filed to compel arbitration. Additionally, the trial court did not decide whether LSF complied with a condition precedent to arbitration. Rather, the trial court merely decided – like Judge Hayden in the 2009 Lawsuit – that LSF failed to satisfy a condition precedent to filing its lawsuit in Superior Court. That decision was correct and must be affirmed.

ISSUES

1. When a case is dismissed for failure to satisfy a condition precedent, can the plaintiff simply re-file the lawsuit and present the same evidence to a new judge hoping for a different result?

2. When a party seeks dismissal of litigation based on a failure to satisfy a condition precedent to filing the lawsuit, is that decision for the trial court or the arbitrator?

3. Did the trial court err in dismissing LSF's claims where LSF failed to meet its burden to prove it satisfied a condition precedent to filing claims in litigation?

4. Did Brix waive its right to require LSF to comply with the condition precedent?

FACTS

Brix Condominium, LLC was the developer of a residential condominium project on Capitol Hill in Seattle called Brix Condominiums. (CP 18)

W.G. Clark, C.M., Inc. (W.G. Clark) is a construction firm, and was a member of Brix Condominium, LLC. For the Brix Condominium project, W.G. Clark provided general contractor and construction management services. (CP 18-19)

On May 29, 2007, W.G. Clark entered into a subcontract with Lightweight Steel Framing 2007 Ltd and/or LSF Structures Ltd (collectively "LSF").[1] (CP 18-19) Section U.3 of the subcontract states:

> Subcontractor agrees not to file any claim in mediation, arbitration, or litigation, until thirty (30) days after having submitted its full claim in writing to Mike Ducey, president of W.G. Clark Construction Co. along with detailed cost documentation and all points of argument in Subcontractor's favor. Subcontractor acknowledges its responsibility to cooperate with W.G. Clark in avoiding unnecessary arbitration or litigation providing W.G. Clark all information available upon which a decision can be made. (CP 19, 41)

Effective as of July 1, 2008, W.G. Clark assigned the subcontracts for the Brix Condominium project, including the subcontract with LSF, to Brix Condominium, LLC. (CP 19)

In February 2009, Brix Condominium, LLC sent a demand for arbitration to LSF. (CP 92; 59)

In August 2009, appellant Lightweight Steel Framing 2007 Ltd filed a complaint in King County Superior Court against Brix seeking to foreclose its mechanic's lien and for a money judgment.

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[1] The subcontract says it is with plaintiff LSF Structures Ltd., but it is signed by plaintiff Lightweight Steel Framing 2007 Ltd. The proper party is not relevant to this litigation.

The prior lawsuit was King County Superior Court Cause No. 09-2-28813-5 SEA (the "2009 Lawsuit") (CP 58-60)

On September 24, 2009, Lightweight Steel Framing 2007 Ltd filed an amended complaint removing the lien foreclosure portion of its complaint. The amended complaint sought a judgment against Brix either in the lawsuit or in arbitration, and sought to stay the litigation pending arbitration. (CP 59)

The parties agreed on an arbitrator, but not on arbitration dates. The parties agreed to exchange documents, but LSF never produced its files. Brix demanded that LSF comply with the condition precedent to arbitration before setting dates for arbitration. (CP 102-105; 58-60)

On June 10, 2010, Brix simultaneously demanded compliance with section U.3 of the LSF subcontract, and suggested certain dates for mediation and arbitration. (CP 104). After demanding compliance with U.3, the remainder of that June 10, 2010 email read:

> With regard to mediation, the people who need to be present are generally unavailable in July either due to vacations or other arbitrations. We are available and can set a date for the latter half of August, say the week of August 16.

