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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 50439-1-II

TACOMA PIERCE COUNTY SMALL BUSINESS INCUBATOR,

Respondent,

v.

JAGUAR SECURITY, RICKY McGEE,

Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

BRIEF OF RESPONDENT

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Statement of Issues

1. Did the trial court err in denying Jaguar and McGee's Motion to Quash the Confirmation of Joinder and Statement of Arbitrability, when the Confirmation of Joinder is not required, when the plaintiff has the right to unilaterally file a Statement of Arbitrability, and where defendants had no basis to remove the case from arbitration?
2. Did the trial court err in entering Judgment on Arbitration Award where Jaguar and McGee failed to serve WFSBI with the Request for Trial de Novo by any agreed upon means within 20 days of the filing of the Arbitration Award?
3. Did Jaguar and McGee waive on appeal the trial court's denial of CR 11 sanctions and a request for attorney's fees, where there is no assignment of error related to the same or section of the brief devoted to an award of fees?
4. Is WFSBI entitled to an award of attorney's fees on appeal pursuant to RCW 4.84.300, RAP 18.1, and MAR 7.3?

Statement of the Case

In January 2011, the Tacoma Pierce County Small Business Incubator, d/b/a William Factory Small Business Incubator, ("WFSBI"), as landlord, entered into a lease with Jaguar Security, Inc. ("Jaguar"), to

rent space in the WFSBI facility. CP 2, 6-18. Ricky McGhee signed the lease on behalf of Jaguar and also personally guaranteed the lease. *Id.* Another lease was executed by the parties on May 10, 2011, and again Ricky McGee personally guaranteed it. CP 20-32. Jaguar fell behind in rent, telecommunication, and long distance charges, and ultimately vacated in July 2015 without notice to WFSBI. CP 2-3. WFSBI filed a Complaint for Damages in Pierce County Superior Court on February 9, 2016, for unpaid rent and related charges, and for attorney's fees pursuant to the Lease. CP 1-40. The defendants were served February 16, 2016. CP 67. An Answer was filed May 3, 2016. CP 43-45.

On September 1, 2016, WFSBI attempted to transfer the matter to mandatory arbitration by filing a Statement of Arbitrability. CP 59. However, it was unable to do so using the LINX filing system unless and until a Confirmation of Joinder of Parties, Claims, and Defenses was filed. *Id.* Accordingly, WFSBI filed a Confirmation of Joinder on September 1, 2016, simply so the Statement of Arbitrability could also be filed. *Id.*; CP 48. The Statement of Arbitrability was also filed on September 1, 2016. CP 49. Both documents were received by Jaguar and McGee's counsel on September 7, 2016. CP 52. No response was filed by Jaguar or McGee to the Statement of Arbitrability until September 21, 2016, when Jaguar and McGee filed a motion asking the court to quash the Confirmation of Joinder and Statement of Arbitrability. CP 50-52. The trial court denied the motion on October 7, 2016. CP 82-84.

An arbitration was conducted and an arbitration award was filed March 3, 2017. CP 91. Even through arbitration, Jaguar and McGee never filed or sought leave of court to file a counterclaim or to add parties. Jaguar and Ricky McGhee filed a Request for Trial de Novo on March 21, 2017. CP 85. Jaguar and McGee submitted the same for service on WFSBI through LINX and through no other method. CP 86-88, 94. WFSBI and Jaguar/McGee had an agreement to serve by direct email, but had never agreed to electronic service through LINX. CP 122.

On June 20, 2016, WFSBI's counsel agreed, at the request of the defendants' counsel, to accept service by e-mail. CP 122. In turn, the defendants' counsel also agreed to accept service by e-mail to his e-mail address, wwright@kraftlawgroup.com. CP 122. That same day, WFSBI's counsel was served with documents directly to her e-mail address, with the documents attached as PDF files to the e-mail, and by no other means. CP 118, 122. No documents were transmitted via LINX on that date.

On July 25, 2016, the defendants' counsel was served directly to his e-mail address with WFSBI's reply documents in support of summary judgment, with the pleadings attached as PDF files. CP 124. Electronic service was also sent via LINX, but defendant's counsel never accepted those documents as he had received them via direct email. CP 147.

On September 26, 2016, the defendants' counsel sent a Motion and Declaration to Quash Confirmation of Joinder and Statement of Arbitrability via US Mail. CP 119, 126-128.

On October 5, 2016, WFSBI's counsel served a response brief regarding the Motion to Quash to the defendants' counsel at his e-mail address, by attaching PDF files of the pleadings. CP 130. Electronic service was also sent via LINX, but again defendant's counsel never accepted those documents as he had received them via direct email. CP 148.

