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COURT OF APPEALS
DIVISION ONE

630474

AUG 24 2009

NO. 630474
(King County Superior Court No. 05-2-13973-1 SEA)

IN THE COURT OF APPEALS, STATE OF WASHINGTON
DIVISION I

EVERETT SHIPYARD, INC.,

Appellant

v.

PUGET SOUND ENVIRONMENTAL CORP.,

Respondent

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RESPONDENT PUGET SOUND ENVIRONMENTAL CORP.' BRIEF

Leslie Clay Terry, III
Attorney for Respondent
8420 Dayton Avenue North
Seattle, WA 98103
(206) 547-1000

Richard N. Boe
Attorney for Respondent
5600 Kitsap Way
Bremerton, WA 98312
(360) 692 - 1133

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I. STATEMENT OF CASE

Respondent Puget Sound Environmental Corp. is a Washington state corporation specializing as a contractor in naval aircraft carrier tank cleaning and related services, with offices located in Bremerton, Kitsap County, Washington. *CP 231* Appellant Everett Shipyard is a prime contractor, specializing in restoration and cleaning of United States Navy vessels, whose principal place of business is in Everett, Snohomish County, Washington. *CP 231*

Appellant, as a prime contractor under a contract awarded by the United States Navy to perform tank cleaning on the aircraft carrier USS CONSTELLATION, entered into a subcontract, dated April 29, 2005, with Respondent to do certain work required in the tank cleaning process, as well as other related services. The actual contract was on one form, signed by both parties, and referred by incorporation to a second document, entitled *Work Order Terms and Conditions* (“Work Order”). *CP 232*

That Work Order contained a specific clause setting out the choice of law and means of dispute resolution. It reads as follows:

11. Choice of Law and Arbitration.

This agreement shall be governed in accordance with the laws of the State of Washington without regard to conflicts of law principles. In the event of any dispute under this AGREEMENT or any ORDER that is not governed by the protest provisions or other similar provisions of this AGREEMENT, the parties agree to first attempt to resolve such issues by a meeting

in person between their respective presidents and/or chief executive officers. If following such meet no resolution is reached, the parties agree to submit such dispute to arbitration in accordance with the American Arbitration Association Rules. The parties agree that there shall be a single arbitrator and they will work in good faith to promptly agree [sic] such arbitrator. In the event of any such arbitration, enforcement of judgment or any permitted legal action under this AGREEMENT or any ORDER, the parties agree that the prevailing party shall be entitled to payment for all costs and expenses, including reasonable legal fees together with interest on such amount at one and one-half percent (1.5%) per month.

After Respondent undertook subcontracting work under the contract, it encountered significant problems with Appellant, including a dispute regarding the remaining amount of unpaid contract payments which were owed to Respondent. Appellant demanded an offset, and the dispute could not be resolved. As a result, the parties were required to seek dispute resolution. *CP 233*

Respondent retained the law firm of *Holmes Weddle & Barcott* to prosecute its claim for damages. *CP 231* On May 25, 2005, Respondent's counsel filed an Amended Complaint for Breach of Contract and Damages in King County Superior Court. *CP 194-196*

Appellant filed a responsive Answer on June 13, 2005, denying the allegations of breach of contract and damages, and simultaneously filed a counterclaim for its claimed offset damages. *CP 197-201*

Significantly, Appellant filed an affirmative defense, citing a mandatory arbitration provision, but did not plead improper venue. *CP 198* Appellant's counterclaim requested damages, and prayed for dismissal of Respondent's claims with prejudice, an award for attorney fees, offset damages and other relief. *CP 198-199* The prayer for relief did not request the Court to transfer the case to arbitration, as both parties had agreed in their contract terms. *CP 199*

On October 4, 2006, after litigating more than 16 months, and after a significant exchange and filing of documents, Appellant filed a Motion to Stay All Proceedings in the case and to compel arbitration. *CP 1-7* The Court granted the motion and in pertinent part stated in its Order:

IT IS HEREBY ORDERED that Appellant Everett Shipyard Inc.'s motion is GRANTED. It is FURTHER ORDERED that further proceedings in this case are stayed and the parties shall participate in arbitration pursuant to their contractual agreement to arbitrate all disputes before a single arbitrator under the rules of the American Arbitration Association.