> As for arbitration, we can pick an arbitrator and set a date, though I think it's best if we wait until you comply with U.3 and until after the mediation. If you want to set a date now, we can set one for January - March 2011, subject to change if we have trouble getting information and documents from LSF. ....
>
> But if LSF complies with U.3 in the next month, and we mediate in August, it's reasonable to think we could be ready to arbitrate in that January – March period.
>
> Our willingness to set dates for mediation and arbitration is without prejudice to our rights to move for a dismissal based on non-compliance with U.3. (CP 14)

As of the summer of 2010, the litigation approaching trial, and Brix moved for summary judgment. After the motion for summary judgment was filed, LSF's attorney sent an email claiming that LSF complied with U.3 years ago, and asking to set dates for mediation and arbitration. Brix's attorney responded on August 18, 2010, as follows:

> Dear Sean: We disagree with your contention that LSF has complied with U.3, which is why we filed the motion. If we have overlooked something and LSF did comply, then it should be pretty easy to send us a copy of what LSF contends was its compliance.
>
> As for dates, I proposed some in my June 10 email which you never responded to. Those dates no longer work for us. Because of your refusal to respond and refusal to comply with U.3, we are no longer willing to set dates until LSF complies with U.3.

> We also agreed to exchange documents. Brix produced their documents two months ago. You have not produced any documents.
>
> In sum, once LSF complies with U.3 and produces its documents, we will be happy to set dates for the mediation and arbitration. (CP 105) (emphasis added)

On September 10, 2010, Judge Hayden granted Brix's motion for summary judgment, and dismissed the 2009 Lawsuit without prejudice. (CP 54) It was dismissed without prejudice because Lightweight Steel Framing 2007 Ltd could still comply with the condition precedent in U3 of the subcontract and then re-file. (CP 54; 61)

Lightweight Steel Framing 2007 Ltd appealed the dismissal. On April 30, 2012, this Court dismissed the appeal because the order of dismissal without prejudice was not appealable. (CP 58-63) As this Court noted: "The complaint can be refiled if and when LSF satisfies the condition precedent." (CP 61)

More than two years later, on July 28, 2014, LSF re-filed its complaint. An apparently related entity was added as a plaintiff,[2] but the allegations are the same as in the 2009 Lawsuit. (CP 1-8) LSF had made no new effort to satisfy the condition precedent

[2] The subcontract says it is with plaintiff LSF Structures Ltd., but it is signed by plaintiff Lightweight Steel Framing 2007 Ltd, which is presumably why both are plaintiffs in the 2014 lawsuit. (CP 20, 52) The new party adds nothing to the issues in dispute. No one complied with U.3.

between the dismissal of the 2009 Lawsuit and the filing of the July 2014 lawsuit.

The July 2014 complaint in this action was substantially the same as the amended complaint in the 2009 Lawsuit. Like the 2009 complaint, the new one sought a judgment "in an amount to be proven at trial (or arbitration), but not less than" $1,017,868.90. Like the 2009 complaint, the 2014 complaint also sought to stay the litigation pending arbitration. (CP 8; CP 59)

LSF contends on page 7 of its Opening Brief that Brix refused to arbitrate, citing CP 102-105. This is not true. As LSF admits (CP 92), Brix had already demanded arbitration. Brix refused to agree on a date (which would, of course, ultimately be up to the arbitrator anyway) until LSF complied with the condition precedent in U3 of its contract. (CP 102-105) CP 102 to 105 proves that Brix was willing to arbitrate as soon as LSF satisfied the condition precedent.

LSF also contends on page 7 of its Opening Brief (and elsewhere) that it filed the 2014 complaint to compel arbitration. This is not accurate. The complaint does not allege that anyone refused to arbitrate, and does not seek to compel arbitration. (CP 1-8). LSF also did not file a motion to compel arbitration.

On February 20, 2015, seven months after the new lawsuit was filed, Brix and the other defendants filed a motion for summary judgment. Like the motion for summary judgment in the 2009 case, this 2015 motion sought dismissal because LSF had failed to comply with the condition precedent in U3 of the subcontract prior to filing the lawsuit. (CP 9-14)

In response to the motion, LSF presented the exact same August 20, 2010 Declaration of Al Malcolm that it had used to oppose dismissal of the 2009 Lawsuit. (CP 79-91) LSF presented the same evidence, and essentially the same arguments, apparently expecting a different result because now they had a new judge. Judge Roberts, however, responded to the evidence the same way that Judge Hayden had in 2010, and granted the motion and dismissed LSF's claims.

