Court of Appeals Case No. 73427-0-I
Washington Supreme Court Case No. 93917-9

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

LSF STRUCTURES LTD., a foreign corporation; LIGHTWEIGHT STEEL FRAMING 2007 LTD., a Washington corporation,

Appellants,

vs.

W.G. CLARK, CM, INC., a Washington corporation; BRIX CONDOMINIUM, LLC, a Washington limited liability company; et al.,

Respondents.

PETITION FOR REVIEW TO THE WASHINGTON STATE SUPREME COURT

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A. INTRODUCTION

Despite the best efforts of the learned Court of Appeals, the outcome in this case cannot be called "justice." Confronted with monthly invoices and documented demands for unpaid labor, work, materials, and supplies totaling more than a million dollars on a condominium project, Respondents first demanded arbitration under a subcontract, incorporating many of the facts and figures taken from the very invoices and other written summaries supplied by Appellants LSF STRUCTURES LTD. and LIGHTWEIGHT STEEL FRAMING 2007 LTD. (together, "LSF"), got LSF to agree to arbitration, and then ultimately turned around and argued that LSF was not entitled to arbitrate, because its invoices and writings had not been complete or final enough to constitute LSF's "full claim" under the subcontract, even though Respondents recognized there was an arbitrable issue and even included the facts and figures they allegedly had no notice of in their own arbitration demand.

When LSF then moved to compel arbitration by filing this lawsuit, Respondents argued that LSF, again, was not entitled to arbitrate and that its complaint did not constitute a complaint to compel arbitration, even though claim 5 of the complaint is called a "Demand for Mediation/Arbitration," the claim asks for mediation/arbitration, and the

Prayer for Relief explicitly asks the Court to stay the litigation pending resolution of the case through mediation/arbitration. Apparently, LSF did not use the right talismanic language in asking the superior court to compel mediation/arbitration.

Finally, although LSF submitted declarations showing that it had provided notice as to the amount of its claims, thus creating a genuine dispute of fact, the Respondents and the lower courts responded that, since the subcontract requires "LSF to document its "full claim" in writing, LSF had not fulfilled the contractual provision, which, through the word "full" apparently requires perfection. Thus, although the parties agree that LSF provided monthly invoices and significant other documentation, LSF has been forced to forfeit its entire million dollar unpaid balance, seemingly because its many efforts to provide notice of its claims in writing were not good enough.

Many years ago, Judge Cardozo claimed that the "law had outgrown its primitive stage of formalism where every slip was fatal." Apparently not. LSF now finds the gates of justice completely barred to it, even to the extent that it provided good and timely written notice. Although Respondents admit they demanded arbitration of these claims; they have been allowed to renege on that deal: LSF gets no arbitration, despite the strong Washington public policy favoring arbitration.

Although LSF provided significant evidence that it complied with the contractual provision requiring it to provide written notice of its unpaid invoices, thus creating a genuine dispute of material fact, LSF gets nothing: it cannot even collect to the extent the fact-finder determines that it complied with the precondition of written notice. If LSF's written notice was not perfect, LSF gets *nothing*, despite the fact that Washington law abhors a forfeiture. That cannot be the right result here.

B. IDENTITY OF PETITIONERS

Appellants LSF STRUCTURES LTD. and LIGHTWEIGHT STEEL FRAMING 2007 LTD. (together, "LSF") respectfully petition the Washington Supreme Court to accept review of the Court of Appeals Opinion, dated November 7, 2016, which affirmed summary judgment in the underlying Superior Court for King Country and terminated review.

C. COURT OF APPEALS DECISION

LSF respectfully requests review of the Court of Appeals Opinion, dated November 7, 2016, which affirmed summary judgment in the underlying Superior Court for Kin Country and terminated review. A copy of that opinion ("Opinion") is attached in the short **Appendix** to this Petition at pages A1 through A9. There was no motion for reconsideration in the underlying matter. Other referenced documents cite to the Clerk's Papers.

D. ISSUES PRESENTED FOR REVIEW

Issue 1: Should a complaint reasonably be construed as "a complaint to compel arbitration,"[1] where the complaint explicitly includes a count called a "Demand for Arbitration/Mediation," includes allegation demanding "mediation/arbitration pursuant to the Contract," and asks for the remedy of a "stay of this lawsuit pending mediation and arbitration of the matters herein, pursuant to the Contract?