On October 6, 2016, the defendant's counsel served a reply brief regarding the Motion to Quash to WFSBI's counsel, at her e-mail address, with PDF files of the relevant pleadings attached to the e-mail. CP 132.

WFSBI's counsel then timely delivered arbitration materials to Defendants' counsel by Legal Messenger, and the defendants' counsel delivered arbitration materials to WFSBI's counsel by again sending the pleadings attached as PDF files to counsel's e-mail address. CP 134-137, 139. Supplemental arbitration materials were also exchanged between the parties and the Arbitrator by transmission to each attorney's e-mail address with the pleadings attached as PDF files. CP 141, 143, 145.

The trial court granted WFSBI's motion on May 19, 2017, and entered Judgment on the Arbitration Award. CP 151-152. Jaguar and McGee now appeal the trial court's refusal to quash the Confirmation of

Joinder and Statement of Arbitrability, and the entry of Judgment on Arbitration Award.

Argument

1. **The trial court did not err in denying the Motion to Quash the Confirmation of Joinder and Statement of Arbitrability.**
 - a. The Confirmation of Joinder is not required in a case subject to mandatory arbitration.

Pierce County Local Rule 19(e) provides:

Cases Subject to Mandatory Arbitration. If a statement of arbitrability pursuant to PCLMAR 2.1 is filed on or before the deadline for filing the Confirmation of Joinder of Parties, Claims and Defenses, the Confirmation of Joinder need not be filed and no status conference will be held.

PCLR 19(e). The deadline for filing the Confirmation of Joinder was December 12, 2016. CP 46. The only reason a Confirmation of Joinder was filed at all in this case was simply to allow WFSBI to file the Statement of Arbitrability. CP 59. The LINX procedures in place at that time would not allow filing of a Statement of Arbitrability without first filing the Confirmation of Joinder. *Id.* The Confirmation of Joinder is of no consequence to the action because it was subject to mandatory arbitration. *Id.*; PCLR 19(e). In fact, WFSBI's counsel agreed to strike the Confirmation of Joinder because it has no procedural effect on the case whatsoever. CP 54. If it was error for the trial court to refuse to strike the Confirmation of Joinder, it was harmless error as it was superseded by the Statement of Arbitrability.

PCLR 19(e).

- b. WFSBI was entitled to unilaterally file a Statement of Arbitrability without notice to the defending parties, and they failed to file a response to the same.

Pierce County Local Mandatory Arbitration Rule 2.1 provides in part:

- (a) Statement of Arbitrability. A party may file a Statement of Arbitrability [Form S] requesting arbitration at any time after all requirements set forth in the certificate of readiness on the Statement of Arbitrability have been met and no later than the discovery cutoff date. After the discovery deadline has passed, the Statement of Arbitrability may be filed only by leave of the court for good cause shown.
- (b) Response to Statement of Arbitrability. Any person disagreeing with the Statement of Arbitrability shall serve and file a response to the Statement of Arbitrability on the forms prescribed by the court within 20 days of service of the summons and complaint, or 7 days after the receipt of the Statement of Arbitrability, whichever time is greater.
- (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.

WFSBI was not required to consult with Jaguar or McGee prior to filing a Statement of Arbitrability. PCLMAR 2.1(a). If the defendants disagreed with the Statement of Arbitrability, they had the opportunity

to file a Response to the Statement of Arbitrability within 7 days of service of the same. PCLMAR 2.1(b). In this case, that deadline was September 14, 2016, as the Statement of Arbitrability was served September 7, 2016. CP 52; PCLMAR 2.1(b). Jaguar and McGee did not seek leave of court to file a late response as permitted by PCLMAR 2.1(c), but instead filed a Motion to Quash on September 21, 2016. CP 50-52.

- c. Even if McGee and Jaguar filed a timely response or obtained leave of court to file a response, they had no basis to remove the matter from mandatory arbitration.

RCW 7.06.020(1) provides:

All civil actions, except for appeals from municipal or district courts, which are at issue in the superior court in counties which have authorized arbitration, where the sole relief sought is a money judgment, and where no party asserts a claim in excess of fifteen thousand dollars, or if approved by the superior court of a county by two-thirds or greater vote of the judges thereof, up to fifty thousand dollars, exclusive of interest and costs, are subject to mandatory arbitration.

Pierce County Local Rule 1.2 provides:

The limit for claims subject to mandatory arbitration is \$50,000.00. For the purpose of this rule, a "claim" is defined to be the net value of the claim, after all reductions for comparative negligence or set-offs; e.g. if the plaintiff's damages are \$70,000.00 and the plaintiff is 50% comparatively negligent, the plaintiff's claim is for \$35,000.00.

