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No. 63772-0
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

VERBEEK PROPERTIES, LLC; DEWEY T. VERBEEK;
and MARILYN VERBEEK,

Appellants

v.

GREENCO ENVIRONMENTAL, INC.; RANDY PERKINS;
and JANE DOE PERKINS,

Respondents.

APPELLANTS' REPLY BRIEF

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February 3, 2010

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January 29, 2010

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I. INTRODUCTION

GreenCo's Response Brief fails to identify any reason for this Court to uphold the trial court's decision. The facts and law support that Verbeek properly initiated and never waived arbitration. Verbeek substantially complied with all requirements related to initiating arbitration and it never faltered in communicating its clear intent to honor the GreenCo contract arbitration provision. Respondent's efforts to subvert Washington's established law favoring the arbitration of disputes on a contrived technicality should fail. This Court should reverse the trial court and order the parties to arbitrate their claims.

II. DISPUTED FACTS

GreenCo mischaracterizes multiple facts relating to this matter that are not important on Appeal. Verbeek objects to many of the facts presented by GreenCo in its Statement of the Case. The facts pertinent to the Appeal are discussed in the "Argument" Section (Section III) below.

III. ARGUMENT

A. **Verbeek and properly initiated arbitration.**

The parties agree that RCW 7.04A applies in this case because GreenCo's contract does not state how to initiate arbitration. RCW 7.04A.020 defines notice of arbitration as "**taking action that is reasonably necessary to inform the other person in ordinary course,**

whether or not the other person acquires knowledge of the notice.”

(emphasis added). Verbeek provided notice of its intent to arbitrate with letters in February and April 2009, when the claims arose and concurrently with the filing of its Complaint. *CP 49-50;.CP 159-160.*

1. Verbeek gave substantive notice under RCW 7.04A.090

Under RCW 7.04A.090, the Notice of Arbitration must contain a description of the nature of the dispute and the remedy sought. *Westcott Homes, LLC v. Chamness*, 146 Wn. App. 728, 192 P.3d 394 (2008) affirms this as well. But, according to the trial court’s ruling, the issue that is before the Court is whether Verbeek properly served its Notice of Arbitration to GreenCo; not whether Verbeek provided proper substantive notice.¹ In any case, the facts show that Verbeek met the substantive notice requirements. It provided two letters making GreenCo aware of its claims and remedy sought. In its February 24, 2009 letter, Verbeek specifically notified GreenCo that “DOE rejected GreenCo’s work.” *CP 49-50*. The letter continues to advise GreenCo of its contract breaches on

Page 2:

- GreenCo failed to prepare a remedial investigation

¹ This issue was not an issue at the trial court level and should not be considered here. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Nevertheless, and out of an abundance of caution, Verbeek will address it here.

report;

- GreenCo failed to develop a feasibility study;
- GreenCo's "bioremediation" at the property was not thoroughly engineered and may have "diluted" the contaminated soil; and
- GreenCo's clean up action report was not clear where remediation took place, where samples were taken, or what remediation was done. . .

Verbeek has paid GreenCo over \$900,000 for a clean up that was unsuccessful. GreenCo has **breached its contract** with Verbeek. Verbeek is currently withholding the \$410,702, allegedly still owed GreenCo, as an offset to its damages. **These damages are in excess of \$410,702 and are continuing to accrue. . .**

You are further notified that Verbeek intends to pursue its claim against GreenCo. Under the parties' contract, mediation is a prerequisite to arbitration. Verbeek is willing to waive that requirement and proceed to arbitration if GreenCo is, as we believe mediation would be futile at this point in time. Please advise us on whether or not you will waive mediation by March 3, 2009. We look forward to hearing back from you.

