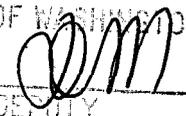


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DIVISION II

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STATE OF WASHINGTON

BY  _____
DEPUTY

Case No.: 50439-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TACOMA PIERCE COUNTY SMALL BUSINESS INCUBATOR,

Respondents,

v.

JAGUAR SECURITY, RICKY MCGHEE,

Appellants

BRIEF OF APPELLANTS (corrected)

William F. Wright, WSBA # 31063

Of Attorneys for Appellants

KRAFT LAW GROUP, PS
18275 SR 410 E., Suite 103
Bonney Lake, WA 98391
Office - 253-863-3366

ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The trial court committed error by denying defendant's motion to quash Plaintiff's confirmation of joinder and statement of arbitrability. CP at 82-84.
2. The trial court committed error by entering judgment on the arbitration award. CP at 151-152.

II. ISSUES ON APPEAL

A. Should the court have granted Jaguar's motion to remove this case from arbitration when the Statement of Arbitrability and Confirmation of Joinder were falsely sworn by TSBI? Yes.

B. Was Jaguar's service by LINX of the Request for Trial de Novo sufficient when the parties agreed to service by LINX and e-service was accepted within 20 days of service of the arbitrator's award? Yes.

III. STATEMENT OF THE CASE

Respondent Tacoma Small Business Incubator ("TSBI") initiated this claim against Jaguar Security ("Jaguar"), and against Ricky McGhee personally for past due rent, fees, interest based on terms contained in commercial leases between TSBI and Jaguar Security, Inc. which terminated in June 2011. (see CP at 1). Despite the termination of both leases, TSBI improperly charged Jaguar monthly rent and fees continuously from July 2011 to July 2015. Trial was set for August of 2017. (CP at 46).

Pierce County Superior Court mandates e-filing via the LINX system. GR 30 (b), PCLGR 30. LINX offers an e-service function as well. (GR 30 (b)(4)). Counsel for both parties agreed to use of the LINX system for service and have used it at times throughout this case as one mechanism for service. (see CP at 106-112.) The issues in this case arise out of use of the LINX system for filing and for service.

A. TSBI hacks LINX to initiate Arbitration.

On September 1, 2016, just less than a year prior to the scheduled trial date, TSBI's counsel attempted to e-file a Statement of Arbitrability but could not. (CP at 59.) To do so, the Pierce County Court LINX e-filing system required filing a Confirmation of Joinder prior to filing a Statement of Arbitrability. (CP at 59.) Both the Confirmation of Joinder and the Statement of arbitrability require the filing party to certify that no party has defenses or counterclaims yet to be raised. (CP at 48, 49, PCLR 19(d).)

To circumvent the requirement, TSBI's counsel filed a Confirmation of Joinder in which she claimed that Jaguar had been consulted and joined. (CP at 48.) TSBI's counsel did not consult with Jaguar's counsel prior to submitting this document to the court as required by PCLR 19, and falsely swore that Jaguar had been consulted and agreed to the contents of the filing. At that time Jaguar was independently researching defenses and the possibility of joining additional parties in counterclaims, so would not have joined.

Having successfully hacked the e-filing system, TSBI's counsel then was able to e-file a Statement of Arbitrability in which she *also* certified that "all parties have been joined and served," that "all answers and other mandatory pleadings have been filed and served" and that "No additional claims or defenses will be raised." (CP at 49). Similarly, TSBI's counsel did not consult with Jaguar's counsel prior to making these claims.

Upon service of the false statements, Jaguar's counsel immediately contacted TSBI's Counsel to notify them of the falsity of their certifications to the court. TSBI's counsel stated that the filings would be corrected. However, she took no action to do so and the matter was scheduled for arbitration.

Jaguar then filed a motion to have the false statements stricken and the case removed from arbitration pursuant to PCLMAR 2. The motion was denied.

B. TSBI accepts e-service by LINX, then claims it insufficient.

The Arbitration Award was filed on March 3, 2017 and served by mail on the parties. Jaguar's request for Trial de Novo was e-filed via LINX on March 21, 2017. E-Service of Request for Trial de Novo on TSBI was also made via LINX on March 21, 2017. (CP at 112). E-Service of the request for trial de novo via LINX was accepted by TSBI's counsel on March 24, 2017. (CP at 112). The 20-day filing and service period

expired on March 27, 2017. Proof of service of the Request for Trial de Novo was filed on April 27, 2017.

