

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CASE NO. 49963-1-II

ANNETTE ATKINSON, a Washington Resident, et. Al.,

Appellee,

vs.

BRIAN ROSE and JANE DOE ROSE, and their marital community, et. al,

Appellants.

APPELLEE'S RESPONSE BRIEF, RAP 10

John Rapp, WSBA #17286
Alison Malsbury, WSBA #49151
Hilary Bricken, WSBA #43000
Daniel P. Harris, WSBA #16778
HARRIS BRICKEN MCVAY, LLP
600 Stewart Street, Suite 1200
Seattle, WA 98101
(206) 224-5657
Attorneys for Annette Atkinson

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I. INTRODUCTION

This appeal, by defendant/appellant Brian Rose (“Rose”¹), should be rejected. The trial court properly denied Rose’s motion to compel arbitration for two reasons. First, the trial court properly found that the dispute at issue was outside the scope of the arbitration clause Rose had agreed to with plaintiff/appellee Annette Atkinson (“Atkinson”) in their Operating Agreement.

Second, the trial court properly found that even if the arbitration clause did apply, Rose had waived any right to arbitration through his substantial litigation against Atkinson.² The trial court relied on the “totality of the circumstances” in this action to find Rose had waived any possible right to arbitration.³ Those circumstances included Rose’s detailed and unsuccessful motion to disqualify Atkinson’s attorneys from any part of this case. Substantial litigation of this case also included extensive discovery regarding every aspect of this case, including full day depositions of Atkinson, Rose and his co-defendant Michelle Beardsley, and substantial written discovery, propounded and responded to by all parties. These parties had been in court for over 10 months when Rose moved for arbitration. This Court should not give Rose “a second bite at the apple.”

This Court should also affirm the trial court’s denial of Rose’s reconsideration motion, as Rose offered no newly discovered evidence, new authority or any other change in circumstances sufficient to justify altering the trial court’s initial ruling. The trial court properly exercised its discretion to find that Rose’s motion for reconsideration was simply an attempt to relitigate the initial ruling. Rose’s “new” authority was a different clause of the same Operating Agreement

¹ Appellant(s) are inconsistent regarding which defendant(s) are appealing. As referring to the appellant(s) in the singular makes for clearer references, appellees have lumped them together. Appellees are similarly referred to in the collective, as their rights herein are similarly situated.

² CP 675.

³ VR 18:7-11.

upon which Rose based his initial, unsuccessful motion to compel. The trial court thus properly exercised its discretion to find that assertion of another clause in the same Agreement could and should have, with reasonable diligence, been offered in the initial motion to compel arbitration. The trial court properly exercised its discretion to find that this new clause in the same contract should not be considered for the first time in a motion for reconsideration.⁴ The trial court decision should be affirmed.

II. ASSIGNMENTS OF ERROR/ISSUES

A. Should the trial court be affirmed in denying Rose’s motion to compel arbitration?

The trial court should be affirmed because: (i) the dispute at issue was not a “deadlock” within the meaning of the parties’ Operating Agreement; and (ii) Rose waived any right to arbitration he may have had by substantially litigating for ten months before he moved to compel arbitration.

B. Did the trial court abuse its discretion to deny Rose’s motion for reconsideration?

The trial court should be affirmed because the only “new” circumstance Rose proffered on reconsideration was a mere citation to a different clause in the same contract upon which he had based his initial, unsuccessful motion to compel arbitration. The trial court properly exercised its discretion.

⁴ CP 675.

III. STATEMENT OF THE CASE

A. Litigation History Between Atkinson and Rose Relating to WooHoo.

The parties have actively and extensively litigated this case. Atkinson filed the initial complaint on February 18, 2016.⁵ On February 25, 2016, Atkinson filed an amended complaint.⁶ On March 15, 2016, Atkinson filed a second amended complaint.⁷

Rose did not answer the initial or first amended complaints. On April 3, 2016, Rose answered the second amended complaint without mentioning any provision for arbitration.⁸

On April 19, 2016, Rose moved to disqualify Atkinson's attorneys from acting in any part of this case, due to an alleged conflict of interest.⁹ Atkinson responded to that motion on May 4, 2016, and a hearing was held on May 6, 2016.¹⁰ The trial court denied the motion.¹¹

The parties then engaged in extensive discovery concerning all aspects of this case, including Atkinson's claims relating to Rose and WooHoo Enterprises, LLC ("WooHoo"). In Rose's first set of requests for admission, he queried Atkinson about WooHoo and her WooHoo claims.¹² Atkinson responded to these requests for admission on July 25, 2016.¹³

In their first set of interrogatories, to which Atkinson responded on August 24, 2016, Rose also requested information pertaining to WooHoo and Atkinson's WooHoo Claims.¹⁴

⁵ CP 1-57.

