FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 367924

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION THREE**

DAVID TERRY INVESTMENTS, LLS-PRC, a Washington State limited liability company, and DAVID TERRY, married individual,

Plaintiff-Respondents,

v.

HEADWATERS DEVELOPMENT GROUP, LIMITED LIABILITY COMPANY, a Washington State limited liability company, STONERIDGE CONTRACTORS, LLC, a Washington State limited liability company, SG SPADY CONSULTING & CONSTRUCTION MANAGEMENT, LLC, a Washington State limited liability company, PARK ROAD COMMONS, LLC, a Washington State limited liability company, and STEVE SPADY, an individual,

Defendants-Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Raymond Clary, Judge

DEFENDANTS-APPELLANTS' REPLY BRIEF

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"over." *Merriam-Webster.com.* 2019. https://www.merriam-webster.com.....4

I. INTRODUCTION

At the heart of this case is an agreement under which David Terry Investments, LLC-PRC and David Terry (hereinafter "Plaintiffs") promised to finance/fund development of real property owned by Headwaters Development Group, LLC (hereinafter "Headwaters"). That agreement included a promise to arbitrate disputes that might arise.

To assist in the development, SG Spady Consulting & Construction Management, LLC ("SG Spady") agreed to provide construction management and consulting services. The agreement between SG Spady and Plaintiffs also came with a promise to arbitrate disputes.

To see the development come out of the ground, a general contractor was needed. Stoneridge Contractors, LLC, another entity formed by Steve Spady, agreed to fill this role.

At its conclusion, the development of the property on Park Rd. needed an entity to sell and/or lease and/or manage the property. Park Road Commons, LLC was formed by the parties for these purposes.

In the midst of this development venture, Plaintiffs ran into financial and tax trouble and stopped funding the development cold turkey. Plaintiffs' breach and repudiation gave rise to disputes. Plaintiffs refused to arbitrate those disputes and instead filed suit claiming breach of contract, fraud, conversion, and unjust enrichment. Distilled to their

essence, Plaintiffs' claims allege that Defendants misused and misappropriated the funds that Plaintiffs invested for development. On the other hand, Defendants contend that the funds were used consistent with the development agreement, and that Plaintiffs breached and repudiated by failing to finance continued work. Thus, at every juncture of this case, the trier fact will need to measure the parties' conduct against the nature, purpose, intent, and terms of their development agreements. Because those agreements contained a promise to arbitrate disputes, that is how the parties should resolve their competing claims.

II. ARGUMENT

A. Washington favors arbitration

"Washington courts apply a strong presumption in favor of arbitration. "*Verbeek Properties, LLC v. GreenCo Environmental, Inc.*, 159 Wn.App. 82, 87, 246 P.3d 205 (2010). "The party opposing arbitration bears the burden of showing the arbitration clause is inapplicable or unenforceable." *Id.* at 86-87. That burden, and the presumption in favor of arbitration applies to every defense to arbitration, including a defense based on construction and interpretation of the contract language. *Id.* at 87.

B. The agreements to arbitrate must be broadly construed to cover Plaintiffs' tort claims

"If any doubts or questions arise with respect to the scope of the arbitration agreement, the agreement is construed in favor or arbitration, unless the reviewing court is satisfied the agreement cannot be interpreted to cover a particular dispute." *Townsend v. Quadrant Corp.,* 153 Wn.App. 870, 887, 224 P.3d 818 (2009), aff'd at 173 Wn.2d 451, 268 P.3d 917 (2012). "There is no bar in Washington to arbitration of tort claims, as long as the language of the arbitration clause does not preclude it." *Id.* Where a tort theory emerges from a contractual relationship requiring arbitration, the presumption in favor of arbitration must win out. *Id.* at 887-888. If no provision in the contract excludes a particular issue from arbitration, then "only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail." *Local Union No. 77, Int'l Bhd. Of Elec. Workers v. Pub. Util. Dist. No. 1, Grays Harbor Cnty.,* 40 Wn.App. 61, 64-66, 696 P.2d 1264 (1985)

Rather than apply the broad reading required by Washington law, Plaintiffs urge the Court to narrowly construe the arbitration clauses at issue. The clauses require arbitration of claims "over" the agreements. Plaintiffs argue that the language chosen by these parties is narrower than language from other cases where the parties employed phrases like

"relating to" or "arising from." Even if that were true, the language used here is still sufficiently broad to encompass the claims alleged.

The dictionary tells us that "over" means to "cover the whole surface," and is used to indicate breadth in the same way as "throughout" or "all through." "over." *Merriam-Webster.com* 2019. https://www.merriam-webster.com. These definitions impart a broad meaning to the word "over," and Plaintiffs offer no contrary definition that would narrow its import. If the parties intended to limit arbitrability only to breach of contract claims, they could have and would have chosen language that said exactly that. By instead using the word "over," the parties assuredly meant to snare a broader scope of claims, namely any claims that fell under the umbrella of their venture to develop real property.