The defendants argued that they were "researching

counterclaims and the possibility of joining additional parties in counterclaims.” CP 51. However, they did not cite as to what potential claims they might be bringing or additional parties who might be added, or allege that any party in the action would be asserting a claim in excess of \$50,000. *Id.* Furthermore, the defendants had been served with the lawsuit on February 16, 2016, and filed an Answer on March 3, 2016. CP 67, 70. They cited no reason as to why they were still investigating potential counterclaims seven months after being served. CP 51.

In addition, the statute and court rule on mandatory arbitration address “claims,” not “potential claims.” RCW 7.06.020(1); PCLR 1.2. WFSBI’s claims were for only monetary damages in an amount less than \$50,000.00 exclusive of attorney fees, interest, and costs. CP 1-4. The defendants had asserted no counterclaims or cross claims that would have made the case ineligible for mandatory arbitration. CP 70-72. Accepting the defendants’ argument that a case should be withheld from mandatory arbitration simply because a party says there “may” be additional claims or parties would frustrate the very purpose of mandatory arbitration, which is to “provide a simplified and economical procedure for obtaining the prompt and equitable resolution of disputes involving claims of \$50,000 or less.” PCLMAR 1.1(a). As a result, the trial court’s decision should be upheld.

2. The trial court did not err in entering Judgment on Arbitration Award.

- a. Service of the request for trial de novo has never been accomplished as there was no agreement to accept service via LINX.

MAR 7.1(a) provides that a request for trial de novo must be “filed with the clerk and served, in accordance with CR 5, upon all other parties” within 20 days of filing proof of service of the arbitration award. MAR 7.1(a). CR 5 allows service upon an attorney by delivery to his or her office or by mail. CR 5(b)(1). Additionally, CR 5(b)(7) provides in part:

Service by Other Means. Service under this rule may be made by delivering a copy by any other means, including facsimile or electronic means, consented to in writing by the person served or as authorized under local court rule....

GR 30(b)(4) provides in part:

A court may adopt a local rule that mandates electronic filing by attorneys and/or electronic service of documents on attorneys for parties of record, provided that the attorneys are not additionally required to file paper copies except for those documents set forth in (b)(2). Electronic service may be made either through an electronic transmission directly from the court (where available) or by a party’s attorney. Absent such local rule, parties may electronically serve documents on other parties of record only by agreement....

Pierce County has adopted a rule requiring mandatory electronic filing. PCLGR 30. However, there is no rule in Pierce County mandating electronic service. *Id.* As a result, parties may only electronically serve attorneys of record as agreed in writing. GR 30(b)(4); CR 5(b)(7). The only writing showing evidence of consent to

any form of electronic service shows that the parties agreed to service by e-mail specifically to the attorneys' e-mail addresses, with the pleadings attached as PDF files. CP 122. Additionally, the facts show that all electronic service was done via direct email. CP 124, 130, 132, 139, 141, 143, 145, 147, 148. Any document served through LINX was also sent via direct email. *Id.* There was never an agreement or practice to serve only via LINX and by no other means. *Id.*

Jaguar and McGee argue that, if any form of alternate service is agreed upon, then the attorneys agree to any form of delivery. However, a plain reading of CR 5(b)(7) shows that service may be made by any other means "that is consented to in writing." CR 5(b)(7). The rule does not state that if an attorney agrees to alternate service, then any means of service is appropriate.

Jaguar and McGee further argue that WFSBI's counsel "accepted service" through LINX by opening the email on March 24, 2017. Even if the court finds this was within the 20 day time period, it was not effective service because it was not by an agreed upon means. MAR 7.1(a); CR 5(b)(7). Following Jaguar and McGee's logic, a party not consenting to fax service would be served simply by receiving the fax, or a party not agreeing to service via direct email would be served because he or she read the email. CR 5(b)(7) is explicit that service other than by mail or personal delivery is only effective when it is "consented to in writing." Furthermore, MAR 7.1(a) requires service "pursuant to CR 5."

MAR 7.1(a). As a result, the request for trial de novo has never been served upon WFSBI, and the trial court's decision should be upheld.

- b. The Request for Trial de Novo was not served within 20 days of the filing of proof of service of the arbitration award.

Even if WFSBI was served on March 24, 2017, this was untimely.