⁶ CP 58-115.

⁷ CP 116-174.

⁸ CP 175-188.

⁹ SCP 682-696.

¹⁰ SCP 697-698.

¹¹ *Id.*

¹² CP 281.

¹³ CP 324.

¹⁴ CP 342-343.

On February 25, 2016, Atkinson served a first set of interrogatories and requests for production, including multiple inquiries about all of Atkinson's claims against Rose.¹⁵

On December 2, 2016, Atkinson served a second set of requests for production on Rose, which again included multiple requests regarding Atkinson's claims against Rose and WooHoo.¹⁶

On November 15, 2016, Atkinson served her first set of requests for admission on Rose, including multiple requests for admission about Atkinson's claims against Rose and WooHoo.¹⁷

In response to Atkinson's requests for production of documents, Rose produced many documents and emails related to Atkinson's claims against him. These documents and emails pertained to his breaches of fiduciary duties at WooHoo, including his attempted eviction of High Washington and his removal of Atkinson from WooHoo's KeyBank account.¹⁸ Rose also responded to each interrogatory and request for admission.¹⁹

Between June and September of 2016, the parties engaged in extensive discovery, with multiple sets of interrogatories, multiple requests for admission, multiple document requests and multiple document productions.²⁰ Rose and co-defendant Michelle Beardsley were also deposed for two days each on September 20 and 21, 2016.²¹ Rose then deposed Atkinson on October 25, 2016.²² Rose's counsel asked Atkinson multiple questions regarding her claims against Rose and WooHoo.²³

¹⁵ CP 373-395.

¹⁶ CP 401-406.

¹⁷ CP 411-421.

¹⁸ CP 271-272.

¹⁹ CP 272.

²⁰ *Id.*

²¹ CP 270.

²² CP 272.

²³ CP 425-451.

In the deposition of Rose, Rose was asked and he answered multiple questions regarding Atkinson's causes of action against Rose arising from: his removal of Atkinson from WooHoo's bank account; money Rose improperly took from that account; his understanding of his fiduciary duties to WooHoo and Atkinson; his failed and attempted repairs of the WooHoo building; his discussions with KeyBank regarding Atkinson's removal from WooHoo's bank account; his personal relationship with Atkinson; the lease agreement between High Washington, LLC and WooHoo; Rose's management authority over WooHoo; his record of meetings with Atkinson regarding the management of WooHoo; his attempted eviction of High Washington, LLC; and his attempts to unilaterally raise High Washington, LLC's monthly rent.²⁴ Atkinson's interrogatories and requests for admission and for production of documents also included multiple inquiries into these issues.²⁵

On November 10, 2016, Plaintiffs filed their third amended complaint only to add in information they had learned about Sweet Leaf, LLC from discovery in this case.²⁶ None of the changes to the complaint involved WooHoo.²⁷ On December 21, 2016, in answer to Atkinson's third amended complaint – over ten months after this action was commenced -- Rose for the first time alleged arbitration as an affirmative defense.²⁸ This was the first time either Rose or his attorneys had ever raised the issue of arbitration, in any context.²⁹

²⁴ CP 452-571.

²⁵ CP 272.

²⁶ CP 273.

²⁷ *Id.*

²⁸ *Id.*

²⁹ CP 270 and 273.

