

FILED
Court of Appeals
Division II
State of Washington
10/9/2020 4:44 PM

No. 53986-1-II

**Court of Appeals, Div. II,
of the State of Washington**

Gregory Hochhalter,

Respondent,

v.

**Kat's Cove Condominium Association and
David Lewis,**

Appellants.

Reply Brief of Appellants

Kevin Hochhalter
WSBA # 43124
Attorney for Appellants

Olympic Appeals PLLC
PO Box 55
Adna, WA 98522
360-763-8008
kevin@olympicappeals.com

Table of Contents

1. Introduction.....	1
2. Reply to Statement of the Case	2
2.1 The background facts remain in dispute and are irrelevant to the issues before this Court.	2
2.2 Plaintiff attempts to mislead the court by continuing to allege that Lewis has not paid assessments even though that allegation was litigated previously and determined to be false.	3
3. Reply Argument	4
3.1 The trial court erred in denying Lewis’s motion to compel arbitration.....	4
3.1.1 Plaintiff’s claims were well within the scope of the arbitration provision.	4
3.1.2 Lewis did not waive his right to arbitrate.....	9
3.2 The trial court abused its discretion in imposing CR 11 sanctions.....	13
3.3 The trial court erred in dismissing Lewis’s counterclaims.	16
3.4 The Court should deny Plaintiff’s request for sanctions because this appeal is not frivolous.....	21
4. Conclusion	23

Table of Authorities

Cases

<i>Bravo v. Dolsen Companies</i> , 125 Wn.2d 745, 888 P.2d 147 (1995).....	16
<i>Heights at Issaquah Ridge, Owners Ass’n v. Burton Landscape Grp., Inc.</i> , 148 Wn. App. 400, 200 P.3d 254, (2009)	2, 5
<i>Lee v. Evergreen Hosp. Med. Ctr.</i> , 195 Wn.2d 699, 464 P.3d 209 (2020).....	12
<i>Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.</i> , 192 Wn. App. 465, 369 P.3d 503 (2016)	5, 6
<i>Otis Housing Ass’n, Inc. v. Ha</i> , 165 Wn.2d 582, 201 P.3d 309 (2009).....	9
<i>River House Dev. Inc. v. Integrus Architecture, P.S.</i> , 167 Wn. App. 221, 272 P.3d 289 (2012)	9
<i>San Juan County v. No New Gas Tax</i> , 160 Wn.2d 141, 157 P.3d 831 (2007).....	21
<i>Shepler Const., Inc. v. Leonard</i> , 175 Wn. App. 239, 306 P.3d 988 (2013)	5, 6
<i>Streater v. White</i> , 26 Wn. App. 430, 613 P.2d 187 (1980)	21, 22

Statutes

RCW 7.04A.080..... 7

Rules

RAP 2.4 17

1. Introduction

After months of litigation, Plaintiffs dropped their original claims and raised all new claims, alleging misconduct related to the Condominium Association. The Condominium Declaration broadly required arbitration of such claims. Within one month of the Amended Complaint, Lewis asserted that he had the right to arbitrate the new claims. Two months after the amendment, Lewis moved to compel arbitration. The trial court erroneously denied arbitration under a misinterpretation of the contract and then imposed CR 11 sanctions, calling Lewis's motion "frivolous." The trial court also erroneously dismissed Lewis's counterclaims for unjust enrichment.

Plaintiff's response brief seeks to confuse the issues with irrelevant assertions of fact and misrepresentations of Lewis's arguments. Lewis's position has been consistent throughout and can be summarized simply: 1) The arbitration clause covers the claims in the amended complaint; 2) Lewis promptly requested arbitration and did not waive his right; 3) Lewis's arguments were not frivolous or sanctionable under CR 11; and 4) It was error to dismiss the counterclaims as originally stated.

This Court should reverse the trial court decisions, vacate the sanctions, restore Lewis's counterclaims, and order that the case go to arbitration.