Respondent's counsel wanted the case to remain before the Superior Court, and filed motions to have the stay lifted. *CP 160*

On November 21, 2006, the Superior Court denied the Motion to Lift the Stay and granted Appellant's Cross-motion to Compel Arbitration.

CP 184 The specific wording was as follows:

It is FURTHER ORDERED that Respondent Puget Sound Environmental Corporation shall fully participate in arbitration proceedings before and under the

rules of the American Arbitration Association and that Respondent shall within five days of this order tender all required fees to the American Arbitration Association in an amount not less the [sic] \$1,375.

Respondent complied with the Court Order and paid \$1,375.00 as required to the American Arbitration Association (hereinafter referred to as "AAA"), fully intending to arbitrate its claim, which was substantial. *CP 233* The Amended Complaint argued for liquidated damages in the amount of \$206,429.69. *CP 195* The counterclaim denied the obligation and requested \$60,000.00 in offset damages. *CP 194* For both parties, the outcome of the arbitration was significant.

By early 2007, AAA estimated the arbitration fee at approximately \$25,000.00. *CP 235* The amount was to be divided between the two parties. With credit for the \$1,375.00 paid by Respondent, its remaining share came to \$10,780.00. *CP 235* Respondent could not afford the arbitration fee at that time because its funds were limited and depleted due to the non-payment by Appellant of funds Respondent believed it was entitled to under the subcontract agreement. *CP 235* It was this nonpayment which originated the lawsuit in the first place.

On April 3, 2007, Appellant paid its share of the arbitration fee, in the amount of \$11,550.00. *CP 28-29, CP 42-44* On April 24, 2007, AAA sent a letter to the parties informing both that Respondent had not yet paid the required fees. A letter, dated May 14, 2007, sent from AAA *suspended* the scheduled arbitration for lack of the required arbitration fee. *CP 246*

The attorneys for Appellant subsequently filed a motion to dismiss Respondent's lawsuit in King County Superior Court, specifically requesting the Court to find under CR 41 that all claims brought by Respondent should be dismissed and Appellant should be considered the prevailing party for an award of attorney fees and costs, as provided in the contract. *CP 55-80*

This relief was requested despite the fact that the arbitration was still on the table. All that had occurred was a delay of a timetable arbitrarily set by AAA. The arbitration and the schedule were merely *suspended*, not terminated. *CP246* Because of financial considerations, Respondent had to wait before it could afford to pay the higher cost of arbitration. *CP 234* If Appellant felt that this was improper, it could have and should have sought relief under the rules of AAA.

After 16 months of unopposed case scheduling activity as the case was being directed toward trial, Appellant's untimely opposition motion in favor of arbitration forced the case to arbitration. The moment the Superior Court granted Appellant's motion, the matter was an arbitration resolution case, and the parties were required to follow the rules of AAA.

When the final fees were mandated to be paid was a decision to be made by AAA. Scheduling arbitration became an arbitration matter. The King County Superior Court had no further jurisdiction, as was requested by Appellant.

The motion to dismiss had been filed on September 12, 2007. *CP 55-80* No opposition either orally or in writing was tendered by Respondent's attorneys. Respondent's attorney appeared before the Court on October 12, 2007, and informed the Court that it was the intention of counsel's firm to withdraw from representation and not to submit any argument on behalf of its client. *CP 81-82*

Respondent requested leave to continue in order to obtain a new attorney and argue that the motion was premature. The Superior Court granted a continuance to November 9, 2007. *CP 83*

Respondent could not find another attorney in time to argue its opposition to the motion to dismiss. Because the motion was unopposed, the Superior Court, on November 9, 2007, granted Appellant's motion dismissing all claims. *CP 84-88* The Order read as follows:

IT IS HEREBY ORDERED AND ADJUDGED that Appellant's motion is GRANTED. It is FURTHER ORDERED that all of Respondent's claims against Appellant Everett Shipyard Inc., *are DISMISSED with prejudice (emphasis added)*.