CP 49-50 (emphasis added). The letter advised GreenCo of Verbeek's claims, that Verbeek's damages were an amount over \$410,000, and Verbeek intended to arbitrate. On its face, this letter meets the substantive requirements of RCW 7.04A.090.²

Then, again, on April 13, 2009, Verbeek provided a letter along with a courtesy copy of the Complaint it had filed a few days earlier,

² GreenCo's response (or lack thereof) to this letter is discussed below.

which included all claims and remedies sought:

Enclosed please find a courtesy copy of the Summons and Complaint . . . **The contract between the parties includes an arbitration provision.** We will voluntarily move to stay this action pending arbitration but would like to reach agreement regarding an arbitrator prior to doing so. . . . **The Verbeeks' property is currently being evaluated, and the Verbeeks will not know the extent of its damages until the evaluation has been concluded. . . . GreenCo's performance on the site, and failure to follow the requirements of MTCA, have left the Verbeeks to start at the beginning with conducting the remedial investigation, feasibility study and action plan.** This process will take some time.

That said, we believe we can proceed with scheduling the arbitration and conducting discovery. Please get back to me as soon as possible with your proposed arbitrators . . .

CP 64-67 (emphasis added). The letter advised GreenCo of the nature of Verbeek's claim and remedy sought, and that Verbeek intended to arbitrate its claims. It met the requirements of RCW 7.04A.090.³

Both of the letters advised GreenCo of the nature of Verbeek's claims, the remedy sought, and that Verbeek intended to arbitrate its claims. There is no requirement that a request to arbitrate be submitted with every letter. Yet, Verbeek requested arbitration in writing in two

³ GreenCo asserts the second letter cannot be considered a demand for arbitration because it came after litigation commenced. However, it cites no authority. It later cites *Otis*, 165 Wn. 2d. 582, 588, 201 P.3d 304 (2008), for a similar proposition, but *Otis* does not state this. Further, the letter was sent contemporaneously with the Complaint being filed.

letters. Its requests were clear that it sought to arbitrate its breach of contract claims for GreenCo's failed work and that it had been damaged as a result.⁴ The substantive requirements of RCW 7.04A.090 were met. And, also importantly, no case law exists to support GreenCo's argument that Verbeek's intended compliance with RCW 7.04A.090 was not sufficient. This is not a 'gotcha' situation. Washington law overwhelmingly supports arbitration. GreenCo itself included the arbitration provision. GreenCo has no basis to refuse to comply with its own contract provision on a contrived technicality.

2. *Verbeek properly served GreenCo with its Notice to Arbitrate.*

GreenCo next alleges that Verbeek did not properly serve it with its request to arbitrate because it did not send a copy by registered or certified mail. When the Notice of Arbitration was provided, GreenCo had hired an attorney related to its lien. Both parties had attorneys, and were no longer communicating with each other, when the letters were sent to GreenCo's attorneys by fax and mail. Therefore, GreenCo was

⁴ GreenCo's argument that Verbeek was required to tell it which claims it wanted to arbitrate is without merit. There is no such requirement. Also, Verbeek intended to arbitrate all claims associated with GreenCo's failed work.

properly served through its counsel, which is reasonable service.⁵

In *Chamness, supra*, the Court of Appeals recognized that “courts may forgive [an] error if counsel has ‘substantially complied’ with an applicable procedure” such as the service of Notice to Arbitrate. 146 Wn. App. at 735 (*citing* 15A Karl B. Tegland & Douglas J. Ende, Wash. Practice: Wash. Handbook on Civil Procedure §6.12 at 129 (2007-2008)). **“The ‘substantial compliance’ doctrine requires both actual notice and ‘service in a manner reasonably calculated to reach the party,’” both of which are present in this case. *Id.* (*citing Chai v. Kong*, 122 Wn. App. 247, 253, 93 P.3d 936 (2004))(emphasis added).**

GreenCo incorrectly argues that the *Chamness* Court never addressed substantial compliance. In *Chamness*, the Court did not address service of the notice because it held the notice did not meet the substantive requirements, which were met in this case. In its discussion, *Chamness* both contemplates and implies that substantial compliance with the notice provision is sufficient. *Id.* at 735. What GreenCo fails to recognize is that the Court would not have brought up substantial compliance with service if it had not considered that it could be an issue. Verbeek is not in error in describing *Chamness’s* holding regarding substantial compliance.