2. Reply to Statement of the Case

2.1 The background facts remain in dispute and are irrelevant to the issues before this Court.

“Courts resolve the threshold legal question of arbitrability of the dispute by examining the arbitration agreement **without inquiry into the merits of the dispute.**” *Heights at Issaquah Ridge, Owners Ass’n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 400, 403, 200 P.3d 254, (2009) (“*Issaquah Ridge*”) (emphasis added). Plaintiff spends considerable time in his Statement of the Case describing his allegations against Lewis on the merits of the case. Those allegations are irrelevant to the issues before the Court in this appeal. As counseled by the *Issaquah Ridge* court, this Court should disregard them.

The facts remain largely in dispute. Despite their irrelevance to the issues before this Court, Lewis anticipated that Plaintiff would bring up his allegations, and therefore Lewis briefly presented his side of the background facts in his opening brief. **Br. of App.** 4-5 (Part 2.2). When the case does go before a fact-finder, these disputes can be resolved.

Because it sheds light on the credibility of Plaintiff’s assertions and arguments, Lewis will highlight just one of those disputes here before proceeding to argue the issues.

2.2 Plaintiff attempts to mislead the court by continuing to allege that Lewis has not paid assessments even though that allegation was litigated previously and determined to be false.

Plaintiff falsely asserts that Lewis has never paid assessments. *E.g.*, **Br. of Resp.** 4 (citing CP 258, 271-72). This assertion has already been proven false in prior litigation in which Plaintiff participated. Plaintiff's citations to the record in support of this assertion contain only conclusory allegations, not evidence. Clerk's Papers 258 is the self-serving Declaration of Gregory Hochhalter, in which Plaintiff claims to have personal knowledge that Lewis has never paid his monthly assessments but provides no documentary evidence to back up his testimony. Clerk's Papers 271-72 is the declaration of Plaintiff's counsel, in which he inappropriately testifies to the alleged contents of the Association's financial records but provides no documentary evidence to back up his claims.

What Plaintiff and his counsel both conveniently left out of their declarations is that both have personal knowledge of the prior lawsuit described in **Br. of App.** 5, in which the Association, under Plaintiff's and Dave Davis's leadership, sued Lewis for this same allegation of not paying assessments. CP 58-60. "Plaintiff [Hochhalter and Davis, by way of the Association] claimed Defendant [Lewis, by way of his LLC] had not paid dues for two years... The claim was false. During deposition, Plaintiff

[Davis] admitted to knowing it was false. Plaintiff's case was built on this false claim." CP 60. The trial court in this prior lawsuit dismissed Plaintiff's claim on summary judgment, holding, "the Court finds the Defendant, Venutri Properties LLC, NOT LIABLE for the assessments that the Plaintiff claims are owed by the Defendant." CP 64.

Plaintiff's claims that Lewis has not paid assessments and owes large sums of money to the Association were fully litigated and **proven false**. Yet Plaintiff continues the same misrepresentation, hoping to paint Lewis in a bad light. Even if there is, in Plaintiff's mind, some semantic technicality under which he is not technically "lying," the intent of his repeated allegations can only be to deceive the Court. This Court should take everything in Plaintiff's brief with a hefty grain of salt.

3. Reply Argument

3.1 The trial court erred in denying Lewis's motion to compel arbitration.

3.1.1 Plaintiff's claims were well within the scope of the arbitration provision.

In his opening brief, Lewis described this state's "strong presumption in favor of arbitration" and the great deference and broad interpretation that the courts give to parties' agreements to arbitrate. **Br. of App.** 11-14 (citing, *e.g.*, *Marcus & Millichap*

Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc., 192 Wn. App. 465, 369 P.3d 503 (2016); *Issaquah Ridge*, 148 Wn. App. 400). Where there is an agreement to arbitrate, Washington courts should order arbitration unless there is no possible interpretation of the arbitration clause that would cover the claims. **Br. of App.** 13-14.