Despite actual service by an agreed method, TSBI moved for entry of the arbitrator's award on April 26, 2017. Jaguar objected based on the timely filing and service of the request for Trial de Novo.

Despite objection by Defendants, the court below entered the award. The court's reasoning was that, despite actual service by LINX within the timeframe, Jaguar was required to serve both by LINX and by email. This appeal arises from those decisions.

IV. ARGUMENT

Appellant Jaguar asks this Court to reverse the lower court's ruling on one of two theories. First, the court improperly refused to amend the falsely sworn Statement of Arbitrability and restore the case to its trial schedule. Second, after arbitration was held, the court improperly ruled that Jaguar's request for Trial de Novo was not timely served.

A. Given TSBI'S false certification, this case should have been withdrawn from arbitration.

Jaguar's motion to "Quash" due to TSBI's false certifications was based on CR 11 and PCLMAR 2.1(c). The substance of the motion was that the case was not ready for arbitration as TSBI falsely certified.

Review of the court's denial involves the application of court rules to a set of particular facts, which is a question of law. This Court should review *de novo* on appeal. See *Matter of Firestorm 1991*, 129 Wn.2d 130,

135, 916 P.2d 411 (1996), *State v. Tatum*, 74 Wn.App. 81, 86, 871 P.2d 1123, *review denied*, 125 Wn.2d 1002, 886 P.2d 1134 (1994).

“When a trial court fails to make any factual findings to support its conclusion, and the only evidence considered consists of written documents, an appellate court may, if necessary, independently review the same evidence and make the required findings.” *Matter of Firestorm 1991*, 129 Wn.2d at 135, *citing Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992).

Under local rules, the court may amend the certification of readiness, making assignment to arbitration improper, even after the initial period to object has passed.

(c) Failure to File - Amendments. A person failing to serve and file an original response within the times prescribed may later do so only upon leave of the court. A party may amend a Statement of Arbitrability or response at any time before assignment of an arbitrator or assignment of a trial date, and thereafter only upon leave of the court for good cause shown.

PCLMAR 2.1(c). Under Jaguar’s motion, the court should have allowed for amendment of the Statement of Arbitrability, and withdrawn the case from arbitration at that time.

1. TSBI's false certifications violated CR11 and should have resulted in removal of this case from arbitration.

TSBI's Counsel sums up the issue in her Declaration.

"Unfortunately, the LYNX system would not accept the Statement of Arbitrability without a Confirmation of Joinder being filed first." (CP at 59). Rather than follow the rules and consult with Jaguar, TSBI's counsel chose to falsely swear both documents to the court "purely to get past the requirements of LYNX..." *Id.*

The false certifications violated the rules and prejudiced Jaguar's ability to continue investigating the case. Additionally, TSBI's counsel agreed to amend the certifications, but failed to do so until after the deadline for filing a motion had passed under PCLMAR 1. (CP at 75). Because of this, Jaguar asks this Court to reverse the decision below.

2. The false certifications violated the rules.

Jaguar's motion was to have the filings withdrawn or amended and to have the case removed from arbitration. PCLMAR 2.1(d). The "good cause" was that TSBI's counsel falsely certified readiness in violation of CR 11.

CR 11 is a foundational rule of legal practice, and provides:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information,

and belief, **formed after an inquiry reasonable under the circumstances:**

(1) **it is well grounded in fact;**

...

(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(4) ... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(CR 11, emphasis added). The “reasonable inquiry,” required in this case is spelled out in PCLR 19(d).

(d) Parties to Confer in Completing Form. The plaintiff shall confer with all other parties in completing the form. This may be in person or by telephone **but requires actual contact with the attorney of record or self-represented party.** (emphasis added.)

TSBI’s counsel violated both CR 11 and PCLR 19(d), and falsely certified to the court that the case was ready for arbitration.

3. Jaguar was prejudiced.

TSBI filed the pleadings nearly a year prior to the scheduled trial date, and 10 months prior to discovery cutoff. (CP at 46). At the time this case was scheduled for arbitration, Jaguar was conducting discovery about additional defense, parties and potential counterclaims. (CP at 52, TR 10/7/2016 at 3-6).

The court chose to discount that information, which denied Jaguar the benefit of discovery. Jaguar was investigating “a pattern of practice of underhanded behavior that has been testified to...” which was “complicated by the fact that the people who I have been talking to have been very reluctant to speak because they feel intimidated.” (TR 10/7/2016 at 5.)