B. WooHoo’s Operating Agreement Regarding Arbitration.

Article 4.3 of WooHoo’s Operating Agreement mandates that “[a]ny action that may be taken at a company meeting may be taken instead without a meeting if an agreement is consented to, in writing, by all members who would be entitled to vote.”³⁰ Article 5.3 of the WooHoo Operating Agreement further provides that “[a]ny act or decision of the Company requires a super majority vote (75%) unless otherwise stated,” and Article 6.2 of that Agreement states that “the managing members shall have co-equal management authority [sic].”³¹

The WooHoo Operating Agreement at Section 5.5 states that “deadlock” occurs if members cannot “reach an agreement” after “negotiations”;

“Deadlock occurs when members, after negotiations, cannot reach an agreement. At such time members agree to; [sic]

- a. Enter binding mediation or arbitration.
- b. If there is a failure to reach an agreement through arbitration or mediation, members may file a request for decision by the appropriate court.
- c. Costs associated with any of the above will become the responsibility in the form of a note payable to the company by the non-prevailing party, or as determined by appropriate court [sic].”³²

In May 2015, without the authority required by WooHoo’s Operating Agreement and without Atkinson’s consent or knowledge, Rose unilaterally removed Atkinson as a signer from the WooHoo bank account.³³ At that time, WooHoo paid its bills with an auto-bill payment system through Atkinson’s WooHoo KeyBank debit card.³⁴ Upon Rose’s removal of Atkinson from the WooHoo KeyBank account, KeyBank suspended WooHoo’s auto-bill payments.³⁵

³⁰ CP 605.

³¹ *Id.*

³² *Id.*

³³ CP 265.

³⁴ *Id.*

³⁵ *Id.*

Atkinson repeatedly notified Rose about WooHoo's outstanding bills and told him she would no longer be able to pay those bills herself due to Rose's having removed her from the account.³⁶ Rose paid only one round of bills on behalf of WooHoo after he unilaterally removed Atkinson from the company's bank account.³⁷ Rose used his sole control over WooHoo's bank account to secure the company's funds for his own personal gain, which he admitted to in his deposition.³⁸

Despite Atkinson's repeated requests to Rose to add her back to WooHoo's bank account so she could continue to pay WooHoo's mounting bills, Rose refused to immediately add her back to the account.³⁹ Rose eventually sought to add Atkinson back to the KeyBank account, but KeyBank froze the account and refused to allow the addition.⁴⁰ Atkinson ended up paying the remainder of WooHoo's outstanding bills with her own personal funds, and KeyBank ultimately closed WooHoo's bank account.⁴¹ Rose admitted in his deposition that he took possession of the remaining WooHoo funds when KeyBank closed the WooHoo account.⁴²

In July 2015, Rose requested Atkinson never again contact him about any WooHoo business.⁴³ On January 22, 2016, Rose tried to open a new WooHoo bank account at Timberland Bank that would list him as the only signer on that account.⁴⁴ Timberland Bank notified

³⁶ *Id.*

³⁷ CP 266.

³⁸ *Id.* and CP 465-466.

³⁹ CP 266.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² CP 473-474.

⁴³ CP 266.

⁴⁴ *Id.*

Atkinson of Rose's actions that same day, and ultimately denied Rose a new WooHoo bank account as Atkinson would not agree to the opening of a new account.⁴⁵

In January 2016, Rose posted an eviction notice against High Washington without ever discussing that eviction with Atkinson.⁴⁶ As justification for that eviction, Rose alleged High Washington had failed to timely pay rent to WooHoo, which is false.⁴⁷ Rose never moved forward with that eviction and, since that eviction notice, High Washington has paid its rent into the trust account of its legal counsel.⁴⁸

In sum, the foregoing wrongful acts by Rose form the basis of Atkinson's claims against him, not claims related to any purported "deadlock" involving the management of WooHoo. All of Rose's actions that form the basis for Atkinson's claims against Rose were taken without Atkinson's knowledge or consent, and without Rose's ever having attempted to meet or negotiate such decisions and actions with Ms. Atkinson.⁴⁹ None of the decision-making processes set forth in the WooHoo Operating Agreement were implicated at all. Rose simply acted unilaterally.

These actions do not constitute management decisions and do not involve the "power dynamic" between the parties, nor were they ever negotiated between the parties. Instead, these acts were simply Rose's unilateral misconduct against Atkinson and WooHoo, as they violate Sections 4.3, 5.3, and 6.2 of WooHoo's Operating Agreement. They constitute Rose's multiple breaches of fiduciary duties both to Atkinson and to WooHoo.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* and CP 505-515.

⁴⁸ CP 266.

⁴⁹ CP 267.

IV. ARGUMENT

A. Standards of Review

1. Denial of the motion to compel arbitration.

Many Washington decisions support de novo appellate review of a denial of a motion to compel arbitration. The inquiry does not stop there, however, if the appeal involves an assertion of implied waiver, as is the case here. This issue authorizes greater deference to the trial court.