Anticipating Plaintiff's arguments, Lewis took care to explain that the sole case on which Plaintiff relies, *Shepler Const., Inc. v. Leonard*, 175 Wn. App. 239, 306 P.3d 988 (2013), does not say what Plaintiff thinks it says. **Br. of App.** 13 n.4. Admittedly, *Shepler* is a complicated case, but it has nothing to do with the standard for compelling arbitration. It was the third appeal from the same underlying litigation. *Shepler*, 175 Wn. App. at 240. In the second appeal, the court held that both parties had waived their arbitration agreement (but did not waive their underlying claims). *Id.* On remand from that second appeal, the trial court "barred the Leonards from asserting any counterclaim that should have been submitted to arbitration" under the agreement. *Id.* In the third appeal, the court reversed, holding that, under their contract, arbitration was not the exclusive remedy for Leonards' claims, therefore they were free to assert those claims in court. *Id.* at 246-47. And even if arbitration was the exclusive remedy, both parties had waived that exclusivity when they waived the arbitration clause. *Id.* at

247-48. Essentially, it was the reverse of what is going on in this case. The question of “exclusive remedy” is irrelevant here.

Shepler does not change the standard for determining whether or not to compel parties to arbitrate. It does not even address that standard, because the determination of whether to arbitrate was decided in the prior appeal. Thus, Plaintiff’s reliance on *Shepler* is entirely misplaced. The correct standard in this case is that stated by Lewis in his opening brief and above: if there is any possible interpretation of the arbitration agreement that could cover the claims at issue, the parties should be ordered to arbitrate. *Marcus & Millichap*, 192 Wn. App. at 480-81.

Plaintiff’s continued reliance on an incorrect standard (see **Br. of Resp.** 18) is fatal to his position. It makes no difference whether the arbitration agreement makes arbitration an “exclusive remedy.” The only thing that matters is whether the arbitration agreement can conceivably cover the claims at issue. If it can, the court must order arbitration.

Lewis demonstrated in his opening brief that the arbitration agreement covers Plaintiff’s claims in this case. **Br. of App.** 14-20. Thus, the trial court erred in failing to order arbitration.

Plaintiff is wrong in arguing that Lewis is relying on his own counterclaims to trigger arbitration. Lewis’s opening brief

demonstrated that **Plaintiff's claims** in the Amended Complaint fall under the broad language of the arbitration provision. **Br. of App. 15. Plaintiff's claims** were also the basis of Lewis's original motion in the trial court. CP 146-47 (arguing that because "this dispute is among Owners or residents of the Property [i.e., Plaintiff], on one hand, and the Association, on the other," it falls under the terms of the arbitration clause). Thus, Plaintiff is also wrong in claiming that Lewis did not present his appeal arguments below.

Plaintiff is also wrong in arguing that Subsection 12.6.6 creates an exception for Plaintiff's claims. As explained in Lewis's opening brief, **Br. of App. 16-20**, Subsection 12.6.6 provides the parties with rights in line with those in the Arbitration Act at **RCW 7.04A.080**, allowing swift action in the courts to preserve the status quo or otherwise protect the effectiveness of the coming arbitration of the merits of the case, without waiving the right to arbitrate. Subsection 12.6.6 permitted Plaintiff to seek his temporary restraining order in the court without violating, canceling, or waiving the arbitration requirement. Plaintiff's use of Subsection 12.6.6 **did not** deprive Lewis of his right, under the same Subsection 12.6.6, to compel arbitration on the merits. *See* CP 175 ("nor shall anything in this Article XII affect the right of any party or person interested in any dispute subject to arbitration hereunder to commence and

prosecute an appropriate proceeding to compel arbitration hereunder.”).

Contrary to Plaintiff’s arguments, Lewis did not concede this point in the trial court. In written submissions to the trial court, Lewis had argued that Subsection 12.6.6 preserved Lewis’s right to compel arbitration even if all of Plaintiff’s claims were injunctive or equitable. CP 202. When Lewis’s counsel at the hearing stated that injunctive or equitable relief may be sought in the courts, the trial court moved on to another point before counsel could explain that Subsection 12.6.6 **also** preserves the parties’ rights to compel arbitration of such claims. *See RP*, Sept. 30, 2018, at 3-4. Lewis clarified his position again in his motion for reconsideration. CP 219-20 (“that the Declarations provide that a party may resort to the courts in instances of injunctive relief does not affect the right of a responding party to compel arbitration even in instances in which solely injunctive relief is sought.”). Lewis has consistently argued that Subsection 12.6.6 preserves his right to arbitrate Plaintiff’s claims.