In addition, the Order continued, as follows:

It is FURTHER ORDERED that as a prevailing party Appellant Everett Shipyard is entitled to an award of reasonable attorneys' fees and costs incurred in defending against this suit, incurred in participating in arbitration before the American Arbitration Association, and in bringing this motion...

On November 29, 2007, the Superior Court awarded Appellant attorney fees of \$33,831.16 and costs associated with arbitration of \$3,000.25. *CP 113-115* The attorney fees included the 16 months of litigation before the motion to stay was filed.

Taking the above stated factual history before the Superior Court on a CR 60(b) motion on November 10, 2008, Respondent requested the Court vacate the judgment of dismissal. *CP 207-230* Respondent's new attorneys argued that the King County Superior Court should vacate its Order dismissing Respondent from the arbitration action, and awarding attorney fees, costs, and arbitration fees to Appellant. *CP 207*

The King County Superior Court reviewed the briefs of both parties on Respondent's motion. It concluded by Order, dated January 8, 2009, that Respondent's motion should be granted because the Superior Court had lost subject matter jurisdiction over the parties once it issued its Order staying the civil suit and compelling arbitration. *CP 155-159*

The argument advanced by Appellant is that, despite the provisions in the arbitration clause within Appellant's own contract, and the Superior Court's decision in favor of Appellant's own motion to have the Superior Court case dismissed in favor of arbitration, the Superior Court continued to have subject matter jurisdiction over this case, without a showing of wrongful intentional or negligent delay in proceeding to arbitration.

The Superior Court, in its decision in favor of Respondent, did not err. The Superior Court determined it did not have subject matter

jurisdiction, and its decision corrected the original judicial error and conformed to the contractual dispute roadmap the parties initially agreed to be bound under.

A subsequent motion by Appellant for reconsideration was denied.

II. ARGUMENT

A. Respondent Puget Sound Environmental is Entitled to Arbitrate its Claims and Did Not Wrongfully Refuse or Negligently Delay the Arbitration.

The introductory facts of Appellant's Brief incorrectly summarized the factual context of the case, particularly during the period relating to the arbitration proceedings taken after the Superior Court granted Appellant's motion to proceed to arbitration.

Historically, this case was about a contract dispute involving economic issues. Respondent believed it should have been paid for work completed under the contract and Appellant believed that it did not owe the money and was entitled to an offset.

Respondent's attorneys filed the case before the King County Superior Court, despite the arbitration clause in the contract. Appellant, in its responsive pleading, acknowledged the existence of an arbitration clause, but failed to take any action for 16 months on the improper subject matter jurisdiction before the Superior Court. Just before trial and despite an obvious waiver of the arbitration clause, Appellant made a motion to correct the improper jurisdiction.

Respondent opposed the motion, but at each opposition, Appellant successfully insisted that the arbitration clause took subject matter jurisdiction out of the hands of the Superior Court.

Once the Court forced both parties to pay the initial arbitration deposit fee of \$1,375.00, the matter before the Superior Court was over. This now became an AAA jurisdictional matter. AAA set a time for the parties to make the remaining payment. Because Respondent had not been paid a significant amount of money by Appellant, Respondent did not have sufficient funds to meet the deadline initially imposed by AAA for the payment.

Appellant has misstated in its Brief a significant fact relating to the AAA arbitration process. When Respondent was unable to pay the final payment, AAA did not “terminate” the arbitration, as stated by Appellant. Instead, AAA simply suspended the arbitration. There was no termination for non-compliance of AAA rules. The suspension of the initial time schedule was based upon non-payment of a fee. There was no evidence ever submitted in either forum that AAA would not proceed with a new schedule at some time in the near future, when payment was received.

The time table, as discussed below, is a matter of reasonableness. There is no denial that there must be some reasonableness involved, and that a refusal, properly documented by specific examples, as set out in the case law below, would justify a motion to the superior court to dismiss the matter with prejudice. But that is not what happened here.