⁵ The first letter was sent to GreenCo’s original counsel. The response to that letter indicated GreenCo had retained new counsel. The second letter was sent to

nor did the trial court make any findings on the issue. Rather, the trial court held that by not pleading arbitration in the Complaint, arbitration was waived. This issue is discussed more thoroughly in the Waiver Section [Section IV, B] below.

4. *Verbeek's request to waive mediation did not constitute a failure to initiate arbitration.*

Verbeek's February 24th letter requested that the parties waive the mediation prerequisite to arbitration and directly arbitrate their claims. *CP 49-50*. The trial court was not clear in its decision relating to the initiation of arbitration. While it held that RCW 7.04A.090 had not been met, it also stated that because mediation was a condition precedent to arbitration and Verbeek sought to waive mediation, it could not have initiated arbitration. *CP 11-14*. The trial court was incorrect in its ruling.⁶

First, looking at the plain language of the February 24th letter, it is clear that counsel is simply inquiring whether GreenCo would agree to waive mediation. There is not statement that Verbeek refuses to mediate. If GreenCo had responded that it wanted to mediate, Verbeek would have done so. The only reason Verbeek proposed the waiver of mediation by both parties is because Verbeek's damages were not yet known. It makes not sense to mediate a claim without knowledge of damages but Verbeek

⁶ GreenCo did not address this issue in its Response Brief.

was still willing to do so. More, at the hearing, GreenCo argued and the trial court held that Verbeek's request to waive mediation meant that arbitration was either not initiated or waived. With respect to waiving mediation, GreenCo contends it responded to Verbeek's request to waive mediation on March 3, 2009 by stating that "any effort by Verbeek to retain another remediation firm would be a breach of contract and would be subject to the mediation and arbitration requirements of the contract." However, the letter is five (5) pages single-spaced and makes no reference whatsoever to Verbeek's request to waive mediation and arbitrate the claims. The March 3rd letter from GreenCo ignores Verbeek's request to arbitrate. *CP 52-56*. GreenCo continued to ignore Verbeek's multiple emails and voicemails following its initial arbitration request as well. *CP 159-160*.⁷

Moreover, the arbitrator, not the Court, has the authority to determine whether a condition precedent to arbitration has been fulfilled. *See RCW 7.04A.060*. Procedural decisions regarding prerequisites to arbitration are left to the arbitrator, not the courts. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557-558 (1964). Therefore, whether the

⁷ GreenCo's argument that it refused to waive mediation because it intended to follow its contract flies in the face of its current position that it will not follow the arbitration provision of its own contract, let alone the mediation provision, and would rather litigate the matter.

parties were required to mediate their claims or not, was not for the trial court to decide. This Court should reverse the trial court's decision, stay the litigation, and order that the parties arbitrate their claims.

B. Verbeek did not waive its right to compel arbitration.

The two factors are needed to establish waiver are the right to arbitration and acting inconsistent with the right. Verbeek did not waive arbitration. It timely requested arbitration on multiple occasions and never acted in any way inconsistent with an intent to arbitrate. *CP 49-50; 159-171; 173*. It always consistently stated its intention to arbitrate as the GreenCo contract required.

GreenCo alleges that Verbeek cannot distinguish its actions from cases finding waiver. GreenCo is clearly ignoring the facts of this case, the holding in cases finding waiver, or both. It, like the trial court, also fails to recognize that the standard for waiver in Washington is very high.

In *Otis Housing Assoc., Inc.*, the court found waiver because plaintiffs appeared at a show cause unlawful detainer hearing involving the same defense as the underlying issue to be arbitrated. 165 Wn. 2d at 588. That is not the case here. The motion to dismiss the lien was a statutory, defensive versus affirmative issue, which further distinguishes it from the unlawful detainer issue in *Otis*. There is no defense or claim asserted here that was decided in the frivolous lien action, as discussed

below. The trial court agreed that the frivolous lien action was not a waiver of the arbitration provision in the parties' Contract.⁸ *CP 11-14*.