Because Lewis’s interpretation of the arbitration clause, including Subsection 12.6.6, is at least plausibly correct, the trial court should have resolved any doubt in favor of arbitration and ordered the parties to arbitrate. This Court should reverse

the trial court's erroneous order and remand with an order to proceed to arbitration.

3.1.2 Lewis did not waive his right to arbitrate.

Lewis's opening brief also addressed Plaintiff's alternative argument in the trial court that Lewis had waived arbitration through his conduct. **Br. of App.** 20-25. Lewis noted this Court's de novo review and the "heavy burden" on Plaintiff to prove that, as events unfolded, Lewis's conduct "reached a point where it was inconsistent with any other intention but to forgo the right to arbitrate." **Br. of App.** 21 (citing *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 230, 237-38, 272 P.3d 289 (2012)). Substantial litigation activity is required before that point is reached. **Br. of App.** 22-23 (citing, *e.g.*, *Otis Housing Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 201 P.3d 309 (2009)).

Lewis did not engage in substantial litigation activity after Plaintiff amended the complaint—replacing the original claim with all new claims—on July 8, 2019. **Br. of App.** 23-24; CP 128. Lewis asserted his right to arbitrate the new claims on August 5, less than one month after the Amended Complaint. CP 192. Lewis moved to compel arbitration on September 19, just over two months after the Amended Complaint. CP 146. Lewis's conduct was consistent with asserting his right to arbitrate Plaintiff's claims.

Plaintiff's response brief seeks to mislead the Court by recounting all of the litigation activity related to the original claim, **Br. of Resp.** 20-21, but that claim, having been abandoned, is no longer at issue. Plaintiff's own timeline of events, **Br. of Resp.** 11-13, demonstrates that nearly all of the litigation activity he relies on for waiver occurred **before** the Amended Complaint—that is, before the claims that Lewis seeks to arbitrate even existed! Lewis cannot waive the right to arbitrate a claim before he even knows that the claim exists. In considering the waiver issue, this Court must focus only on the time period between the Amended Complaint and Lewis' motion to compel arbitration.

Plaintiff is wrong in arguing that Lewis ever requested a trial. Although Lewis filed a "Note for Trial," that was before the Amended Complaint and is irrelevant. He filed that note at the urging of the trial court, **RP**, Jan. 22, 2019, at 4-5, related only to the original claim, which Plaintiff abandoned in the Amended Complaint. Lewis's motion to continue the trial, *see* CP 143, was not asking for a trial—it was asking to **not have a trial** on entirely new claims less than one month after those claims were first raised. Lewis's answer to the Amended Complaint also did not ask for a trial; it merely contained boilerplate language in its prayer for relief, seeking "damages in an amount to be proven at trial." CP 140. There is no authority that would transform a

simple boilerplate statement in an Answer into waiver of the right to arbitrate. Especially when Lewis asserted his right to arbitrate within one week of the Answer and less than one month after the Amended Complaint.

Plaintiff's assertion that Lewis filed "extensive" discovery requests fails to meet his burden. First, assuming Lewis did send such a discovery request, it was expressly allowed under the arbitration provisions of the Condominium Declaration. Subsection 12.6.2 provides, "The parties shall be entitled to conduct discovery in accordance with the Washington Civil Rules of Superior Court." CP 175. It cannot be said that Lewis waived arbitration by making a request that was allowed under the arbitration agreement.

Second, the only sign in the record of this alleged discovery is a single line in argument, unsupported by any declaration or documentary evidence. CP 189. The statement was inadmissible. There is no evidence from which this Court can determine when the requests were sent or how "extensive" they really were. Without knowing these details, it cannot be said that the alleged discovery was inconsistent with the right to arbitrate. Plaintiff has failed to meet his "heavy burden."