[This case is unusual in that Defendant/Respondents made an actual demand to mediate and arbitrate under the contract to resolve an ongoing dispute about unpaid invoices and monies owing to LSF. (CP 92 at ¶ 2). LSF agreed, and the parties picked an arbitrator. Respondents then thought better of it and refused to move forward with the agreed arbitration. (CP 92 at ¶ 2; CP 102–105). With the statute of limitations fast approaching, LSF filed the instant lawsuit, which asks both for monetary damages and for mediation/arbitration.

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[1] The contract at issue invokes both mediation and (followed by) arbitration. (CP at 41). In this Petition, for simplicity, LSF refers simply to "arbitration" as a shorthand, since the same laws and policies apply to both mediation and arbitration, with both being favored under the law.

Specifically, LSF's Fifth Claim or Count is a "Demand for Mediation/Arbitration and Request for Stay of Proceedings." (Complaint at 7, CP at 7). That Fifth Count requests: "a stay of these proceedings pending resolution of the claims stated herein by mediation/arbitration, pursuant to the Contract." (*Id.*). Under the "Prayer for Relief," the remedies LSF seeks expressly include an order requiring "stay of this lawsuit pending mediation and arbitration of the matters herein, pursuant to the Contract." (CP at 8).

While LSF admits that the language used in this claim could have been more crystalline and explicit, it is reasonable to view the claim as a claim requesting an order compelling arbitration. Indeed, there is no other reason to include the claim in the Complaint, other than to compel arbitration and stay of the litigation until arbitration is resolved. Yet, the Court of Appeals concluded, as a major rationale for its decision, that Appellants "failed to show that [LSF's] lawsuit should be interpreted as a complaint to compel arbitration." (Opinion, Appendix, A1, A6). Issue one presents the Supreme Court with an opportunity to clarify that there is no talismanic or magic language that a party must recite to ask the Court to compel the parties to go to arbitration under a contractual arbitration provision. Certainly, the Washington Uniform Arbitration Act does not require any such magic language. *See generally* R.C.W. 7.04A. Put another way, the complaint for

arbitration need not explicitly recite "party X requests an order compelling arbitration."]

Issue 2: May a party to a contract itself invoke the arbitration clause in the contract, send a demand for arbitration that incorporates the other party's own disputed claims, and insist on and agree to arbitration to resolve a contract dispute, only to later argue that arbitration should not occur because the opposing party failed to comply with a condition precedent requiring formal notice of its claims?

[Again, the facts of this case are remarkable in that Defendant/Respondents made an actual demand to mediate and arbitrate under the contract to resolve an ongoing dispute about unpaid invoices and monies owing to LSF *and actually included the amounts that LSF was claiming under its own invoices and demands* in the demand. (CP 92 at ¶ 2 CP 102-05). LSF agreed, and the parties picked an arbitrator. Respondents then thought better of it and refused to move forward with the agreed arbitration. (CP 92 at ¶ 2; CP 102–05). With the statute of limitations fast approaching, LSF filed the instant lawsuit, which asks both for monetary damages and for mediation/arbitration.

Respondents defended the lawsuit by arguing, *inter alia*, that LSF had failed to fully satisfy a condition precedent to filing "any claim in mediation, arbitration, or litigation, until thirty (30) days after having

submitted its full claim in writing to. . . W.G. Clark Construction Co. along with detailed cost documentation and all points of argument in Subcontractor's favor." The alleged failure to satisfy this supposed "condition precedent," which Appellants disputed on summary judgment (believing that they had created a genuine issue of material fact), was one of two primary bases for the learned court of appeals' Opinion in this matter. (Appendix, A1, A6-A8).

But Respondents waived that argument when they previously made a demand to mediate/arbitrate *the same issues* – namely, what amount of monies they owed LSF under the unpaid invoices. Having made a demand for arbitration, Respondents should not later be able to "pull the rug out from under Appellants" by arguing they had no notice, hyper-technically, of LSF's "full claim." This is particularly true where, as here, Respondents actually included the amounts claimed by LSF in their own demand, thereby proving that they did in fact receive the written notice of LSF's claims that they cynically claimed not to have.