The court chose to ignore that current counsel had recently substituted into the case. (TR 10/7/2016 at 4.) The court also discounted that TSBI’s counsel had promised and failed to amend the filings (CP at 52,) focusing instead on when the case had been filed and various other issues.

4. The case should have been returned to the trial track.

PCLMAR 2.1 allows for amendment of the Statement of Arbitrability “for good cause.” Jaguar asks that this Court review and consider those facts in the context of PCLR 19(d), PCLMAR 2.1(c) and CR 11. Given the facts, Jaguar asks that this Court rule that arbitration was improper. Alternatively, for the reasons set forth below, Jaguar asks that

the case be allowed to proceed to Trial de Novo. Furthermore, should the Court find violation of CR 11, Jaguar asks for an award of attorney fees and costs.

B. Entry of the arbitrator's judgement was improper because Jaguar's Trial de Novo was properly filed and served.

Disqualification of Jaguar's request for Trial de Novo is similarly reviewed *de novo* as an application of a court rule to a set of facts. The court's ruling was based on MAR 7.1(a). The trial court's application of court rules to the facts is a question of law, and should be reviewed *de novo*. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001).

In this case, the facts clearly show that Jaguar timely filed the request for Trial de Novo, and that TSBI accepted service per agreement by LINX three days before the 20-day period expired. This Court should reverse the trial court and remand this case for trial.

1. Trial de Novo must be filed within 20 days of service of the Arbitrator's award.

RCW 7.06.050(1) sets forth the law regarding appeal of arbitration awards.

Within twenty days after such filing (of the arbitrator's award), any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.

RCW 7.06.050(1). This is clarified by the Mandatory Arbitration Rules:

Any request for a trial de novo must be filed with the clerk and served, in accordance with CR 5, upon all other parties appearing in the case within 20 days after the arbitrator files proof of service of the later of: (1) the award...

MAR 7.1(a).

The arbitration award was mailed to counsel on March 3, 2017. (CP at 91.) The 20 days begins to run three days after the Arbitrator deposits the award to be served by mail. CR 6(e), *Seto v. American Elevator, Inc.*, 159 Wn.2d 767, 154 P.3d 189 (2007). In this case the 20-day period expired on March 27, 2017¹.

2. All Counsel agreed to E-Service in this case in July of 2016.

In this case, Jaguar timely filed and served a request for trial de novo within the 20 days provided using the Pierce County LINX system by agreement of the parties. (CP at 85, 112). Despite filing and acknowledged service of the filing via LINX, the court below erroneously disregarded the request and entered the arbitrator's award. The court reasoned that despite actual receipt and acceptance of service by LINX, since other documents had been served by email, service would require both LINX and email. (TR 5/19/2017 at 10).

CR 5(b)(7) provides in part, "Service under this rule may be by delivering a copy **by any other means**, including facsimile or electronic means, **consented to** or in writing by the person served." (CR 5(b)(7)

¹ March 26, 2017 fell on Sunday.

emphasis added.) By the plain reading of this rule, if parties have agreed to multiple forms of service, then “any other” form of delivery is sufficient. Thus, if the agreement was by fax and by email, and the fax failed to transmit, then email would be sufficient if it were received.

CR 5(b)(7) makes electronic service *ineffective* only if "the party making service learns that the attempted service did not reach the person to be served." In short, electronic service occurs if the opposing party has received the documents at issue. The parties agreed to service by LINX and email. It is undisputed that the LINX record shows actual acceptance of service by TSBI’s counsel on March 24,2017. (CP at 112.) Therefore, service on TSBI was effective on March 24, 2017.

3. The parties agreed to service LINX and by email.

TSBI initiated the agreement to electronic service, both parties agreed, and E-service by LINX and by email has been used in this case since July 2016. (CP at 106-112). The LINX system clearly articulates the how service is made via that system, and every person who agrees to use it for service agrees to specific terms regarding service. (See CP at 112.)

LINX also cites to GR 30, which provides that

Electronic service may be made either through an electronic transmission directly from the court (where available) or by a party's attorney...[absent a local rule mandating e-service] parties may electronically serve documents on other parties of record only by agreement.

GR 30(4). Therefore, when TSBI and Jaguar agreed to service by LINX, they agreed to its terms.