Appellant took the Draconian measure of immediately returning to the Superior Court to insist that the Superior Court exert jurisdiction over a subject matter Appellant originally argued the Superior Court did not have. The Superior Court erroneously granted the Order requested by Appellant.

That Order specifically denied Respondent the opportunity to arbitrate its case as a punishment for not meeting a suggested time table set out by AAA for payment of arbitration fees. The Superior Court did not have subject matter jurisdiction once it stayed the case and initially ordered arbitration. Jurisdiction did not exist at that time.

Respondent's Motion to Vacate the Order under CR 60 for lack of subject matter jurisdiction was entirely proper. The arbitration process was still a viable forum. At no time did AAA ever state that the arbitration was permanently terminated or that arbitration was no longer available to the parties because its initial scheduling had to be suspended due to non-payment of its remaining arbitration fee from Respondent.

Inherent in the argument of Appellant is that under Constitutional authority, superior courts have the power to hear cases in all matters except those expressly denied, such as by the Legislature or the Constitution. The wrap-around argument is this commercial contract case is within the proper subject matter jurisdiction of the superior court, despite specific contract terms to take away the subject matter jurisdiction of the superior court, except for the entry of the arbitration award.

In Mitsubishi Goshi Kaisha v. Carstens Packing Co., 116 Wash. 630, 200 Pac. 327 (1921), Appellant incorrectly relied upon this case to establish support for its argument that there is subject matter jurisdiction over cases involving agreements to arbitrate. But the statement does not survive an analysis between the facts of instant matter and the facts of the Mitsubishi Goshi Kaisha case.

When the Supreme Court considered the argument of appellant in Mitsubishi Goshi Kaisha that the superior court below did not have jurisdiction to enter the order of judgment, the Supreme Court disagreed. The court said that there was implied consent in the agreement to arbitrate and that the final order may thereafter be submitted to the superior court for enforcement of the judgment. That is precisely the argument and position of Respondent in the instant matter.

Entering an arbitration order in superior court is not consistent with the issues presented in the instant matter. What is in controversy here is the subject matter jurisdiction of the Superior Court before the arbitration even takes place, or within a reasonable time to have the arbitration, as defined by Washington case law.

The same misdirection was applied by Appellant in citing RCW 7.04.0150, which defines subject matter jurisdiction regarding arbitration. The statute was clearly defined in Federated Servs. Ins. Co. v. Estate of Norberg, 101 Wn. App. 119, 4 P.3d 844 (2000). The Court restated previous holdings that superior courts are invested by the Legislature with

subject matter jurisdiction to “confirm, vacate, modify, or correct arbitration awards.” *Id.*, 101 Wn. App. at 123.

Appellant states incorrectly that there “is no question” that the Superior Court has “continuing” subject matter jurisdiction after the stay and the referral to arbitration, as well as to confirm or vacate any arbitration award. This statement is misleading and was made without authority. Confirmation or vacation requires first the arbitration. There is no “continuing” until that event occurs, or unless the offending party makes it clear in words or in action that no arbitration will take place or that delay of arbitration is preferable for the sake of delay, as delineated by Washington case law.

In Federated Servs. Ins. Co., *supra*, a panel of arbitrators was convened to hear a survival action on a claim for damages to the estate of a deceased. Those damages were the inheritance the deceased would have received from his parents if he had outlived them. The deceased was a truck driver who died intestate in an automobile accident, without a spouse or dependents. The beneficiaries of the estate were the parents of the deceased who sought UIM policy limits from the deceased’s carrier due to inadequate coverage by the driver at fault.

The UIM claim was submitted to arbitration, as required under the contract of insurance. The arbitrators awarded the estate \$273,000.00 in lost earnings and \$400,000.00 in lost of perspective inheritance from his parents had he lived.