[Issue 2 offers the Washington Supreme Court an opportunity to clarify that Washington law and policy strongly favoring enforcement of arbitration clauses prohibits a party from themselves invoking arbitration, making a demand for arbitration (CP at 92), agreeing to arbitration, and then hiding behind a provision requiring the other party to provide specific

notice before the other party files its claims for litigation and/or arbitration. Importantly, here the "condition precedent" at issue allegedly bars LSF from filing its own claims in litigation or in arbitration until the condition is satisfied: it never bars LSF from defending against the other party's claims. Accordingly, once Respondents served a demand for arbitration of their own arguments and claims, LSF was entitled to argue the facts and amounts in controversy.]

Issue 3: Even if the Court of Appeals gave effect to the supposedly unsatisfied condition precedent of requiring LSF to have provided its "full claim in writing," did the Court err by failing to give effect to LSF's claims at least to the extent they were provided to Respondents, or any of their agents, in writing, especially given that there is no dispute that LSF provided significant documentation of its claims in writing to Respondents and/or their agents. Put another way, is a clause limiting arbitration in an adhesion contract correctly interpreted to work a 100% forfeiture of the value of a party's claims on summary judgment, even where there is a genuine dispute of fact concerning whether the party provided adequate notice *as to*, and thus satidifed, *at least some portion of the disputed claims*?

[Issue 3 gives the Washington Supreme Court an opportunity to clarify that a condition precedent does not work a 100% forfeiture when

the condition has unquestionably been satisfied at least in part. In other words, if the trial of fact can conclude that a party provided adequate written notice as to, say, 50% of the disputed monies, then the policies favoring arbitration, construing contracts against the drafter, and abhorring a forfeiture should allow the party to proceed in its case at least with respect to the 50% of the case where there is a genuine dispute of material fact concerning whether the party provided adequate written notice.]

E. STATEMENT OF THE CASE

On or about May 2007, Appellants LSF entered into a contract (the "Subcontract") with Respondent W.G. Clark, CM, Inc. ("W.G. Clark"), a Washington corporation, to provide steel framing and drywall services on a construction project (the "Project") known as the Brix Condominiums, located on Capitol Hill in Seattle, Washington. (CP 79 at ¶ 2; CP 20-52). W.G. Clark was the general contractor on the Project, and Respondent Brix Condominium, LLC ("Brix"), a Washington limited liability company, was the developer and owner of the real property upon which the Project was located. (*Id*.).

Section U.3 of the Subcontract provides as follows:

> 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.

(CP 41).

On or about July 10, 2008, LSF received a Notice of Assignment of Subcontract ("Notice") from Brix informing LSF that W.G. Clark was no longer "in charge of construction for the Brix Condominium Project and had assigned its subcontract. . . to Brix Condominium, LLC." (CP 83-84). The Notice indicated the assignment was effective as of July 1, 2008, and that Brix had retained H.A. Andersen Co. ("Andersen") to serve as the owner's new representative and construction manager. *Id.* The Notice further stated: "[a]ccordingly, effective as of July 1, 2008, all references to "W.G. Clark" or "Member" in your subcontract shall be deemed to mean "Brix Condominium, LLC," the Services Addendum shall continue to serve as your Main Contract . . ." (*Id.*). The Notice went on to indicate that "all applications, lien releases and notices should be delivered" to Brix Condominium, LLC, Attn: Jim Donahue, with a copy to: H.A. Andersen Co., Attn: Martin Cloe, Senior Vice President. (*Id.*).

LSF continued to provide labor, materials, equipment, and supplies to the Project until about July 29, 2008, when LSF was terminated by Brix. (CP 80 at ¶ 6). Throughout its work on the Project, LSF provided W.G. Clark with monthly invoices, on or before the 25th of each month, requesting progress payments for work performed on the Project. *Id.* LSF was paid for its progressive work on the project through approximately May 2008, until Brix terminated W.G. Clark. (*Id.*). After May 2008, Brix did not pay LSF for its work even though

LSF continued to provide labor, materials, equipment, and supplies to the Project until July 2008. (*Id*.).

From July 2008 through September 2008, Al Malcolm ("Malcolm"), President of LSF, attended meetings with personnel from Brix and H.A. Andersen Co. to discuss the Project and LSF's outstanding invoices. (CP 79 at ¶ 1; CP 80 at ¶ 7). For example, Appellants (through Malcolm) attended meetings regarding the Project with Brix and Andersen personnel on or about July 10, 2008; July 18, 2008; July 29, 2008; and August 13, 2008. (CP 80 at ¶ 7). Appellants also exchanged numerous emails, phone calls, and written correspondence with management personnel from Brix and H.A. Andersen regarding the outstanding invoices. (*Id*.).