In *Ives*, Ramsden answered the complaint, engaged in extensive discovery, took depositions, and prepared for trial over a period of three years. Then on the eve of trial, it asserted the arbitration provision. The Court held that Ramsden performed activities that were inconsistent with an intent to arbitrate and had waived the arbitration provision. 142 Wn. App. at 384. In this case, there has been no discovery or depositions and very little time (less than one week) passed between the filing of the Complaint and the last request to arbitrate. Also a request to arbitrate was provided prior to the Complaint being filed. The facts of this case substantially differ from those in *Ives*. There was no waiver here.

In *Harting v. Baron*, 101 Wn. App. 954, 6 P.3d 91 (2000), the dispute involved mediation and arbitration as prerequisites to litigation. Additionally, mediation was raised for the first time after summary judgment. In this case, arbitration was requested from the beginning and no other pleadings beyond the complaint, answer, and motion to arbitrate have been filed. All of these cases finding waiver can be distinguished from the present case.

⁸ This issue was not appealed by either party and is not at issue here. RAP 5.1(d).

Both parties agree that *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Northwest, Inc.*, 28 Wn. App. 59, 61, 621 P.2d 791 (1980) is the controlling authority relating to the issue here. However, the parties disagree on whether there was a voluntary and intentional relinquishment of the right to arbitrate in this case.

GreenCo argues that the *Lake Wash.* holding was that the right to demand arbitration is only preserved if the complaint contains a demand for arbitration. *Lake Wash.* does not state this.⁹ In *Lake Wash.*, the parties' Contract contained an arbitration provision. Mobile Modules answered the school district's complaint and alleged arbitration as an affirmative defense. It moved to compel arbitration three months later. The trial court denied the motion. The Court of Appeals reversed the trial court and held that the three month time period after filing the answer but before moving to compel did not waive arbitration. It also held that even though Mobile Modules asserted a counterclaim and conducted some discovery, there was no waiver because such activity "does not rise to the level of conduct inconsistent with their right to seek arbitration." *Id.* at 63. (Emphasis added.)

This case is nearly identical to *Lake Wash.* Arbitration was

requested from the moment GreenCo filed its claim of lien through, prior to filing the Complaint, and after the Complaint was filed. *CP 49-50; 159-171*. Again, Verbeek requested arbitration early on, before it ever filed its Complaint, and has not waived arbitration. *Id.* It never showed any intention of foregoing its known right to arbitrate. Arbitration should have been compelled.¹⁰

Contrary to GreenCo's assertion, Verbeek was not trying to distinguish this case from *Lake Wash*. In fact, Verbeek was pointing out that this case was similar to *Lake Wash*, except that Verbeek performed less litigation and the Court in *Lake Wash* still found there was no waiver. As such, *Lake Wash* should be applied to this case and the Court should rule that Verbeek did not waive its right to arbitrate.

1. Filing the Complaint did not waive arbitration.

GreenCo argues that arbitration is automatically waived when it is not plead in a complaint. GreenCo alleges that *Pedersen* holds that arbitration must be strictly plead or it is waived. *Pedersen v. Klinkert*, 56

⁹ GreenCo cites to Page 63 of the Opinion for this proposition. The only reference to this proposition is a cite to *Pedersen*, which is distinguishable, as discussed below.