“[W]hether or not a waiver is to be implied must necessarily be a mixed question of fact and law.” *Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 700, 483 P.2d 880 (1971). In such cases, like this one, an appellate court should go “no further than to determine whether there is substantial evidence to sustain the trial court’s findings.” *Reynolds Metals Co.*, 4 Wn. App. at 698-699. When reviewing a finding of implied waiver, an appellate court should not weigh conflicting evidence, as the trial court properly does. *Id.* at 699; *see also Schuster v. Prestige Senior Management*, 193 Wn. App. 616, 633, 376 P. 2d 412 (2016) (“Whether waiver occurs necessarily depends on the facts of the particular case ...”) (citation omitted); *see also Lake Washington School Dist. v. Mobile Modules*, 28 Wn. App. 59, 62-63, 621 P.2d 791, 794 (1980) (“finding of implied waiver presents mixed question of law and fact”); *Geo. Nolte & Co. v. Pieler Const. Co.*, 54 Wn. 2d 30, 34, 337 P.2d 710, 713 (1959) (“If a waiver is accomplished by implication, it ... is an issue to be determined by the court, based upon the facts and circumstances relied upon.”); *Bowman v. Webster*, 44 Wn. 2d 667, 670, 269 P. 2d 960, 962 (1954) (“Whether there has been a waiver is a question for the trier of the facts.”)

The trial court is best positioned to consider all pertinent facts: “Despite reviewing the question of waiver de novo,” this Court has held that “we recognize the trial court to be in a good, if not better, position to comprehend the prejudice that results from a party participating in

a lawsuit ... and then demanding arbitration.” *Schuster, supra*, 193 Wn. App. at 648. Such deference is especially justified if “the court litigation process allowed [Rose] to gain more discovery than available in arbitration,” such as “extensive discovery, including interrogatories, requests for production and depositions.” *Id.*, 376, P. 2d, at 428. Rose used all of these discovery methods before requesting arbitration.

The trial court properly found that the “totality of the circumstances” demonstrated that Rose, by substantial litigation for over ten months, waived any basis for arbitration under the Operating Agreement.⁵⁰ This fact-intensive finding should not be disturbed by this Court.

2. Denial of the motion for reconsideration.

A trial court’s ruling on a motion for reconsideration is reviewed only for an abuse of discretion. *Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 752 n.1, 162 P.3d 1153 (2007). Abuse of discretion occurs “when the trial court’s decision is manifestly unreasonable or based upon untenable grounds or reasons.” *In re Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004). The trial court’s decision is “manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the legal standard.” *Horner, supra*, 151 Wn.2d at 894 (citation omitted); *see also River House Dev. v. Integrus Architecture*, 167 Wn. App. 221, 231, 272 P.3d 289, 294 (2012) (“abuse of discretion” required to reverse reconsideration) (relied on by Rose). This relaxed standard supports the correctness of the trial court’s ruling.

Rose moved for reconsideration under CR 59(a)(7), which authorizes reconsideration if “there is no evidence or reasonable inference from the evidence to justify the verdict or the

⁵⁰ VR 18:7-11.

decision, or that it is contrary to law ...”⁵¹ Reconsideration was denied because Rose’s argument was not included in his original motion. The trial court’s order states that Attachment A, Article I, Sections 7(a) and 7(b) -- on which Rose based his full argument for reconsideration -- “are not newly discovered evidence that the party could not have discovered with reasonable diligence.”⁵²

Rather than even trying to show that “no evidence or reasonable inference from the evidence” justified denial of his motion to compel arbitration, Rose instead sought to make a new argument based on the same Operating Agreement. The trial court correctly concluded that such an argument was inappropriate for the Court to consider for the first time on reconsideration.