Despite repeated demands, Respondents failed to pay Appellants for all services and materials provided to the Project in the amount of $1,017,868.90. (CP 81, ¶¶ 8–10). Respondents do not appear to dispute that they owe Appellants substantial unpaid monies or the amount in controversy on the unpaid invoices. Appellants provided Brix and H.A. Andersen's management personnel with a detailed breakdown of Appellants' cost claim, as required by section U.3 of the Subcontract, as well as other written cost documentation detailing the amounts of Appellants claim, on several occasions between July 2008 and September 2008. (CP 81 at ¶¶ 8–10; CP 86, Ex. B).

Respondents continued to refuse to pay Appellants on their outstanding invoices, but in response to Appellants' cost claim,

Respondents provided Appellants with their own responsive detailed cost breakdown of their purported offsets, dated September 5, 2008. (CP 81 at ¶ 10; CP 88–91). Respondents purported claim incorporated and included Appellants' detailed cost breakdown and thus acknowledged Appellants' claims. (CP 88-91).

Appellants' claim consists of the unpaid amount of its invoices for the labor, materials, equipment, and supplies that Appellants provided to the Project up to and including July 2008, plus interest, costs, and attorney's fees. (CP 81 at ¶ 8).

Respondents actually sent the initial demand for arbitration to Appellants. (CP 92 at ¶ 2). Appellants agreed to Respondents' demand, and the parties agreed to mediate and then arbitrate the dispute. (CP 92 at ¶ 2; CP 105). After initially demanding arbitration, Appellants ultimately reversed their position and refused to arbitrate, despite their initial demand to do so, which Appellants had accepted. (CP 92 at ¶ 2; CP 102–105). Respondents alleged that Appellants had not complied with a condition precedent to arbitration despite having previously received and responded to Appellants detailed cost claim. (CP 86–91).

On July 28, 2014, Respondents timely filed a complaint for damages and to compel arbitration in accordance with the parties' prior agreement. (CP 1–8). On February 20, 2015, Respondents filed their Motion for Summary Judgment ("MSJ"). (CP 9-14). Appellants filed their Response, which was supported by a declaration from Al

Malcolm and Appellants' counsel. (CP 68-93). On April 10, 2015, the Court heard oral argument on Respondents' MSJ. (CP 106; Narrative Report of Proceedings). On April 10, 2015, the trial court entered its Order Granting Motion for Summary Judgment ("Order") and dismissing the underlying Lawsuit with prejudice. (CP 107-08). Appellants timely appealed the trial court's Order. (CP 109-14). On November 7, 2016, the learned Court of Appeals issued its Opinion. Because new counsel on this matter was having medical issues when a Petition for Review would be due, Appellants filed a motion for a short extension, so counsel could draft this Petition for Review. This Petition for Review followed.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Opinion in this matter contradicts the strong Washington public policies favoring resolution of cases through arbitration, upholding arbitration clauses, and resolving cases on the merits and not through technicalities by which litigants forever lose fundamental rights. *See* RAP 13.4 (b).

This case is unusual in that Defendant/Respondents made an actual demand to mediate and arbitrate under the contract to resolve an ongoing dispute about unpaid invoices and monies owing to LSF. (CP 92 at ¶ 2). LSF agreed, and the parties picked an arbitrator. Respondents then thought better of it and refused to move forward with arbitration. (CP 92 at ¶ 2; CP

102–105). With the statute of limitations fast approaching, LSF filed the instant lawsuit, which asks both for monetary damages and for mediation/arbitration. Nonetheless, the Court of Appeals concluded, as a major rationale for its decision, that Appellants "failed to show that [LSF's] lawsuit should be interpreted as a complaint to compel arbitration," even though the Complaint includes a claim demanding arbitration/mediation. (Opinion, Appendix, A1, A6). This is inconsistent with the strong Washington public policy favoring resolution of cases through arbitration. *See Davidson v. Hensen*, 135 Wash.2d 112, 118 (1998); *Heights at Issaquah Ridge v. Burton Landscape Group, Inc.*, 148 Wash. App. 400, 404-05 (2009).