The insurance company moved in superior court to vacate the award of \$400,000.00 for lost inheritance after the estate filed a motion to confirm the judgment on the award. Both motions were heard simultaneously. At that time, the estate objected to the insurance company's motion to vacate because the estate alleged it did not receive timely notice of the motion. However, just before the superior court was to hear the estate's argument, an agreed scheduling order was worked out. The estate agreed to allow the insurance company to pay the award for lost earnings immediately and then it would continue to pursue its motion to vacate the award for lost inheritance.

Therefore, by agreement, the parties agreed to the entry of judgment, which the superior court entered. Subsequently, the superior court granted the insurance company's motion to vacate the lost inheritance award.

However, on appeal the estate contended that a motion to vacate must be heard at the same time as the motion to confirm judgment on an arbitration award. The argument was that once the trial court confirms a lost earning portion of the award, it lost jurisdiction to entertain a motion to vacate the remainder of the award.

This is the authority cited by Appellant in the instant matter that the superior court has continuing subject matter jurisdiction.

Appellant neglected to include the specific circumstances. It was really not an issue of whether a motion to vacate should be heard at the

same time as the motion to confirm. The Court of Appeals found it preferable based upon policies of finality and integrity, but stated that a superior court does not lose jurisdiction to hear a motion to vacate an arbitration award merely by entering a judgment that confirms it.

Instead, the Federated Servs. Ins. Co. case revolved around a dispute as to whether the cause of action for lost inheritance was viable, and if the award under that cause of action by the arbitration panel was proper. This is where the superior court had jurisdiction. Not at the commencement of the arbitration, but at its end.

In quoting Federated Servs. Ins. Co., the Appellant misstated the intention of the Court of Appeals decision. The Court stated, “the Legislature has invested the superior courts with subject matter jurisdiction to confirm, vacate, modify or correct arbitration awards.” The Court referred to RCW 7.04. The Court also stated that even after a judgment has been entered to confirm an award, the motion to vacate can still be heard as long as it is made within the statutory three-month period. RCW 7.04.180.

In other words, the arbitration award triggers the subject matter jurisdiction to confirm or vacate, or even to modify. Until that award, the purview is within the jurisdiction of the contractually agreed upon arbitrator. This is why in deciding motions to vacate, a court does not review the merits of the case or consider evidence which was considered

by the arbitrators. Federated Servs. Ins. Co., 101 Wn. App at 124, *citing Davidson v. Hensen*, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998).

As stated by the Federated Court, arbitrators are not required to file or preserve evidence for court review. The error complained of must be identified from the language of the award, which can be either a few words or long pronouncements. From the arbitration award in that case, the superior court could recognize that the first award was identified as a loss to the estate from earnings and that the second award was in the form of lost inheritance to the estate from what the deceased may have received from his parents if they had predeceased him.

The trial court, once it had jurisdiction of the arbitration awards, recognized that the first award was proper under Washington's general Survival of Actions statute. It also recognized that that same statute did not create a separate claim for survivors, but preserved only causes of action a person could have maintained had he or she not died. If the decedent had survived and sued for personal injury, he could not have sued for lost inheritance. The same held true for his survivors.

That decision in the Federated case squarely conforms to the argument of Respondent in the instant matter.

Appellant argued that using the Federated case, logic would dictate that the superior court retains subject matter jurisdiction to supervise and monitor a refusal to arbitrate contrary to court order. This is a convoluted and factually incorrect analogy. There was no refusal to arbitrate. There

never was a refusal to arbitrate after the superior court ordered to do so. What was holding up the arbitration was a lack of money, which suspended the arbitration. That arbitration still could have taken place and time was available to do so within reasonable limits.

If Appellant wanted to move forward with arbitration and seek a default in the hearing, or establish an arbitration that Respondent was wrongfully intending or negligently delaying arbitration, that would be up to Appellant. If Respondent felt that the allegations of wrongful delay before the arbitration was premature or improper, that was for Respondent to argue before the arbitrator. If the arbitration opinion went to Appellant, or if arbitration was shown to be wrongfully frustrated by Respondent, Appellant then would be free to seek confirmation or a sanction of dismissal with the superior court. The consideration would be whether Respondent wrongfully refused to arbitrate or negligently delayed, as delineated in Washington case law.