B. Any Arbitration Right Rose Could Have Had Was Waived By His Failure to Timely Invoke It and By Engaging In Extensive Litigation Conduct

1. The Trial Court Properly Found Atkinson’s Claims Were Not Arbitrable

The arbitration clause in the WooHoo Operating Agreement calls for arbitration or mediation *only* in the event of a “deadlock,” which it defines as occurring only “when members, *after negotiations*, cannot reach an agreement.”⁵³ (Emphasis added). The Operating Agreement’s definition of a “deadlock” comports well with the Merriam-Webster Dictionary definition of a “deadlock” as a “state of inaction or neutralization resulting from the opposition of equally powerful uncompromising persons or factions.” No deadlock occurs without negotiation.⁵⁴

And indeed, Rose acknowledges the Webster Dictionary’s definition of “negotiation” as “discussion aimed at reaching agreement,” but fails to indicate what discussions took place

⁵¹ CP 658.

⁵² CP 675.

⁵³ CP 605.

⁵⁴ CP 605.

between Rose and Atkinson prior to Rose taking unilateral and unauthorized action on behalf of WooHoo.⁵⁵ As noted above, a “deadlock” results in a “state of inaction or neutralization.” Here, no standstill occurred, nor any state of inaction. Rather, Rose *acted* without ever discussing those actions with Atkinson. These unauthorized actions form the basis of Atkinson’s claims, not a state of inaction resulting from an inability of the parties to agree.

No negotiations or even discussions between the parties took place regarding Rose’s unilateral actions that form the basis of Atkinson’s claims. Indeed, Rose told Atkinson, explicitly, that he did not want to discuss WooHoo business with her at all or again. Rose notes that he attempted to work with Atkinson to place her back on the WooHoo bank account; however, this communication occurred *after* Rose unilaterally had Atkinson removed from the account. Had Rose approached Atkinson *prior* to removing her from the account and suggested her removal, and had the parties at that time been unable to reach agreement as to how they should proceed, the parties would have been in a “deadlock,” with no action having been taken. Those, however, are not the facts of this case.

Rose concedes that certain acts, if “extreme” enough in nature, would not be subject to the arbitration clause.⁵⁶ Rose’s counsel stated that, “if it was a situation where he assaulted a customer or something like that or – I don’t know – set fire to the building, I don’t think that would be subject to private arbitration.”⁵⁷ But the extremity of the acts is irrelevant in determining whether Atkinson’s claims are subject to arbitration. What is relevant is that Rose took unilateral action to the detriment of WooHoo, without ever consulting Atkinson. The type of conduct—whether setting fire to a building, misappropriating company funds, or committing

⁵⁵ Rose’s Appellate Brief, p.12.

⁵⁶ VR 17.

⁵⁷ *Id.*

the type of malfeasance Rose engaged in against Atkinson or WooHoo—is not the determining factor in whether the arbitration clause applies. The determining factor is whether there was “deadlock,” and no unilateral misconduct on the part of a member, regardless of extremity, can be considered “deadlock.”

Without any negotiations or discussions, and without a resulting state of inaction, no “deadlock” occurred. A situation involving a rogue company owner’s seizing control of a company, and failing to consult another member before doing so, does not constitute a deadlock. Not only did the required deadlock never occur, the parties’ failure to have “negotiated” and then been unable to “reach an agreement” also means the conditions precedent for arbitration were never present. By reading the express terms of the Operating Agreement, the trial court properly found no deadlock and it should be affirmed.

2. Failure to timely invoke arbitration.

A party to an arbitration clause may waive its enforcement. *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 620 (1979) (citation omitted). A contractual right to arbitration may be waived if it is not timely invoked. *Otis Housing Ass’n v. Ha*, 165 Wn.2d 582, 587 (2009); *see also B & D Leasing Co. v. Ager*, 50 Wn.App. 299, 303 (1988) (“parties to an arbitration contract may expressly or impliedly waive that provision ... by failing to invoke the provision when an action is commenced”). Rose completely failed to invoke arbitration when this case was commenced.

Rose admits the pertinence of these and other authorities. He argues, however that his waiver of arbitration was not “unequivocal.”⁵⁸ More specifically, Rose contends that all his

⁵⁸ Rose’s Appellate Brief, p. 16.

conduct, before bringing his motion to compel, was not “inconsistent with an intent to arbitrate” and that he took sufficient “action to enforce” arbitration “within a reasonable time.”⁵⁹ These assertions contradict the factual record and the law, including many decisions Rose cites.