That Washington law and policy should prohibit a party from themselves invoking arbitration, making a demand for arbitration (CP at 92), agreeing to arbitration, and then hiding behind a provision requiring the other party to provide specific notice before the other party files its claims for litigation and/or arbitration. Importantly, here the "condition precedent" at issue allegedly bars LSF from filing its own claims in litigation or in arbitration until the condition is satisfied: it never bars LSF from defending against the other party's claims. Accordingly, once Respondents served a demand for arbitration of their own arguments and claims, LSF was entitled to argue the facts and amounts in controversy.]

Finally, Washington law also abhors forfeiture of litigants' substantive rights, preferring cases to be resolved, not on technicalities but on the merits. *Barr v. MacGugan*, 119 Wash. App. 43, 47 (2003). Here, the Court should clarify that a condition precedent does not work a 100% forfeiture when the condition has unquestionably been satisfied at least in part. In other words, if the trier of fact can conclude that a party provided adequate written notice as to, say, 50% of the disputed monies, then the policies favoring arbitration, construing contracts against the drafter, and abhorring a forfeiture should allow the party to proceed in its case at least with respect to the 50% of the case where there is a genuine dispute of material fact concerning whether the party provided adequate written notice.]

G. CONCLUSION

LSF respectfully petitions the Washington Supreme Court to accept review of the attached Opinion (Appendix A) affirming summary judgment and terminating this case *with prejudice*. LSF asks the Court to remand the case to the Superior Court and to order the parties to proceed to arbitration, consistent with the Court's decision in this matter.

RESPECTFULLY SUBMITTED this 28th day of December, 2016.

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LSF STRUCTURES LTD, a foreign, corporation; LIGHTWEIGHT STEEL FRAMING 2007 LTD, a Washington corporation, Appellants, v. BRIX CONDOMINIUM, LLC, a Washington limited liability company; W.G. CLARK CM, INC., a Washington corporation; Respondents, SAFECO INSURANCE COMPANY OF AMERICA AS SURETY FOR CONTRACTOR'S REGISTRATION BOND NO. 6079369, a Washington corporation, Defendant.	)	No. 73427-0-I DIVISION ONE UNPUBLISHED OPINION FILED: November 7, 2016

BECKER, J. — Respondents Brix Condominium LLC and W.G. Clark CM Inc. were entitled to summary judgment because Appellants LSF Structures LTD and Lightweight Steel Framing 2007 Ltd. failed to satisfy the contractual condition precedent to bringing the lawsuit and failed to show that its lawsuit should be interpreted as a complaint to compel arbitration. We affirm.

FACTS

This is the second time these parties have been before this court on the same facts and mostly the same legal issues. Brix Condominium LLC (Brix) was the developer of the Brix Condominiums project. W.G. Clark CM Inc. (WGC) was the general contractor for the Brix Condominiums project and a member of Brix. In 2007, subcontractor Lightweight Steel Framing 2007 Ltd. and LSF Structures Ltd. (together LSF)[1] and WGC executed a subcontract for work on the Brix Condominiums project. Section U2 and U3 of the subcontract required the parties to submit their disputes to nonbinding mediation followed by binding arbitration. Section U3 also provided:

> 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 [WGC], along with *detailed cost documentation and all points of argument in Subcontractor's favor.* Subcontractor acknowledges its responsibility to cooperate with [WGC] in avoiding unnecessary arbitration or litigation by providing [it] with *all information available upon which a decision can be made.*

(Emphasis added.) Effective July 1, 2008, WGC assigned its interest in the subcontract to Brix and notified LSF that all references in the subcontract to WGC would be deemed to mean Brix. The notice informed LSF that Brix had retained H.A. Andersen Company (Andersen) as the new representative and all "applications, lien releases and notices should be delivered" to Brix with a copy to Andersen.

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[1] The subcontract states that it is with LSF Structures Ltd., but it is signed by Lightweight Steel Framing 2007 Ltd.

Later in July 2008, Brix terminated LSF. A dispute arose over unpaid invoices. By letter dated February 4, 2009, Brix invoked the arbitration and mediation provisions of the subcontract and made a formal demand for arbitration.[2] The parties subsequently agreed on a mediator and arbitrator but did not reach agreement on dates for holding the mediation and arbitration.

In August 2009, LSF filed a complaint in superior court for, among other claims, breach of contract, quantum meruit, and recovery of its contractor registration bond. LSF does not mention the 2009 complaint in its brief. While the 2009 complaint was pending, the parties continued to discuss arbitration. However, LSF failed to produce the files or documentation requested by Brix despite a series of e-mail exchanges between February 2010 and August 2010.