MAR 7.1(a). Jaguar and McGee argue that the 20 day period to file a request for trial de novo does not begin to run until the attorneys are actually served. The *Seto* decision cited by Jaguar and McGee for this proposition was decided March 8, 2007. *Seto v. American Elevator, Inc.*, 159 Wn.2d 767, 154 P.3d 189 (2007). At that time, MAR 7.1(a) provided, in relevant part, “[w]ithin 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may serve and file with the clerk a written request for trial de novo...” *Id.* at 771-772, 191. The *Seto* Court had to decide how that rule and MAR 6.2 correlated. *Id.*

MAR 7.1(a) was later amended effective September 1, 2011, and now provides as follows:

Any aggrieved party not having waived the right to appeal may request a trial de novo in the superior. 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 or (2) a decision on a timely request for costs or attorney fees. A request for a trial de novo is timely filed or served if it is filed or served after the award is announced but before the 20-day period begins to run.

MAR 7.1(a). Had the Supreme Court wanted to enact a rule that adopted the ruling in *Seto*, MAR 7.1(a) would say that the 20 day period begins to run after “filing *and service*” of the arbitration award. However, the language was actually changed to specify that the 20 day period begins to run after the filing of “proof of service.” Therefore, the *Seto* decision is inapplicable to MAR 7.1(a) as amended in 2011.

The arbitrator filed his “proof of service” on March 3, 2017, when he included a “Certificate of Service” on the Arbitration Award itself. CP 91. Therefore, under MAR 7.1(a), the 20 day period expired March 23, 2017. Even if WFSBI’s counsel viewing the document via LINX on March 24, 2017, was effective service, it was 21 days after proof of service of the arbitration award was filed. CP 91, 94. As a result, the trial court’s decision should be upheld.

3. Jaguar and McGee waived any request regarding the trial court’s denial of CR 11 sanctions and further waived the request for fees on appeal.

Jaguar and McGee ask for an award of attorney’s fees if the court finds a violation of CR 11. However, there is no assignment of error related to the trial court’s refusal to grant CR 11 sanctions, nor is there a “section of its opening brief” devoted “to the request for the fees or expenses.” RAP 18.1(b). “Mere inclusion of a request for fees and costs in the last line of the conclusion in a brief is not sufficient.” *Johnson v. Cash Store*, 116 Wn. App. 833, 851, 68 P.3d 1099, 1109 (2003); RAP 18.1(b). In addition, Jaguar and McGee have waived any potential request for attorney’s fees under MAR 7.3 and RCW 4.84.330. *Id.*

4. WFSBI should be awarded costs and fees on appeal pursuant to MAR 7.3 and RCW 4.84.330.

When a contract provides for a fee award in the trial court, the party prevailing on appeal “may seek reasonable costs and attorney fees incurred on appeal.” RCW 4.84.330; RAP 18.1; *First-Citizens Bank & Tr. Co. v. Reikow*, 177 Wn. App. 787, 800, 313 P.3d 1208, 1215 (2013). The leases at issue contain a provision allowing costs and attorney’s fees to the prevailing party. CP 10, 24. Furthermore, under MAR 7.3, the court “shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party’s position on the trial de novo.” MAR 7.3. Here, if Jaguar and McGee’s appeal is denied, WFSBI is entitled to attorney’s fees and costs under the leases, as well as MAR 7.3. RCW 4.84.330; RAP 18.1; MAR 7.3.

Conclusion

The trial court did not err in denying Jaguar and McGee’s request to quash the Confirmation of Joinder, as it not a required pleading and was of no consequence to the case. Furthermore, the only claim pending before the court at the time the Statement of Arbitrability was filed was a claim by WFSBI for monetary damages far below \$50,000. Jaguar and McGee presented no evidence that they would be adding claims such that any party would be seeking relief exceeding \$50,000, and as a result, removal of the case from the mandatory arbitration track would have been inappropriate. The trial court also ruled correctly in determining that the request for trial de

novo was not served upon WFSBI within the required 20 day period, as it was never served in an agreed upon manner, and the only arguable service occurred 21 days after the proof of service was filed.

For these reasons the trial court's decision should be affirmed and WFSBI should be awarded costs and fees as the substantially prevailing party under the leases, and pursuant to MAR 7.3.

Respectfully submitted this 22nd day of December, 2017.

BLADO KIGER BOLAN, P.S.



Nicole M. Bolan, WSBA #35382
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Certificate of Service

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 22nd day of December, 2017, she electronically filed the attached Brief of Respondent for filing with the Court of Appeals, Division II, and true and correct copies of the same were electronically delivered to each of the following parties and their counsel of record:

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Dated this 22nd day of December, 2017, at Tacoma, Washington.

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/s/_____
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