This time, Judge Roberts dismissed LSF's claims with prejudice. This was because, by the time of the hearing on the motion, the statute of limitations had expired. Thus, LSF could no longer comply with U3 and refile its complaint. (CP 12; 1-8)

ARGUMENT

A. STANDARD OF REVIEW

A trial court's ruling on summary judgment is reviewed de novo. *Wash. Fed. Sav. & Loan Ass'n v. McNaughton*, 181 Wn. App. 281, 299, 325 P.3d 383, 391 (2014).

B. LSF CANNOT BE ALLOWED TO RE-FILE THE SAME CASE AND GET A DIFFERENT RESULT

LSF's subcontract contains a condition precedent that it must comply with before filing any claims in litigation. That condition precedent is in section U3, and states:

> Subcontractor agrees not to file any claim in mediation, arbitration, or litigation, until thirty (30) days after having submitted its full claim in writing ... along with detailed cost documentation and all points of argument in Subcontractor's favor. Subcontractor acknowledges its responsibility to cooperate with W.G. Clark in avoiding unnecessary arbitration or litigation providing W.G. Clark all information available upon which a decision can be made. (CP 37)

Incredibly, after dismissal of the 2009 Lawsuit and that appeal, LSF made no effort to satisfy the condition. This bears repeating: Rather than satisfy the condition, LSF simply waited until the last day of the statute of limitations, and re-filed the same complaint. When Brix moved for summary judgment to dismiss LSF's claims, LSF provided the same evidence as it had in opposing dismissal of the 2009 Lawsuit. Judge Roberts viewed the

same evidence that Judge Hayden had relied upon in 2010, and again dismissed the action.

Had LSF re-filed its lawsuit one day after the September 10, 2010 dismissal of the 2009 Lawsuit, it would be deemed a bad faith and circuitous effort to get a different decision from a different judge. The fact that LSF waited almost four years before taking that same action should not change that analysis. In those four years, LSF made no effort to satisfy the condition. And after it re-filed its lawsuit, it presented the same evidence, but now to a new judge under a different cause number.

This is, in substance, no different than a belated motion for reconsideration. The 2014 lawsuit was just a redo of the 2009 Lawsuit, but with a different cause number and before a different judge. Dismissal was the proper result because nothing had changed, and LSF cannot seek a new result from a different judge.

Although this bizarre scenario does not fit neatly into the law of the case doctrine, or res judicata, parties cannot be allowed to ignore a judge and re-file the same case to get a different judge with hopes of getting a different result. For that reason alone, the trial court must be affirmed.

The fact that this dismissal is with prejudice cannot change the result. The only reason this dismissal is with prejudice is because LSF chose not to try and satisfy the condition, and waited until the last day before the expiration of the statute of limitations before re-filing. LSF's dilatory tactics cannot be grounds for enhancing its legal options.

C. THE MOTION FOR SUMMARY JUDGMENT WAS PROPERLY BEFORE THE TRIAL COURT RATHER THAN THE ARBITRATOR.

Brix's motion for summary judgment was an issue for the judge. Section U.3 of LSF's contract specifically states that LSF will not file any "claims" in "litigation" until it complies with U.3. Brix sought dismissal of the claims brought in the litigation, including the claim to over $1 million in damages "to be proven at trial." Obviously, the question of whether LSF has met that condition precedent prior to filing litigation is for the trial court. An arbitrator has no authority to dismiss claims brought in a lawsuit.

Brix did not seek to avoid arbitration by claiming a failure to comply with Section U.3. That question would be for an arbitrator if LSF ever files any claims in arbitration. But the question of dismissing the litigation was properly for the trial court.