Similarly, Plaintiff's assertion that Lewis filed improper small claims actions is unsupported by any declaration or documentary evidence. Plaintiff has failed to provide the Court

with any basis to determine whether the assertion is true or whether the alleged claims could constitute a waiver. Even if the assertion is true, Lewis’s actions in other cases have no bearing on his right to arbitrate **Plaintiff’s** claims in **this case**. Lewis’s conduct has been entirely consistent with an intent to arbitrate Plaintiff’s claims in the Amended Complaint.

Plaintiff’s reliance on *Lee v. Evergreen Hosp. Med. Ctr.*, 195 Wn.2d 699, 464 P.3d 209 (2020), is misplaced. *Lee* notes that a party must have “knowledge of an existing right to compel arbitration” before that party can waive the right. *Lee*, 195 Wn.2d at 705. Lewis cannot have known that he had a right to compel arbitration of Plaintiff’s new claims until Plaintiff filed the Amended Complaint. Thus, as Lewis has argued, this Court can only consider what Lewis did **after** the Amended Complaint was filed. What Lewis did was obtain counsel, answer the Amended Complaint to avoid default, stave off the trial, and assert his right to arbitrate. Lewis’s two-month effort to preserve and assert his right to arbitrate is a far cry from the nine months of discovery and litigation—including **opposing** a motion to continue the trial—that resulted in Evergreen waiving its right to arbitrate. *See Lee*, 195 Wn.2d at 707-08.

Because Plaintiff failed to meet his “heavy burden” of proving waiver of Lewis’s right to arbitrate, the trial court erred in denying Lewis’s motion to compel arbitration. This Court

should reverse the trial court order and remand with an order to proceed to arbitration.

3.2 The trial court abused its discretion in imposing CR 11 sanctions.

In his opening brief, Lewis recited the trial court's reasons for imposing CR 11 sanctions against him for bringing his motion to compel arbitration—in essence, the trial court believed that Lewis was so wrong about arbitration that the motion was frivolous and therefore sanctionable. **Br. of App.** 26-27. Lewis argued that the trial court abused its discretion because his motion to compel was entirely justified or at least well-grounded and not frivolous. **Br. of App.** 27.

Plaintiff argues that the motion was sanctionable because Lewis allegedly ignored Subsection 12.6.6 of the Condominium Declaration. **Br. of Resp.** 22. This is false. Plaintiff also argues that Lewis's motion cited “no law or legal authority whatsoever.” **Br. of Resp.** 23. This is also false. Lewis's motion to compel arbitration referred to and quoted the Condominium Declaration. CP 146-47. As the contract governing the parties' rights to arbitration, the Declaration **was** the applicable “law or legal authority.” Lewis then explained how this arbitration agreement covers the claims in the case. CP 147. No other authority should have been necessary. Lewis's motion, although simple, was well-grounded in fact and warranted by existing

law, as demonstrated in this appeal. *See Br. of App.* 11-25, and Part 3.1, above.

Lewis did not ignore Subsection 12.6.6. As demonstrated in Lewis's reply in support of the motion, CP 200-03, and in this appeal, Subsection 12.6.6 does not eliminate Lewis's right to compel arbitration of the claims in the Amended Complaint. Because Subsection 12.6.6 does not change the analysis of whether the trial court should have ordered arbitration, it was entirely appropriate for Lewis not to quote it in his original motion. All the same, Lewis **did** include the entire Condominium Declaration, including Subsection 12.6.6, in his Declaration filed together with the original motion. CP 148-86. He did not hide anything from the trial court. He simply focused his motion on what was relevant. The motion was not frivolous or sanctionable.

As explained above in Part 3.1.1, Lewis did not make any admission or concession or otherwise change his position at the hearing. Lewis's counsel attempted to answer a question from the trial court, but the trial court moved on before counsel could fully explain the position that had been set forth in writing. Lewis followed with a motion for reconsideration, clarifying that his position was still the same as it had been in the original motion and reply.