The law contradicts Rose’s contention that ten months of litigation is too short to justify a finding of waiver. For example, in *Schuster, supra*, this Court noted that “a ten-month delay was substantially longer than any other delay encountered, wherein they did not rule a waiver” and “[t]he longest case ... wherein the court did not find a delay, was two months.” 193 Wn. App. at 635 (citation omitted; collecting cases); *see also Saili v. Parkland Auto Center*, 181 Wn. App. 221, 228, 329 P. 3d 915, 919 (2014) (“seven-month silence” constituted waiver).

Furthermore, Rose admits that at the time this lawsuit was filed he was aware of the arbitration clause in the Operating Agreement, but chose not to immediately seek enforcement of that clause.⁶⁰ Rose provided no justification for having waited until ten months of litigation had passed before attempting to assert this right.

3. Waiver by engaging in extensive litigation conduct.

Rose’s ten-month delay constitutes both “waiver by delay” and “waiver by litigation conduct.” *River House Dev., supra*, 167 Wn. App. at 232, 272 P. 3d at 295. Indeed, even if Rose had requested arbitration earlier, he “took too many steps down the path of litigation and too few down the path of arbitration to reasonably claim this [his] conduct was consistent with a continuing right to arbitrate.” Wn. App at 224. Rose chose to actively engage in litigation until he became dissatisfied with it. The Court should not sanction this silent delay.

⁵⁹ *Id.*

⁶⁰ VR 8.

Rose both proffers and distinguishes a plethora of decisions. The gravamen of virtually all of them is a choice by a litigant, such as Rose, to “invoke the litigation machinery” through “active litigation” paired with “failure to raise arbitration in one’s answer,” which “alone is inconsistent with any reliance on a right to arbitrate.” *Schuster, supra*, at 635-36. (citations omitted); *see also Romney v. Franciscan Medical Group*, 2017 WL 2952370 at *8 (Wash. App. 2017) (“delay amounts to prejudice where there is no good excuse for it”); *Lake Washington School Dist., supra*, 28 Wn. App. at 62, 621 P.2d at 793 (1980) (prejudice not required). Rose should have spoken up sooner and clearly – before Atkinson expended major “time, energy, and resources” in court. *Romney, supra*, 2017 WL at *8. Rose offers no excuse for his silent delay.

In fact, Rose never even mentioned arbitration in his initial Answer,⁶¹ which was served eight months before his amended Answer, in which he first pleaded arbitration as a defense.⁶²

Rose therefore became a party who “actively litigates a case for an extended period only to belatedly assert that the dispute should have been arbitrated.” *Schuster, supra*, at 645; *see also Parkland, supra*, 181 Wn. App. at 227 (waiver found as party did not allege “in its answer” that parties “were required to arbitrate their claims” nor made “any reference to the arbitration provision”). Rose litigated too long and too actively to be allowed to abandon litigation for arbitration now.

Instructively, in *Ives v. Ramsden* this Court held a party to have waived arbitration when he “answered the complaint, engaged in extensive discovery, deposed witnesses, submitted and answered interrogatories” and otherwise prepared for trial. 142 Wn.App. 369, 382-83 (2008). As detailed in the foregoing Statement of the Case, Rose engaged in this specific conduct.

⁶¹ CP 187.

⁶² CP 654.

In a decision on which Rose heavily relies, the Court collected cases “wherein the Court found waiver ... since the party seeking the stay had answered the complaint, interposed a counterclaim and had taken further steps leading toward trial before it moved for a stay.” *Lumbermens Mut. Cas. Co. v. Borden Co.*, 268 F. Supp. 303, 312 (1967) (citations omitted).

Rose’s actions in this case have been inconsistent with asserting a right to arbitrate Atkinson’s claims against him concerning WooHoo. Instead of moving to compel arbitration either before or immediately after filing his Answer to the second amended complaint, Rose instead moved to disqualify Atkinson’s counsel from representing her in this case. This motion made many references to this full case -- not just to the non-WooHoo claims, as Rose asserts now.⁶³

Nor did Rose mention arbitration in his Counter and Third-Party Claims, which pleading was filed on August 18, 2016⁶⁴ -- four months before he first mentioned arbitration in his second Answer -- and six months after this action started. Rose omitted this key pleading from his brief.