LSF is also wrong to now claim that its lawsuit was filed only in order to compel arbitration. An arbitration demand had already been filed by Brix back in 2009, thus there was no need to compel anything. A lawsuit, and thus a motion, to compel arbitration may not be filed if the other party has agreed to arbitrate. *See* RCW 7.04.080(1).

Moreover, nothing in the complaint seeks to compel arbitration. LSF filed its lawsuit seeking a judgment "in an amount to be proven at trial (or arbitration)." (CP 8) It also sought a stay pending arbitration, but did not seek to compel arbitration. (CP 8) Because of the alternative requested relief, and the approaching trial date, Brix was correct to seek dismissal of the claims in the litigation from the trial court.

In sum, whether or not to dismiss claims brought in King County Superior Court was an issue for the court. The trial court simply did not address whether LSF could pursue its claims in arbitration.

D. THERE WERE NO DISPUTED MATERIAL FACTS

LSF never complied with this condition precedent before filing this lawsuit. (CP 15-16; 18-19; 54; 58-60; 64-65; 79-91). After dismissal of the 2009 Lawsuit, LSF made no new efforts to

comply. There were no disputed material facts about its non-compliance.

LSF had the burden to prove it satisfied Section U3 prior to filing. "The party seeking enforcement of the contract has the burden of proving performance of an express condition precedent." *See Walter Implement v. Focht*, 107 Wn.2d 553, 557, 730 P.2d 1340, 1342 (1987).

On summary judgment, if the moving party is a defendant on the claim at issue, its burden is merely to "point out" that the claimant lacks evidence to support its claims. *Young v. Key Pharmaceuticals Inc.,* 112 Wn.2d 216, 225 n.1, 770 P.2d 182, 188 (1989). Brix met its burden as the moving party. (CP 9-14; 15-16; 18-19; 64-65) In response, LSF "fail[ed] to make a showing sufficient to establish the existence of ... elements essential to its case, and on which it will bear the burden of proof at trial," thus, summary judgment [was] appropriate. *Young v. Key Pharmaceuticals Inc.,* 112 Wn.2d 216, 225 n.1

The issue for the trial court was whether, prior to filing its claims in the lawsuit, LSF complied with the condition precedent in section U.3 of LSF's subcontract. Section U.3 required LSF to provide its "full claim in writing" along with its "detailed cost

documentation and all points of argument." And it requires LSF to cooperate and provide "all information available upon which a decision can be made."

If LSF had complied before filing the lawsuit, it was incumbent on LSF to provide a copy of the same with its response to the motion for summary judgment. *See e.g. School Dist. No. 1J, Multnomah County v. AcandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). LSF did not present such a copy. It did not even submit a transmittal or a cover letter, or an email reference, showing that it earlier sent its "full claim" with "cost documentation" and "all points of argument."

LSF's response contained merely the same single page document that it submitted in opposition to the dismissal in the 2009 Lawsuit. (CP 86) This page only lists the amounts billed to date and the "Total outstanding on contract." LSF also submitted the exact same 2010 declaration from Al Malcom stating that LSF submitted "other written cost documentation detailing the amounts of LSF's claim" on several occasions. (CP 81)

This was the exact same evidence presented in the 2009 Lawsuit, which insufficient evidence lead to the dismissal of that case. In any event, the one page document is, to state the obvious,

not compliance with U.3. And merely stating that other unidentified documents were earlier provided is also not sufficient to raise a disputed material fact. Without copies of the documents, or even a description or identification of the documents it claims to have provided, the testimony is irrelevant. And there was no evidence that LSF ever submitted "detailed cost documentation," "all points of argument in Subcontractor's favor," or that LSF has provided "all information available upon which a decision can be made" as required by U.3. This was all explained to LSF in a June 10, 2010, email, but LSF never responded to that email. (CP 14)

Ironically, as LSF agreed in its Subcontract, the purpose of Section U3 was for the parties to "cooperate .. in avoiding unnecessary arbitration or litigation." Since Brix served its demand for arbitration in February of 2009, rather than pursue counterclaims in that arbitration, LSF has needlessly fomented litigation twice in the Superior Court, and now twice on appeal. It has now been eight years since Brix terminated LSF, and seven since Brix demanded arbitration. Yet LSF has made no effort to comply with the condition precedent in U3.