Plaintiff incorrectly claims that Lewis misrepresented the content of the Amended Complaint when he argued that Plaintiff was seeking money damages.¹ Plaintiff's prayer for relief seeks "declaratory relief adjudging and decreeing that ... Lewis ... must pay all assessments in full as and when due with no exception and with no credit for any payments allegedly made at any time before the entry of any judgment in this case." CP 133-34. This request appears to be reaching back in time as well as forwards. It at least arguably seems to be seeking to establish that Lewis owes a debt for past assessments, with no credit for prior payments. A declaration that Lewis owes a debt would be functionally no different from a judgment for money damages. And the prayer for relief does seek "judgment against Defendants," implying a money judgment. CP 133. Plaintiff clarified at the hearing that he would not seek money damages, but that was only after Lewis had made his argument. **RP**, Sep. 30, 2019, at 4. Lewis's argument was not frivolous or sanctionable at the time it was made.

It was also made only in reply to **Plaintiff's** erroneous arguments, at CP 188. As Lewis clarified in his reply, even if

¹ This was not a part of the trial court's basis for imposing sanctions. *See* CP 213; **RP**, Sep. 30, 2019, at 5. As such, it is irrelevant to the analysis of whether the trial court's decision was based on untenable grounds or untenable reasons. Nevertheless, Lewis responds to Plaintiff's argument.

Plaintiff was not seeking money damages, Subsection 12.6.6 still preserved Lewis's right to arbitrate Plaintiff's claims. CP 202.

The trial court erred in denying Lewis's motion to compel arbitration. Because Lewis was correct, his motion could not have been frivolous or sanctionable. Even if this Court finds that Lewis was not correct, his motion was at least well-grounded in fact and warranted by existing law, as demonstrated by Lewis's arguments in this appeal. Either way, the trial court's imposition of CR 11 sanctions against Lewis was an abuse of discretion. This Court should reverse.

3.3 The trial court erred in dismissing Lewis's counterclaims.

Lewis's opening brief argued that the trial court erred in dismissing his counterclaims under CR 12(b)(6). **Br. of App.** 27-32. Lewis explained the standard for such a dismissal, including that "any hypothetical situation conceivably raised by the [pleading]" defeats a CR 12(b)(6) motion if it supports the elements of the claim. **Br. of App.** 27-28 (citing, *e.g.*, ***Bravo v. Dolsen Companies***, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)). Lewis presented the situation conceivably raised by the counterclaims and demonstrated how it met the elements of a claim for unjust enrichment. **Br. of App.** 29-32. The trial court erred in dismissing the counterclaims, and this Court should

reverse. Lewis also demonstrated how this issue is reviewable by this Court at this time. **Br. of App.** 28.

Under **RAP 2.4(b)**, the dismissal of the counterclaims is reviewable if it “prejudicially affected” the order denying arbitration. While it is true that arbitration was actually required based on Plaintiff’s claims, with or without Lewis’s counterclaims, that is not how the trial court viewed the issues. Under the trial court’s erroneous application of the arbitration agreement, arbitration could only be denied if there were no claims for money damages:

THE COURT: ... Mr. Damasiewicz, are your clients seeking any monetary damages other than their attorney fees and costs?

MR. DAMASIEWICZ: Absolutely not, Your Honor.

THE COURT: Okay. Motion to compel arbitration is denied.

RP, Sep. 30, 2019, at 3-4. By this reasoning, it was only possible to deny arbitration because Lewis’s counterclaims for money damages had already been dismissed. Thus, by this reasoning, the dismissal “prejudicially affected” the denial of arbitration, opening the door for review by this Court under **RAP 2.4(b)**. That door does not close just because Lewis is challenging the trial court’s reasoning on arbitration.