¹⁰ GreenCo cites a non-binding 7th Circuit case in a desperate attempt to argue that if a pleading does not allege a right to arbitrate, that arbitration is waived. See Respondents' Brief, p. 19 (citing *Grumhaus v. Comerica Securities, Inc.*, 223 F.3d 648, 650 (7th Cir. 2000)). *Grumhaus* was based on an entirely different set of facts; the claims

Wn. 2d 313, 320, 352 P.2d 1025 (1960). In *Pedersen*, the issue on appeal was whether a default judgment would be vacated. The defendant raised the optional arbitration clause for the first time after the default was entered. The Court was not interested in the arbitration clause because it was optional and a default had been entered. *Id.* The *Pedersen* case does not support GreenCo's argument. It is based on an entirely different set of circumstances than this matter, discusses optional arbitration in four paragraphs of its eight-page opinion, and should not be used as precedent in this case. GreenCo's argument is flawed. Verbeek is unaware of any Washington case holding that the filing of a Complaint is a waiver of arbitration.

Here, Verbeek's filing of the Complaint was justified, as it was not receiving a response regarding its requests to arbitrate. Additionally, the letter accompanying the Complaint requested arbitration. The reason for filing the Complaint followed contemporaneously by the letter regarding arbitration was that Verbeek's counsel became concerned that the parties would have a difficult time agreeing on an arbitrator, that GreenCo would continue to ignore the request, and that the Court may need to assist in selecting an arbitrator. Filing the Complaint did not waive arbitration.

were litigated for almost a year before arbitration was demanded and the Court based its holding on that fact. 223 F.3d at 653. That is not the case here.

2. ***Waiver was not caused by not pleading arbitration.***

GreenCo failed to oppose Verbeek's authorities cited to prove it did not waive arbitration by not pleading it in its Complaint. There are no Washington cases directly on point. However, as previously briefed, courts that have addressed the issue have held that there is no waiver.

In *Blood v. Kenneth Murray Ins., Inc.*, 68 P.3d 1251 (Alaska 2003), the plaintiff did not plead arbitration in his complaint. The appellate court held there was no waiver because the plaintiff made written demand to arbitrate and moved to compel before and during the litigation. *Id.* at 1255-1256. Even though the plaintiff had acted inconsistently with arbitration by moving for partial summary judgment, preparing a witness list, and objecting to jury instructions, the court held that there was sufficient evidence in the record showing an intent to arbitrate. In this case, Verbeek did not plead arbitration in its Complaint but made at least two written demands to arbitrate. It has not filed any other motions, prepared witness lists, or objected to jury instructions. It has not acted inconsistent with its right to arbitrate. The Court should follow *Blood* and find there was no waiver here.

Likewise, in *Bernalillo County Medical Center Employees' Assoc. Local Union No. 2370 v. Cancelosi*, 92 N.M. 307, 587 P.2d 960 (N.M. 1978), the plaintiffs did not plead arbitration in their complaint, which the

trial court held constituted waiver. The only pleadings filed were a complaint, motion to dismiss, an amended complaint, and a motion to compel arbitration. *Id.* at 310. In acknowledging numerous cases holding that “the filing of a complaint where nothing of consequence has occurred in the court proceedings does not constitute waiver,” the appellate court reversed and held that no waiver had occurred. *Id.* at 309 (citing *Farr & Co. v. Cia. Intercontinental de Navegacion*, 243 F.2d 342 (2nd Cir. 1957); *Chatham Shipping Co. v. Fertex Steamship Corp.*, 352 F.2d 291 (2nd Cir. 1965); *Richard Nathan Corp. v. Diacon-Zadeh*, 101 F. Supp. 428 (S.D.N.Y. 1951); *Commercial Metals Co. v. Int’l Union Marine Corp.*, 294 F. Supp. 570 (S.D.N.Y. 1968); *Guthrie v. Texaco, Inc.*, 89 LRRM, 2510 U.S.D.C. (S.D.N.Y. 1975)). The present case is almost identical. Verbeek filed its Complaint but nothing else of consequence has occurred. There was no waiver of the right to arbitrate.

C. The trial court’s ruling of waiver should not be upheld.

GreenCo argues that even though it did not appeal the trial court’s ruling that Verbeek did not waive arbitration by bringing a separate frivolous lien action, Verbeek waived arbitration by litigating contract issues in that action. GreenCo’s argument is muddy and makes little sense, but Verbeek will attempt to address it here and in the Section addressing the frivolous lien action, below.