In August 2010, Brix moved for summary judgment. Brix argued that LSF had failed to satisfy the condition precedent set forth in section U3 prior to filing the complaint. In response, LSF argued that there were issues of fact regarding its compliance with section U3. In support of its response, LSF attached the declaration of Al Malcolm, president of LSF, stating that he had been submitting monthly billing statements and had met with Brix personnel regarding the amounts due. Malcolm attached a one-page exhibit that was a summary of the amounts LSF claimed were owed.

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[2] Some of this background factual information is gleaned from this court's 2012 opinion, which was entered into the record as an attachment to Brix's motion for summary judgement.

On September 10, 2010, the superior court granted summary judgment, dismissing the 2009 complaint without prejudice and finding that LSF had failed to satisfy the condition precedent to filing the lawsuit. LSF appealed. On April 30, 2012, this court dismissed the appeal, holding that a dismissal without prejudice is not appealable and concluding that discretionary review was not warranted.

On July 28, 2014, LSF[3] filed the present lawsuit in superior court for breach of contract, promissory estoppel/unjust enrichment, quantum meruit, and recovery of its contractor registration bond. It was based upon the same underlying facts as the 2009 complaint. The complaint requested a stay pending resolution of the claims by mediation/arbitration, pursuant to the subcontract.

On February 20, 2015, Brix again moved for summary judgment based on LSF's failure to satisfy the condition precedent prior to filing the lawsuit. In response, LSF again claimed that there were issues of material fact as to whether it complied with the condition precedent. LSF presented the same August 30, 2010, declaration of Al Malcolm that had been presented in the prior lawsuit. Attached to Malcom's declaration was the same one-page summary listing the amounts allegedly due from Brix pursuant to the subcontract.

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[3] Lightweight Steel Framing 2007 Ltd. was the plaintiff in the 2009 complaint. In 2014, LSF Structures Ltd. was added as a second plaintiff, but LSF has not argued that there is anything significant about adding a second named plaintiff.

In reply, Brix noted that LSF was presenting the same arguments and declaration that were previously unsuccessful but expecting a different result. Brix asked the court to dismiss this case with prejudice because the complaint was filed on the day the statute of limitations was set to expire, precluding LSF from filing another complaint. The superior court granted summary judgment and dismissed the complaint with prejudice. LSF appeals.

ANALYSIS

"We review summary judgment orders de novo . . ., viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. . . . [S]ummary judgment is appropriate where there is 'no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Elcon Const., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164-65, 273 P.3d 965 (2012) (some alteration in original) (citations omitted) (quoting CR 56(c)). Although the evidence is viewed in the light most favorable to the nonmoving party, if that party is the plaintiff and it fails to make a factual showing sufficient to establish an element essential to its case, summary judgment is warranted. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "Conclusory statements and speculation will not preclude a grant of summary judgment." Elcon Const., Inc., 174 Wn.2d at 169.

The complaint does not ask the trial court to compel arbitration

LSF contends that it filed this lawsuit "for the purpose of compelling arbitration," and the trial court erred because the arbitrator should decide "'whether a condition precedent to aribitrability has been fulfilled.'"

LSF filed a complaint alleging breach of contract and seeking over one million dollars "in an amount to be proven at trial (or arbitration)." It is not a complaint to compel arbitration, it contains no allegations that Brix refused to arbitrate, and it does not ask the trial court to compel arbitration. Accordingly, the trial court rightfully considered whether LSF satisfied that condition precedent to *filing a lawsuit*. Although LSF contends that it filed the lawsuit so that it would have "a mechanism to compel [Brix] to arbitrate" the issue of enforcing the arbitration provision was never before the trial court.

LSF failed to comply with section U3 of the subcontract

LSF filed the lawsuit. As the party seeking enforcement of the contract, LSF had "the burden of proving performance of an express condition precedent." Walter Implement, Inc. v. Focht, 107 Wn.2d 553, 557, 730 P.2d 1340 (1987); Ross v. Harding, 64 Wn.2d 231, 240, 391 P.2d 526 (1964). LSF did not raise a genuine issue of material fact with respect to performance.

Brix submitted declarations from Mike Ducey, president of WGC, Matt Adamson, counsel for Brix, and Barbara Cowan, controller of a Brix affiliate charged with overseeing disputes involving Brix. With these declarations, Brix, as the moving party, met its initial burden by showing there was an absence of

evidence supporting LSF's case. See Young, 112 Wn.2d at 224 n.1. At that point, the burden shifted to LSF to show an issue of material fact as to whether it satisfied the condition precedent. Elcon Const., Inc., 174 Wn.2d at 169.