The simple fact is that LSF never complied with the condition precedent before filing this lawsuit for the second time. The trial court was correct in dismissing the lawsuit.

E. THE LAW DOES NOT REQUIRE ADDITIONAL CONTRACT LANGUAGE OR PREJUDICE, AND PUBLIC POLICY DOES NOT SUPPORT LSF.

When a party fails to satisfy a condition precedent prior to filing suit, dismissal is appropriate. *See Downie v. State Farm Fire & Cas. Co.*, 84 Wn. App. 577, 585 (1997), (holding that party's failure to comply with contractual condition precedent to filing lawsuit mandated dismissal) rev'd on other grounds by *Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 418, 295 P.3d 201 (2013); *Levy v. State*, 91 Wn. App. 934, 941, 957 P.2d 1272, 1276 (1998).

LSF relies on *Shepler Construction v. Leonard*, 175 Wn. App. 239, 246 (2013). In *Shepler*, the parties waived any requirement to arbitrate, and thus arbitration was not required. In dicta, the Court also addressed whether the arbitration clause was binding, saying that "the arbitration clause did not provide that it was the exclusive remedy for breach" and therefore it wasn't.[3] *Shepler Constr., Inc. v. Leonard*, 175 Wn. App. 239, 244 - 246.

[3] To the extent this is read to mean that arbitration clauses must use the words "exclusive," or "sole remedy," it would upset the expectations of parties to a vast

Section U3 provides: "Subcontractor agrees not to file any claim in mediation, arbitration, or litigation, until thirty (30) days after having submitted its full claim in writing." This clause clearly indicates an intent that claims will not be filed without compliance, an intent that can only be enforced by dismissing claims filed without compliance. Any reasonable person would understand that non-compliance would lead to dismissal of the claims without prejudice, thus giving the contractor another chance (or six years worth of chances, as the case may be). *See e.g. Levy v. State*, 91 Wn. App. 934, 941 (dismissal is proper remedy even though statute does not use magic words that dismissal will be the result of violating the statute).

Moreover, unlike the clauses in *Mike M. Johnson v. County of Spokane*, 150 Wn.2d 375, 386-392, 78 P.3d 161 (2003) and related cases, where a contractor usually has about 15 days to present its claim or waive it, this clause gives the contractor six years to present its claim. This clause does not limit any remedies, or even shorten the statute of limitations. The purpose of this clause, as is stated in U3, is to ""cooperate" and "avoid[]

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horde of contracts that call for binding arbitration without using those magic words.

unnecessary arbitration or litigation." There is a clear public policy in favor of "avoiding unnecessary arbitration or litigation." See e.g. *State v. Noah*, 103 Wn. App. 29, 50, 9 P.3d 858 (2000) (noting a strong public policy in favor of settlement). It would make no sense to allow the contractor to ignore the clause and pursue what very well could be "unnecessary arbitration or litigation."

LSF also relies on *Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994), an insurance case, arguing that Brix must show prejudice before the condition will be enforced. That case dealt with conditions that "are clearly placed in policies to prevent the insurer from being prejudiced by the insured's actions." *Public Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 803. However, this case does not involve an insurance contract, payment of insurance premiums, or protection of one party's rights from being prejudiced by actions of another. As the contract says, the condition in U3 exists so that the parties will attempt to "avoid unnecessary arbitration or litigation." Section U3 does not provide for any actions by LSF or Brix that could cause LSF to lose its claim. The opposite is true. Only inaction by LSF for six years would cause it to lose its claim.