Contrary to Plaintiff’s bare assertion, the trial court did not deny arbitration on the alternative ground of waiver. As

shown in the quote above, the trial court's focus was on the lack of any claim for money damages.² The only time the trial court referenced the waiver arguments was in reinforcing its decision on CR 11 sanctions: "I think the fact that the declarations involved in the homeowner's association specifically authorize an action to be brought in court is - renders this motion to compel arbitration frivolous, especially when you then consider how much time and effort has been spent in the litigation itself." **RP**, Sep. 30, 2019, at 5.

Plaintiff makes note of a subsequent motion to amend—which is irrelevant to this appeal—in which Lewis attempted to cure whatever deficiencies the trial court saw in the original counterclaims.³ Plaintiff's opposition to that motion argued two points: 1) that the unjust enrichment claim had already been dismissed and lacked merit for the same reasons as before, CP 317-20; and 2) that it was too close to trial to allow an amendment, CP 320-21. Neither of these arguments has any relevance at this point. If the trial court erred in dismissing the

² Although the trial court did base its decision on waiver, Lewis knew that alternative reasons would be fair game in this de novo review and therefore devoted a portion of his brief to that issue.

³ Plaintiff supplemented the record with his own response to the motion but failed to include the motion itself or the trial court's order on the motion. Because this subsequent motion is irrelevant to the issues on appeal, Lewis sees no need to further supplement the record.

original counterclaims, this Court can reverse the dismissal, and the counterclaims would be revived. The subsequent motion to amend, having been denied, would be of no effect, leaving the original counterclaims intact.⁴

Plaintiff falsely argues that Lewis is asserting for the first time on appeal that the counterclaims included a claim for unjust enrichment. Lewis's response to the motion to dismiss explained, "[Lewis] has a claim of unjust enrichment against Plaintiffs for paying their dues owed to the Association, personally, on their behalf." CP 207. Lewis's declaration filed at the same time explained that the claim was one of unjust enrichment. CP 211. The trial court understood that Lewis was arguing that his counterclaim was for unjust enrichment. **RP**, Sep. 30, 2019, at 2-3.

The exchange between the trial court and Lewis's counsel at the hearing demonstrates that everyone knew that Lewis was making a claim for unjust enrichment:

THE COURT: Okay. The response ... is premised primarily upon an assertion by Mr. Lewis that

⁴ Plaintiff also faults Lewis for not appealing the subsequent order, but the order was not appealable by right and did not meet the "prejudicially affected" test for inclusion in this appeal. But that does not remove this Court's authority to reverse the dismissal of the counterclaims. If the dismissal is reversed, the counterclaims are revived. Denial of a subsequent motion to amend would have no effect on the restored original counterclaims.

somehow the individual plaintiffs were unjustly enriched.

Is that your argument Mr. Friese?

MR. FRIESE: It is.

RP, Sep. 30, 2019, at 2-3. The trial court then dismissed the counterclaim because it did not use the words, “unjust enrichment”:

THE COURT: In your client’s answer and counterclaim did they plead unjust enrichment?

MR. FRIESE: It didn’t specifically plead unjust enrichment.

THE COURT: They did not, did they. Motion to dismiss is granted.

RP, Sep. 30, 2019, at 3.

Plaintiff disingenuously characterizes counsel’s statement as an admission that it was not an unjust enrichment claim. But the complete context makes it clear that counsel **was** asserting an unjust enrichment claim (“Is that your argument Mr. Friese?” “It is.”), but also candidly admitted that the language of the pleading did not “specifically plead”—that is, did not use the words—“unjust enrichment.” Failure of a pleading to identify each claim by using “magic” words such as “unjust enrichment” is not grounds for dismissal. Rather, dismissal under CR 12(b)(6) “is appropriate only when it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint,

which would justify recovery.” *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007).

Here, Lewis has demonstrated a set of facts which justify recovery under a theory of unjust enrichment. Lewis explained in his opening brief how each of the elements of an unjust enrichment claim are met. **Br. of App.** 29-32. Plaintiff’s response brief fails to address Lewis’s arguments on the elements of unjust enrichment and instead attacks a set of claims that Lewis is not making. **Br. of Resp.** 26-27. Because there is a set of facts “conceivably raised” by the pleadings that is legally sufficient to support each element of an unjust enrichment claim, the trial court erred in dismissing Lewis’s counterclaims. This Court should reverse and reinstate the counterclaims.