Appellant cited Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 28 P.2d 823 (2001). Appellant limited its factual explanation of the case to one involving a stock broker who signed an employment agreement which contained an arbitration clause and subsequently sued her employer for wrongful termination. After she failed to arbitrate as required by the superior court, her case was dismissed. The Court of Appeals affirmed that dismissal, maintaining that the employee failed to arbitrate after she

was ordered to do so, and that was a violation of her employment agreement.

From that explanation, Appellant states that the dismissal order provides satisfactory authority that the superior court in the instant case had subject matter jurisdiction when it entered its order of dismissal. However, the circumstances in Tjart were vastly different than the instant matter.

In Tjart, the plaintiff was a stockbroker who filed a discrimination claim in the superior court where jurisdiction and venue were proper, but she was bound by an arbitration clause within her contract to resolve disputes.

The defendant-employer in Tjart filed for an Order compelling the plaintiff-employee to arbitrate all of her claims under the Federal Arbitration Act, which had been mandated in her assorted contracts. The employee opposed the motions, primarily under arguments that she was unaware of the arbitration clauses or that they did not apply to her particular cause of action. The trial court granted the motion to stay the judicial proceedings and compelled arbitration.

The employee in Tjart did nothing for years. A clerk's notice was sent to her stating that the case would be dismissed for want of prosecution unless she made written application to the court within 45 days as to why there was good cause that the case should not be dismissed. The employee, by this time, was *pro se* and wrongfully assumed her case

had already been dismissed. As *pro se*, she filed a motion to rescind the dismissal and continue the stay. Her argument was that her case was no longer governed by binding arbitration, and therefore should not be dismissed. The Court denied her motion, and subsequent motions for reconsideration. From these facts, the employee appealed.

The Tjart Court reviewed the specific documents and arbitration clauses, primarily from a federal point of view because this case involved federal claims and stock market exchange rules. The Tjart Court found that an agreement subject to arbitration did exist, and despite her disagreement or nondesire to arbitrate, the employee had assented to its terms.

There is a similarity in Tjart to the instant case. The superior court below responded to the motion by staying and compelling arbitration in a case in which, but for the arbitration clause, there would be no question of jurisdiction for purposes of hearing the case. Because there was an arbitration clause which had been agreed upon, and the court determined that it was a valid clause, arbitration was compelled.

The superior court in the Tjart case below did not impose an immediate deadline upon the employee in that case. The employee had time in Tjart to seek arbitration. Although the Court Order did not specify how much time, several years passed before the clerk's notice for dismissal for want of prosecution was sent, and it still provided the

employee with an additional opportunity to have time to arbitrate the claim upon a showing of good cause.

These facts clearly distinguish the instant case from the Tjart case. It was erroneous for Appellant to suggest to this Court that the facts in Tjart were similar and therefore the same analysis should be applied. In the instant case, Respondent had not arbitrated less than a year before the motion to dismiss was filed. No deadline had been imposed and there was no affirmative action to accomplish an arbitration hearing on a default by Appellant before it filed its motion in the superior court to dismiss the arbitration.

Appellant similarly and erroneously relied upon Harting v. Barton, 101 Wn. App 954, 6 P.3d 91 (2000). Appellant summarized the matter as a contract case involving a clause which provided for mediation prior to litigation. The defendant in that case maintained that because mediation had to be exhausted prior to litigation, the court lost subject matter jurisdiction to enter judgment. The Court of Appeals disagreed, finding that because the defendant had failed to invoke the mediation process, subject matter jurisdiction was not lost.

The Harting case is hardly on point. Appellant ties it by trying to couple a mediation provision prior to litigation with an arbitration clause denying litigation. Appellant tells this Court that there should be no reason why the two should be different. The argument is skewed.

In Harting, there was a lease with an option to purchase real property. The lessors alleged breach of the lease because the land involved was not being farmed in a professional farm-like manner, as required in the lease. Among other issues was whether a provision within the lease for a notice of claim and a mediation clause in the lease denied the superior court of subject matter jurisdiction.