4. Rose extensively litigated WooHoo claims, defenses and issues.

Rose tries to nullify the relevance of his litigation conduct by asserting that the discovery and pleadings evince a distinction between his WooHoo-related claims and other claims.⁶⁵ This attempted distinction is premised on the parties’ alleged failure to litigate claims about the WooHoo Operating Agreement, in which the arbitration clauses at issue are found. Rose has been inconsistent about this: “This case is not, as [Atkinson] suggest[s], a simple and routine dispute between two individual plaintiffs and two individual defendants over ownership and management rights to retail business. ... Marijuana licensing issues, partnership disputes, real

⁶³ SCP 684-685 and 687-688.

⁶⁴ SCP 705-710.

⁶⁵ See, e.g., CP 612: 18-19.

property disputes with Woohoo Enterprises are all involved in this lawsuit.”⁶⁶ Rose now contends that this action comprises many claims and defenses that are “inextricably related.”⁶⁷ This contention belies any alleged distinction between WooHoo and other claims.⁶⁸

Similarly inconsistent with Rose’s current distinctions are the topics on which he has propounded and responded to discovery.⁶⁹ Between February and December 2016, instead of demanding arbitration under WooHoo’s Operating Agreement, Rose engaged in discovery about Atkinson’s WooHoo claims – and responded to extensive discovery from Atkinson about those same claims. Rose produced documents and emails pertaining to his breaches of fiduciary duties at WooHoo, including his attempted eviction of High Washington and his removal of Atkinson from WooHoo’s KeyBank account.⁷⁰ Rose likewise requested information pertaining to WooHoo and Atkinson’s Woohoo Claims.⁷¹ During the depositions, both parties questioned each other extensively regarding Atkinson’s causes of action against Rose arising from: his removal of Atkinson from WooHoo’s bank account; money Rose improperly took from that account; his understanding of his fiduciary duties to WooHoo and Atkinson; his failed and attempted repairs of the WooHoo building; his discussions with KeyBank regarding Atkinson’s removal from WooHoo’s bank account; his personal relationship with Atkinson; the lease agreement between High Washington, LLC and WooHoo; Rose’s management authority over WooHoo; his record of meetings with Atkinson regarding the management of WooHoo; his attempted eviction of

⁶⁶ SCP 723, CP 191, 198-201, 204-05, and 209.

⁶⁷ CP 221.

⁶⁸ CP 619.

⁶⁹ CP 271 and CP 343.

⁷⁰ CP 271-272.

⁷¹ CP 342-343.

High Washington, LLC; and his attempts to unilaterally raise High Washington, LLC's monthly rent.⁷² Rose's contentions are belied by the record. Such discovery implied his waiver.

Indeed, as detailed in the foregoing Statement of the Case, Rose has, in many pleadings and papers, actively asserted and probed the basis for the WooHoo-related claims, along with the other claims at issue in this case. Rose should not now be heard to contend that he remained silent on WooHoo claims, as he did regarding arbitration. In fact, he actively and explicitly litigated WooHoo-related claims by many methods. These actions justified finding waiver.

V. CONCLUSION

The WooHoo Operating Agreement's arbitration clauses are inapplicable because the parties were never in a "deadlock" pertaining to the claims of this case. Furthermore, by his failure to timely invoke arbitration and by engaging in extensive litigation conduct, Rose waived any purported arbitration right he may have had. For these reasons and for the reasons stated above, the trial court's decisions should be affirmed.

Respectfully submitted this 28th of July, 2017.

HARRIS BRICKEN MCVAY, LLP

By: /s/ John Rapp
John Rapp, WSBA #17286
Alison Malsbury, WSBA #49151
Hilary Bricken, WSBA #43000
Daniel P. Harris, WSBA #16778
600 Stewart Street, Suite 1200
Seattle, WA 98101
Tel: 206-224-5657
Fax: 206-224-5659
john.rapp@harrisbricken.com
alison@harrisbricken.com
hilary@harrisbricken.com
dan@harrisbricken.com
Attorneys for Appellees

⁷² CP 452-571.

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below a copy of the document to which this certificate is attached, on the Appellants via counsel as follows:

MDK Law
777 108th Ave NE #2000
Bellevue, WA 98004
Tel: 425.455.9610
Email: *jware@mdklaw.com, cbhatt@mdklaw.com*

Via Mail
 Via Email
 Via Facsimile
 Via Messenger

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 28th day of July, 2017.



Katherine LaPorte, Paralegal

HARRIS BRICKEN MCVAY, LLP

July 28, 2017 - 4:42 PM

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