First, this issue was already addressed by the trial court, which found no waiver, and the issue is not an issue on appeal. Therefore, it should not be considered. *CP 8-10; RAP 5.1(d)*. Second, at the time the frivolous lien action was filed, the only dispute between the parties was GreenCo's lien. Moreover, and as discussed more thoroughly below, a frivolous lien action seeks dismissal of a lien on property and does not assert an affirmative claim. It is a limited action to protect property rights, not to litigate claims. Third, GreenCo never litigated any substantive issues in the lien action. The only issue addressed was whether GreenCo's work was an "improvement" to the property under the statute. There are no issues in this matter that were in the underlying matter. The trial court made this finding and GreenCo did not appeal it. *CP 8-10; RAP 5.1(d)*. There is no basis for the Court to rule that this issue constitutes waiver.

D. Issues outside this Appeal should be rejected.

GreenCo spends seven pages of its 30 page brief discussing issues Verbeek has not appealed, and for which the trial court ruled in favor of Verbeek. These issues should not be considered because GreenCo did not file a cross-appeal and they are not issues on appeal. *CP 8-10; RAP 5.1(d)*. Should the Court consider them, Verbeek has disputed them here.

1. The motion to dismiss the lien did not waive arbitration.

GreenCo argues that by filing its Motion to Dismiss GreenCo's

frivolous lien, Verbeek waived its right to arbitrate. GreenCo misrepresents to the Court the issues relating to the lien. It states that Verbeek sought relief for matters subject to arbitration in its Motion to Dismiss Lien. *Response Brief*, p. 16. This is not true. The only relief sought was dismissal of the lien. Moreover, in the statutory frivolous lien action, the Court did not make any findings on substantive claim issues relating to GreenCo's work. The trial court specifically found that no waiver occurred as a result of the frivolous lien action and GreenCo did not appeal it. *CP 8-10; RAP 5.1(d)*.

GreenCo also points to *Otis Housing Assoc.*, 165 Wn.2d 582, for the proposition that Verbeek waived the arbitration provision by filing its statutory motion to dismiss GreenCo's lien, as set forth in RCW 60.04.081. In *Otis*, the exact issue presented at the show cause hearing – the validity of a purchase option – was the exact issue that would be presented at arbitration. Therefore, the Court held that arbitration would not be enforced because the issue was already decided. The Court's decision was based on res judicata or issue preclusion issues that are not present in this case. *Id.*

Despite *Otis*' very limited holding, GreenCo states that *Otis* applies because the same issues presented in this case were presented at the frivolous lien hearing. That statement is incorrect. The issue at the

hearing was whether the nature of GreenCo's work constituted an improvement to the property so that it could maintain a lien under RCW 60.04. The crux of Plaintiffs' argument at the hearing was the holding in the case of *TPST Soil Recyclers of Washington v. W.F. Anderson Cons., Inc.*, 91 Wn. App. 297, 957 P.2d 265, which held that an environmental remediation contractor could not lien the property on which it had performed work because the work was not an improvement to the property. At the frivolous lien hearing, no decision was made as to whether GreenCo breached the contract, committed fraud, misrepresentation, or consumer protection act violations, whether GreenCo complied with the Model Toxins Control Act ("MTCA"), Ecology requirements, permitting requirements, or whether GreenCo's claimed costs were valid. These issues are subject to arbitration; not the lien. Moreover, the *Otis* case did not involve the situation here, where Plaintiffs requested arbitration prior to the frivolous lien action being filed. The parties in this case may have been able to resolve the lien issue at arbitration had GreenCo responded to Verbeek's requests relating to arbitration. Further, the frivolous lien action was filed to protect the Verbeek property and should not be a waiver, just as filing a lien is not a waiver. See *Stewart v. Covill & Basham Const., LLC*, 13 Mont. 153, 75

P.3d 1276 (2003); *Homestead Savings & Loan Ass'n v. Superior Court in & for Marin County*, 195 Cal.App.2d. 697, 16 Cal. Rptr. 121 (1961).