The lessors filed a complaint to terminate the lease and the option to purchase. The lessors ignored the mediation provision and went straight to court, and the lessee was alleged to have waived the defense of jurisdiction by failing to object in its pleadings and filing a counterclaim. However, the lessee contended that the notice and mediation provisions divested the court of subject matter jurisdiction.

The Court of Appeals disagreed with the lessee. It found that a notice of claim or mediation clause in a contract does not deprive the court of subject matter jurisdiction, but only conditions a lawsuit. Harting v. Barton, 101 Wn. App at 962. In the Harting matter, once the lessor had filed the complaint and the lessee responded without an affirmative defense or objection in the lessee's Answer, the condition of the lawsuit under the lease had been waived. Failing to plead denied the lessee of the right to raise the affirmative defenses of failure to provide notice of default or failure to submit to mediation. The superior court in the Harting case always had subject matter jurisdiction; however, its authority to hear the

case was conditioned upon a notice of default being given and a mediation taking place first, if not waived.

These facts are entirely different than the matter in the instant case. Appellant has taken the requirement of arbitration without the necessity of litigation to somehow be defined as similar to litigation conditioned upon mediation.

Appellant also cited the federal case of Morris v. Morgan Stanley & Co., 942 F.2d 648 (9th.Cir 1991). In discussing the merits of the Morris case as it related to the instant matter, Appellant gleaned over the facts by suggesting that a dismissal by a federal district court in Northern California for failure to prosecute the arbitration under the equivalent CR 41 rule was similar to the facts between Appellant and Respondent.

To the contrary, a long, lengthy and unexplained series of delays in moving forward with arbitration, which both parties in Morris desired, was the catalyst for the court's eventual dismissal action. The case is replete with multiple variations of delays by the offending party, from repeated dismissals of attorneys, unkept promises of performance, refusal to sign stipulations, to false statements being made to the court in five consecutive status conferences.

Finally, the appellees who demanded arbitration had had enough of the incessant and unexplained delays, and moved for the court under FRCP 41(b) (which is similar to CR 41(b)) to dismiss for refusal to prosecute the arbitration. The appellants subsequently made a demand for

arbitration to AAA, but by this time it was too late, and the Court ordered the dismissal.

In discussion on the merits of the appeal, the 9th Circuit Court of Appeals considered the weight of four separate factors: (1) the court's need to manage its docket; (2) the public interest in expeditious resolution of litigation; (3) the risk of prejudice to defendants from delay; and (4) the policy favoring disposition of cases on their merits. Morris v. Morgan Stanley & Co., 942 F.2d at 651. (Emphasis added)

The Court also favorably reiterated a previous case finding regarding the failure to prosecute diligently, which the Court said was sufficient by itself to justify a dismissal, even if there was no actual prejudice to the other party from such failure.

Appellant in the instant matter has attempted to melt that latter statement into the facts of the instant case, but review of the Court's intention demonstrates that the party who is facing dismissal must attempt to prosecute "diligently." In the Morris case, it was at least two years of delay upon delay, so much so that the Court commented that "[T]here appears from the record early evidence Appellants did not intend to pursue this case to trial in a reasonably diligent manner." Morris v. Morgan Stanley & Co., 942 F.2d at 649.

The circumstances of the Morris case, where the arbitration was on the table for at least two years and visible efforts were being taken to avoid the arbitration, led to the decision that the appellants were not being

diligent. This is significantly different than the instant case, where Appellant demanded the harsh penalty of dismissal of the arbitration and case unless Respondent immediately paid for and entered into arbitration.

The fact that Respondent could not immediately pay the arbitration fee and AAA suspended the planned arbitration, does not on its own right mandate an extinguishment of the claim. The time between the Order of the Court to arbitrate, which was November 21, 2006, and the motion to dismiss, on September 12, 2007, had not yet been one year.

In addition, there had been no communication between Appellant and Respondent over the arbitration or means to advance the arbitration. The only delay, which was made known, was that Respondent immediately lacked the funds at the time to move forward with the arbitration. In Morris, the Court found that appellants repeatedly failed to respond to correspondence from appellees and they “unnecessarily” delayed the adjudication for almost two years. Morris v. Morgan Stanley & Co., 942 F.2d at 651.