3.4 The Court should deny Plaintiff’s request for sanctions because this appeal is not frivolous.

An appeal is frivolous only when it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980). “In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as

to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Streater*, 26 Wn. App. at 434-35.

Plaintiff falsely asserts that this entire appeal rests on an argument that the trial court should have allowed Lewis to amend his counterclaims. Even a casual reading of Lewis’s opening brief proves this notion to be false. Lewis’s primary argument in this appeal—that the trial court erred in denying arbitration—is summarized with the heading, “**Plaintiff’s claims** were well within the scope of the arbitration provision.” **Br. of App.** 13 (emphasis added). Nothing in Part 3.1 of the opening brief suggests that amendment of counterclaims has anything to do with Lewis’s right to arbitrate Plaintiff’s claims in the Amended Complaint. And even though Part 3.3 on dismissal of the counterclaims mentions leave to amend in passing at **Br. of App.** 32, the rest of the argument at **Br. of App.** 27-32 demonstrates that the counterclaims were sufficient to survive a CR 12(b)(6) motion based on the **original language** of the pleading, without any amendment necessary.

It makes no difference to the outcome of this appeal that the trial court never gave Lewis the opportunity to amend his counterclaims. All that matters is that 1) the trial court erred in denying arbitration where Plaintiff's claims in the Amended Complaint fell under the broad arbitration agreement in the Condominium Declaration; 2) Lewis did not waive his right to arbitrate when he asserted it within one month of the Amended Complaint and brought his motion to compel two months after the Amended Complaint; 3) Lewis's arguments were not frivolous or sanctionable under CR 11; and 4) It was error to dismiss Lewis's counterclaims as originally expressed in his Answer to the Amended Complaint. If any of these arguments has at least arguable merit, Lewis's appeal is not frivolous. The Court should deny Plaintiff's request for sanctions.

4. Conclusion

The trial court erred in denying arbitration, dismissing Lewis's counterclaims, and imposing CR 11 sanctions. The arbitration clause covers the claims in the amended complaint. Lewis promptly requested arbitration and did not waive his right. Because the motion to compel arbitration was well-founded in fact and law, the trial court abused its discretion in imposing CR 11 sanctions. Lewis's counterclaims raised

sufficient factual allegations to support a claim for unjust enrichment under a CR 12(b)(6) standard.

This Court should reverse the trial court decisions, vacate the sanctions, restore Lewis's counterclaims, and order that the case go to arbitration.

Respectfully submitted this 9th day of October, 2020.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellants
kevin@olympicappeals.com
Olympic Appeals PLLC
PO Box 55
Adna, WA 98522
360-763-8008

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on October 9, 2020, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

Jeffrey A. Damasiewicz
110 W Market St Ste 106
Aberdeen, WA 98520-6206
jeff.damasiewicz@mail.com

Andrew Friese
Scuderi Law Offices, P.S.
924 Capitol Way S
Olympia, WA 98501
andrewfriese@scuderilaw.com

SIGNED in Lewis County, WA, this 9th day of October, 2020.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
PO Box 55
Adna, WA 98522
360-763-8008

OLYMPIC APPEALS PLLC

October 09, 2020 - 4:44 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53986-1
Appellate Court Case Title: Gregory Hochhalter, Respondent v. Kat's Cove Condominium Association, et al,
Appellants
Superior Court Case Number: 18-2-00975-4

The following documents have been uploaded:

- 539861_Briefs_20201009164151D2734264_2919.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Brief - Appellant Reply 2020-10-09 final.pdf

A copy of the uploaded files will be sent to:

- andrewfrieese@scuderilaw.com
- jeff.damasiewicz@mail.com

Comments:

Sender Name: Kevin Hochhalter - Email: kevin@olympicappeals.com
Address:
PO BOX 55
ADNA, WA, 98522-0055
Phone: 360-763-8008

Note: The Filing Id is 20201009164151D2734264