The issues here and in the frivolous lien hearing are clearly not the same. Verbeek did not waive its right to arbitrate by bringing the frivolous lien action.

2. *Non-breach of contract claims do not waive arbitration.*

GreenCo asserts that Verbeek waived its right to arbitrate by seeking declaratory judgment, relief under MTCA, and a claim against GreenCo's bond, but neither the statutes nor cases cited by GreenCo support its argument. Moreover, even if it were true that arbitrators cannot grant declaratory relief, it does not follow that Plaintiffs would have thereby waived their right to arbitrate by seeking such relief. Furthermore, the trial court specifically ruled that Verbeek's claims for declaratory relief and against GreenCo's bond did not constitute a waiver of the right to arbitrate. *CP 8-10*. The MTCA claims were not brought up or addressed at the trial court so they should not be considered here. *RAP 2.5(a)*. Moreover, GreenCo did not appeal the holding by the trial court on these issues and they are not an issue on appeal. *CP 8-10; RAP 5.1(d)*.

a. *Declaratory Judgment claims do not waive/bar arbitration.*

Nothing in Washington’s Declaratory Judgment Act strips an arbitrator of the ability to award declaratory relief. RCW 7.24.010, which GreenCo cites, grants courts the authority to provide declaratory relief, but it does not address the power of arbitrators.¹¹ And, Washington’s Arbitration Act grants arbitrators broad authority to fashion relief. RCW 7.04A.210 provides that an arbitrator may

order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under RCW 7.04A.220 or for vacating an award under RCW 7.04A.230.

The cases cited by GreenCo do not support its argument. *Kruger* involved the enforceability of arbitration clauses in agreements between an insurance carrier and medical providers. *See Kruger Clinic Orthopedics, LLC v. Regence BlueShield*, 157 Wn.2d 290, 294, 138 P.3d 396 (2006). The court held that a Washington regulation prohibiting “health insurance carriers from requiring providers to engage in ‘alternative dispute resolution to the exclusion of judicial remedies’” rendered the arbitration clauses unenforceable. *Id.* at 295, 303-05. *Marina Cove* involved claims by homeowners against a developer under

¹¹ While a declaratory judgment action is not subject to mandatory arbitration under the Superior Court Mandatory Arbitration Rules, they allow for arbitration of declaratory judgment actions when parties agree to submit them to an arbitrator. 15 Wa. Prac. §47.7. This supports that declaratory judgment matters may be arbitrated.

the Washington Condominium Act. *Marina Cove Condominium Owners Ass'n v. Isabella Estates*, 109 Wn. App. 230, 34 P.3d 870. The Act provides that “any right or obligation declared by this chapter is enforceable by judicial proceeding,” and also that “provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived.” *Id.* at 235-36. Thus, the court held that an arbitration clause was not binding on the homeowners’ claims. *Id.* at 237. These cases simply do not support GreenCo’s argument. There is no statement in Washington law that an arbitrator cannot grant declaratory relief. Verbeek has not waived its right to arbitrate by seeking declaratory relief.

b. The bond claim does not waive/bar arbitration.

Likewise, the claim against the surety bond is a statutory claim that is valid, enforceable, and does not waive arbitration. RCW 18.27.010. Despite GreenCo’s disingenuous argument, the claim is not against the company, Developers Surety, it is against GreenCo’s statutory bond. There are no additional claims to litigate against the bond that are not being litigated against GreenCo. Verbeek may only collect on the bond to the extent GreenCo is liable. Verbeek is also not attempting to arbitrate the bond claim. The claim against GreenCo’s bond should be stayed pending the outcome of arbitration, as that right is conferred against the

bond based on the success of the claims against GreenCo and only to the extent of the amount of the bond, \$12,000.00. RCW 18.27. By bringing a statutorily granted claim against the bond and seeking to stay that claim pending arbitration, Verbeek has not waived arbitration.

c. MTCA claims do not waive/bar arbitration.