It is not clear what "public policy" LSF believes should save it from the consequences of its inaction. There is a clear public policy in favor of "avoiding unnecessary arbitration or litigation." See e.g. *State v. Noah*, 103 Wn. App. 29, 50, 9 P.3d 858 (2000). In contrast, no public policy stands for ignoring your contract, ignoring a judge, and re-filing the same case expecting a different result from a different judge.

F. THE TRIAL COURT WAS CORRECT TO DISMISS THIS SECOND ACTION WITH PREJUDICE.

When a case is to be dismissed without prejudice, but the statute of limitations has expired, then the case is dismissed with prejudice. *See Troxell v. Rainier Public School District #307*, 154 Wn.2d 345, 111 P.3d 1173 (2005) (dismissing action with prejudice for failure to comply with condition precedent of required notice, where statute of limitations prevented re-filing).

As stated in the Complaint, paragraph 3.6, Brix terminated LSF on July 29, 2008. LSF's claims all arise out of alleged nonpayment of work under the construction contract. LSF's claims thus accrued no later than July 29, 2008. The statute of limitations for a written contract is six years, and expired on July 28, 2014. RCW 4.16.040. LSF filed this action on July 28, 2014. Thus, LSF

can no longer comply with U3 and re-file. Any new action would be barred by the statute of limitations, and therefore the dismissal must be with prejudice.

G. BRIX DID NOT WAIVE ITS RIGHT TO DEMAND COMPLIANCE WITH U3

LSF claims that Brix waived enforcement of U.3 by filing a Demand for Arbitration and agreeing to mediate and arbitrate the dispute. Brix did not waive its rights.

Section U.3 only applies to "claims" brought by LSF in arbitration or litigation. Thus, by filing its own claims in an arbitration, Brix could not possibly waive U.3 as it applies to LSF's claims.

Brix also did not waive U.3 as it applies to the claims in the litigation. Brix specifically reserved its rights under U.3 and demanded compliance. (CP 102-105)

Waiver is an intentional relinquishment of a known right. "The person against whom a waiver is claimed must have intended to relinquish the right .. and his actions must be inconsistent with any other intention than to waive. To constitute a waiver .. there must be unequivocal acts evincing an intent to waive." *Birkeland v. Houchen*, 51 Wn.2d 554; 565, 320 P.2d 635 (1958); *Am. Safety*

Cas. Ins. Co. v. City of Olympia, 162 Wn.2d 762, 771-72, 174 P.3d 54 (2007). LSF has not pointed to any facts in the record that could support waiver. That Brix specifically reserved its rights directly contradicts LSF's position.

CONCLUSION

The trial court correctly dismissed this action for failure to satisfy a condition precedent to filing claims in litigation. We are only here because of LSF's refusal to comply with its contractual obligation to present its full claim in writing prior to filing any claims, and its refusal to abide by Judge Hayden's dismissal of its 2009 Lawsuit, and its refusal to listen to this Court's earlier ruling that "the complaint can be refiled if and when LSF satisfies the condition precedent." LSF ignored its contract, Judge Hayden, and this Court and refiled the same case after making no effort to satisfy the condition. It cannot obtain a different result. The fact that LSF waited until the last minute to re-file cannot change that result. The trial court must be affirmed.

DATED this 15th day of June, 2016

JAMESON BABBITT STITES
& LOMBARD, P.L.L.C.

By _____
Matt Adamson, WSBA #31731
Attorneys for Respondents
madamson@jbsl.com

CERTIFICATE OF SERVICE

I, Laura Kondo, declare as follows:

1. I am a legal assistant with the law firm of Jameson Babbitt Stites & Lombard, P.L.L.C., over the age of 18 years, a resident of the State of Washington, and not a party to this matter.

2. On June 15, 2016, I deposited with the U.S. Mail a copy of the foregoing Response Brief of Respondents to be served upon counsel of record at the following address:

   Sean B. Malcolm
   Sean B. Malcolm PLLC
   5400 Carillon Point
   Kirkland, WA 98033

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: June 15, 2016, at Seattle, Washington.

Laura Kondo

Laura Kondo