As stated in the Pierce County LINX notification,

*** NOTICE ***

This page displays either documents that were served upon you by another Attorney or documents you have served to other Attorneys. If you or your authorized support staff view a document from **ANYWHERE** on the LINX website that has been served upon you then you are considered served. Similarly, if Attorneys you have served or their authorized staff view a document from **ANYWHERE** on the LINX website that has been served upon them by you then they are considered served. Served documents are displayed with the service acceptance date as well as the individual who accepted it. Unserved documents are marked "pending". A subscription is not required to view the document(s) you where served from this page.

Please feel free to contact the LINX help desk at 253-798-7757 if you have any questions.

*** Remember ***

GR30 -- Parties may electronically serve documents on other parties of record only by agreement .

(see CP at 112.) By agreeing to LINX, the parties agreed to its terms, including acceptance of e-service.

4. TSBI used LINX and presumably knew its terms.

Pursuant to that agreement, the parties have used LINX and email, as well as other methods such as mail and messenger throughout this case. Specifically, TSBI used LINX as follows:

- On July 25, 2016, Plaintiff used LINX to serve her reply and additional declaration in support of summary judgment.
- On October 5, 2016, Plaintiff used LINX to serve her responses to Defendants' motion.
- Additionally, on October 5, 2016 Plaintiff filed a Declaration of Service, which acknowledges in writing that e-service was made **"by agreement."**

Those occurrences and TSBI's October 5, 2016 declaration of service are sworn testimony to the agreement between the parties that e-service by LINX was one acceptable form of service.

During the hearing, TSBI pointed out that Jaguar had not accepted service using LINX, but had by email. (CP at 147). This further supports the argument that a variety of e-service methods were used by the parties by agreement, and that both LINX and email were accepted forms of e-service.

5. LINX e-service on TSBI was completed within the 20-day timeframe.

The facts show an agreement to e-service by LINX. The facts and the law both confirm that Plaintiff was served on March 21, 2017 in by LINX accordance with that agreement. (CP at 112.) LINX confirmation receipts show transmission of the filings to the Pierce County Clerk and for service via LINX on March 21, 2017. (CP at 110, 112). As stated on the March 21, 2017 "e-service confirmation" from Pierce County LINX, "You have electronically served document(s)... upon the following parties: Kristal McCollum Cowger <kristal @bkb-law.com>". At that point, the documents were served. CR 5². (CP at 110).

² Per CR 5(b)(7) e-service is complete upon "transmission," which was on March 21, 2017. Ms. Cowger accepted service via LINX on March 24, 2017. (CP at 112).

6. The court below ignored the facts to reach its conclusion.

The court's reasoning was that, despite actual service by LINX as agreed, service failed because no separate service by email was made. This Court should reverse the lower court's erroneous decision and remand this case for trial de novo.

It is uncontested that the request was filed and served using the Pierce County Superior Court LINX system. It is uncontested that Incubator's Counsel accepted service by LINX upon opening the email delivery of the notice sent by LINX on March 24, 2017, which is within the 20 period that expired on March 27, 2017. It is uncontested that the terms of LINX expressly state that opening a served document constitutes service.

All the evidence supports the conclusion that actual service of the request for Trial de Novo was made within the 20-day period. The lower court erred by ruling otherwise and this Court should REVERSE the court below, remanding this case for trial.

V. CONCLUSION

For the foregoing reasons, Respondents urge this Court to GRANT this appeal and remand to the trial court with instructions to modify its order(s).

RESPECTFULLY SUBMITTED this 20th day of November 2017.

The Kraft Law Group PS

By: 

William F. Wright, WSBA # 31063

Attorney for Appellants

18275 SR 410 E., Suite 103

Bonney Lake, WA 98391

(253) 863-3366

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Appellants

DECLARATION OF SERVICE

The undersigned William F. Wright declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused two copies of this declaration and the following documents:

- 1. Brief of Appellant (corrected);

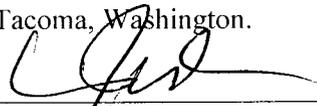
to be served one each on the following parties by first class mail, US postage prepaid on November 20, 2017:

Kristal M. Cowger
Blado Kiger, Bolan
4717 S. 19th Steet, Ste. 109
Tacoma, WA 98405

Nicole Bolan
Blado Kiger, Bolan
4717 S. 19th Steet, Ste. 109
Tacoma, WA 98405

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

Signed this 20th day of November, 2017 at Tacoma, Washington.



William F. Wright, WSBA #31063

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