There is no statute or case law barring arbitration of MTCA claims. *See* RCW 70.105D *et. seq.* Also and despite GreenCo's assertion, the MTCA claims are not the heart of Verbeek's case, breach of contract and fraud are. These claims may be decided in the arbitration.¹² Therefore, the MTCA claims do not preclude arbitration.

3. The lien foreclosure claim does not bar arbitration.

GreenCo alleges that its lien foreclosure counterclaim bars arbitration of Verbeek's claim. GreenCo asserts this while arguing in the same breath that mediation and arbitration are contract requirements it was holding Verbeek to perform when Verbeek requested mediation be waived.¹³ GreenCo is arguing two positions that are very inconsistent.

¹² GreenCo asserts that only some of Verbeek's claims are subject to the arbitration provision because they do not all deal with the contract. This assertion is made without reference to any authority. The arbitration provision states, "the parties agree that **any claim or dispute arising out of this Agreement** shall be submitted to, and be subjected to, binding arbitration for resolution." *CP 179 (emphasis added)*. All of the claims arose out of the parties' Agreement and should be arbitrated.

¹³ GreenCo arguing this position begs the question of why it asserts an arbitration provision in its contract if it knows its claims will likely result in lien foreclosure actions, which it contends cannot be arbitrated.

This argument is also one the trial court specifically rejected and was not appealed. *CP 8-10; RAP 5.1(d)*. The Court should not entertain it, but if it does, the Court should hold that this argument is without merit.

Washington has acknowledged that arbitration of lien claims is appropriate. *See RCW 60.04.181(3)*.

Like the claim against the bond, GreenCo's lien foreclosure claim should be stayed pending the outcome of arbitration. It is not an uncommon practice for contract claims to be resolved in arbitration and the foreclosure action to be resolved after the arbitration award. The Court will not have to retry any of the issues.

4. *GreenCo's claims of prejudice should be rejected.*

Having apparently thought it would lose on the issues of this Appeal, GreenCo has thrown more mud, in the form of a prejudice argument, in hopes that it might just stick. GreenCo pointed out that prejudice is not a factor courts consider relating to arbitration, yet a few pages later, it argues prejudice in one last "Hail Mary."

GreenCo first alleges it has been prejudiced by incurring expenses between when the lien and the Motion to Compel were filed, which was about three months. This passage of time is minimal, especially when you consider that GreenCo was the party who filed the lien and GreenCo was the party who filed a motion for an extra 30 days on this Appeal. GreenCo

has also not alleged what prejudice it may have suffered. This is because it was not prejudiced. GreenCo also alleges that it was prejudiced when it was forced to pay its counsel to litigate the frivolous lien matter. This argument is almost laughable, as Verbeek ended up paying GreenCo's fees in that matter. How can GreenCo claim monetary prejudice when it suffered none? GreenCo next asserts that the MTCA and declaratory judgment claims would be tried separately in superior court and require duplication of litigation. As discussed above, that is not true. Those matters would be arbitrated with the other claims. Therefore, there would be no prejudice. GreenCo's prejudice arguments should be rejected.

IV. CONCLUSION

Simply put, the trial court got it wrong. Washington law overwhelmingly supports the arbitration of claims, and GreenCo's efforts to circumvent its own contract based on a contrived technicality should not be entertained. Verbeek properly initiated arbitration and never waived it. GreenCo's arguments to the contrary should be rejected. This Court should reverse the trial court and order arbitration of the parties' claims.

DATED this 29th day of January, 2010.

Respectfully submitted,

GROFF MURPHY, PLLC

A handwritten signature in cursive script that reads "KFavard". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused to be served a copy of the foregoing document directed to the following individuals in the manner indicated below:

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