The Morris Court further recalled the failure of the appellants to appear at a scheduled meeting and misrepresented their intentions to the district court on at least five separate occasions, as well as substituting counsel on four different occasions.

The analogous attempts by Appellant of the instant case to Morris for justification of its demand for dismissal of Respondent’s arbitration rights with prejudice is without the case law support Appellant relies upon.

Both the Morris and the Tjart cases were not on point, but were extreme examples of willful refusal or severely negligent-based delays which prejudiced the innocent party, and met the four criteria that concerned the Court, as well as the requirement to prosecute diligently matters before the Court.

Further, it is an egregious misrepresentation for Appellant to state that Respondent violated two court orders requiring arbitration and that a favorable decision would allow Respondent or others to ignore court orders with impunity. In addition, there was no successful undermining of the arbitration process or arbitration agreement by a favorable decision to Respondent. Appellant did not ask for arbitration until just before trial more than 16 months after the lawsuit was served on it. When it moved for arbitration, it insisted on an immediate arbitration or a complete dismissal of the case, rationalizing such demand with unfounded allegations of willful refusal and delay.

In a footnote, Appellant attempted to persuade this Court that the natural extension of the superior court order would result in the Court being unable to enter judgment on the arbitration. There is no basis for this analysis or theory. No argument has ever been raised in any pleadings that the superior court does not have authority to enter judgments on arbitration decisions.

Appellant reaches into numerous foreign jurisdictions to advance the argument that the superior court retains jurisdiction throughout

mandatory arbitration and that dismissal of the dispute between the parties may be had by order of the court. As Appellant misstated the argument earlier, it does so again with this similar authority. The issue in all of those cases had to do with one party refusing to go on with arbitration despite the arbitration clause. Facts were clear relating to the amount of effort that was made and the lack of effort by the offending party. None of those cases is remotely related to the facts of this case.

B. Respondent Puget Sound Environmental is entitled to an award of attorney fees and costs.

The contractual agreement between Respondent and Appellant mandated arbitration of disputes. There is no question that Respondent attempted to litigate the dispute in violation of the arbitration clause. There is also no question that Appellant continued to litigate the case despite the arbitration clause for 16 consecutive months. Just before trial, Appellant protested and insisted upon arbitration. Despite the fact that Appellant clearly waived the arbitration clause, that waiver was not presented at the court level. Instead, the superior court considered only the arbitration issue and ordered the matter into arbitration.

Deposits were made for arbitration and the matter was set before AAA for arbitration. The date selected was shortly after the order became effective. Respondent believed the arbitration cost was temporarily prohibitive. AAA only suspended the date it selected. It did not extinguish the arbitration itself or declare that arbitration could not take place.

Respondent took no affirmative act to indicate that it refused arbitration, or that it would not continue to go to arbitration to resolve the dispute. Appellant seized the delay to fashion a complete dismissal argument, incorrectly asserting a refusal to arbitrate as its principal argument, for which all of its authority is resting upon.

If the superior court decision is upheld, and arbitration is ordered, Respondent would be the prevailing party for purposes of appeal and entitled to its fees and costs under the arbitration agreement. In such a case, Respondent respectfully requests leave of this Court to submit its fee and cost accounting in a petition subsequent to decision.

III. CONCLUSION

Puget Sound Environmental, as the Respondent in this matter, respectfully requests this Court to uphold the order of the superior court, dated January 8, 2009, vacating its prior orders of dismissal Respondent respectfully requests an award of attorney fees and costs under a subsequent petition if it should be determine to be the prevailing party.

Dated this 3rd day of August, 2009.

Respectfully submitted,

LAW OFFICES OF
LESLIE CLAY TERRY, III


LESLIE CLAY TERRY, III
WSBA #8593
Attorney for Respondent

A BOE LAW FIRM


RICHARD N. BOE
WSBA # 38695
Attorney for Respondent