In its response opposing summary judgment, LSF again relied on the declaration of Malcolm and the one-page summary attached thereto. The summary does not satisfy section U3 of the subcontract because it is not a "full claim in writing" nor a "detailed cost documentation," much less "all points of argument in Subcontractor's favor," or "all information available upon which a decision can be made."

Malcolm's declaration states that (1) throughout its work on the project, LSF sent monthly invoices to WGC requesting progress payments; (2) from July through September 2008, he attended meetings with personnel from Brix and Andersen to discuss the project and LSF's outstanding invoices; (3) he exchanged numerous phone calls, e-mails, and written correspondence with management personnel from Brix and Andersen regarding outstanding invoices; and (4) he provided Brix and Andersen's management personnel with "other written cost documentation detailing the amounts of LSF's claim."

These statements are not the detailed breakdown required by section U3 of the subcontract. They are too conclusory to withstand summary judgment. See Elcon Const., Inc., 174 Wn.2d at 169; Little v. Countrywood Homes, Inc., 132 Wn. App. 777, 780, 133 P.3d 944, review denied, 158 Wn.2d 1017 (2006). LSF should have presented, or at least described in greater detail, the

documents it claims to have provided to Brix. See CR 56(e). Absent such documents or details, LSF failed to carry its burden. Sch. Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993) (When documentary evidence is cited as a source of a factual contention, the affidavit should attach the documents.), cert. denied, 512 U.S. 1236 (1994).

LSF relies on Staples v. Allstate Ins. Co., 176 Wn.2d 404, 295 P.3d 201 (2013), to contend that "substantial compliance" with the condition precedent is sufficient to withstand summary judgment. This reliance is misplaced. Substantial compliance was sufficient in Staples due to the quasi-fiduciary nature of the insurer/insured relationship. Staples, 176 Wn.2d at 414. Brix did not owe a fiduciary duty to LSF.

Waiver

LSF also argues that Brix waived the condition precedent by filing a demand for arbitration and agreeing to arbitrate. LSF is incorrect for two reasons. First, section U3 applies to "any claim in" mediation, arbitration, or litigation. Thus, Brix's demand for arbitration did not waive the condition precedent as to any claim or counterclaim LSF might assert. And even if a demand for arbitration could waive the condition for purposes of arbitration, LSF filed a lawsuit; the condition would still apply to claims brought in litigation.

Dismissal was warranted for failure to comply with the condition precedent

In general, when a party fails to satisfy a condition precedent prior to filing a lawsuit, dismissal is appropriate. See Ross, 64 Wn.2d at 241 ("breach by a

plaintiff of a material condition precedent relieves a defendant of liability under a contract"). LSF claims that failure to comply with a condition precedent warrants dismissal only if the contract explicitly states that dismissal is the remedy for non-compliance, citing Shepler Construction v. Leonard, 175 Wn. App. 239, 246, 306 P.3d 988 (2013).

Shepler Construction is not on point because there the parties waived arbitration. The court did not address the consequence of a failure to satisfy a condition precedent to either arbitration or litigation.

Finally, we reject LSF's contention that dismissal was improper absent a showing of prejudice. The cases cited by LSF concern the unique relationship between an insurer and an insured. See, e.g., Staples, 176 Wn.2d at 418; Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 803-04, 881 P.2d 1020 (1994); see generally Mendoza v. Rivera-Chavez, 140 Wn.2d 659, 662-65, 999 P.2d 29 (2000). The public policy governing conditions precedent in insurance contracts is not applicable in this case.

We conclude that the trial court properly granted Brix's motion for summary judgment and dismissal with prejudice.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Leirella, J.

CERTIFICATE OF SERVCE

I hereby certify that, on December 28, 2016, I caused the foregoing document to be filed with the Washington Supreme Court by email, and served upon the below named individual(s) by email and mail:

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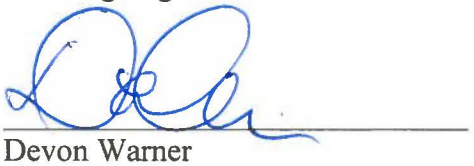
FAX: (206) 292-1995

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



Devon Warner