When looking at the claims alleged, it is clear that the entire thrust of Plaintiffs' case, whether couched as a tort or contract theory, is that Defendants misused and misappropriated funds that Plaintiffs' invested for the development venture. In other words, the central question will be whether Defendants spent the funds consistent with legitimate development purposes. Resolving this question will, for every disputed expenditure, require analysis of what was required to perform the construction, labor, and consulting work that Defendants promised under

the contracts. This puts the contracts at the center of all claims and defenses and therefore requires arbitration as the sole method to resolve the disputes.

Cases from Washington are in line with this conclusion. For example, in *Townsend,* the Court sent the plaintiffs' tort claims to arbitration reasoning that, "[a]lthough some of the children's claims sound in tort, the source of the duty of care Quadrant owed the Homeowners and their children arises from the sale of the home."153 Wn.App. at 887-888.

Similarly, in this case the parties' development agreement was the "source of" all duties that Plaintiffs allege were breached. Being unable to divorce Plaintiffs' claims from contracts requires that the presumption in favor or arbitration must win out even in the face of ambiguous contract language.

C. Estoppel prevents Plaintiffs from two bites at the same apple

Questions about the breadth of the contract language and its applicability to the tort claims alleged by Plaintiffs are further put to rest by the doctrine of estoppel. Under that doctrine, the cases tell us that once a party invokes a contract requiring arbitration, it cannot use tort claims to escape arbitration where the allegedly tortious acts or omissions are intertwined with the underlying contract obligations. *Kramer v. Toyota*

Motor Corp., 705 F.3d 1122, 1129 (9th Cir. 2013). In this way, estoppel prevents a party from losing the benefits of arbitration by being forced to resolve related disputes in two separate forums at the same time. *See Herzog v. Foster & Marshall,* 56 Wn.App. 437, 443, 783 P.2d 1124 (1989). Indeed, dual track litigation "frustrates the strong public policy in this state favoring arbitration of disputes." *Id.*

Yet dual track litigation is exactly what Plaintiffs ask the Court to indulge. Specifically, if Plaintiffs had it their way, they would get to argue in arbitration that Defendants misused and misappropriated the invested funds in violation of the contract while, in a separate forum, argue that the exact same facts support tortious misuse and misappropriation of the exact same funds. This would permit Plaintiffs two bites at the apple and effectively destroy the entire purpose of arbitration. Worse yet, the dual track litigation would invite the potential for diverging results with one forum concluding that there was no misuse or misappropriation of Plaintiffs' investment, while the other could conceivably reach the opposite conclusion. To avoid this potential absurdity, the Court should instead send all disputes between the parties to arbitration.

D. Claims against agents of signatories must be arbitrated

A "nonsignatory may be bound to an arbitration agreement through contract or agency principles." *Raven Offshore Yacht, Shipping, LLP v.*

F.T. Holdings, LLC, 199 Wn.App. 534, 541, 400 P.3d 347 (2017). When the claims against a non-signatory are based "on the same set of facts and inherently inseparable, the court may order arbitration against the party even if that party is not a party to the arbitration agreement." *Romney v. Franciscan Medical Group,* 186 Wn.App. 728, 747, 349 P.3d 32 (2015).

There is no legitimate dispute that the non-signatories at issue here (Stoneridge Contractors, LLC and Park Road Commons, LLC) were agents of the signatories. Headwaters (a signatory) owned the real property that was to be developed, SG Spady(a signatory) promised to provide construction management and consulting toward that development, Stoneridge Contractors, LLC (a non-signatory) was engaged to act as the general contractor for the development, and Park Road Commons, LLC (another non-signatory) was designed to manage the Park Rd. development once it was finished. In other words, all of the parties in this case were either signatories to a contract requiring arbitration or acting on behalf of and subject to the control of an agent of at least one of the signatories. Plaintiffs have presented no evidence to the contrary, and their suggestion that doubt exists as to the relationship between the parties is disingenuous.

Additionally, the claims against the non-signatories are irrevocably intertwined with the claims against the signatories. This much is made clear in paragraph 3.11 of Plaintiffs' complaint:

> .... Spady/Headwaters had been transferring these funds to Spady personally, to Stoneridge, SG Spady Consulting and Park Road. In other words, Spady/Headwaters had been misappropriating DTI's invested funds. Spady, Stoneridge, SG Spady Consulting, and Park Road had improperly accepted these funds. On information and belief, Spady and these other entities have retained these funds (again, improperly).

(CP 103). These are the only factual allegations against the non-signatories contained within the First Amended Complaint and ostensibly form the entire bases for the causes of action asserted against them. (CP 99-107).

Once again, this leaves us in a position where the entire case is about the money that was invested and whether that money was used in conformance with the development agreement. Washington law and the practicalities of these circumstances dictate that all such claims be resolved together in arbitration.

E. The trial court should not have reached the motion to amend or the motion to compel discovery

Orders that deny a motion for stay pending arbitration are immediately appealable as a matter of right. *Herzog,* 56 Wn.App. at 445. The justification for this rule is simple: once a party invokes an agreement

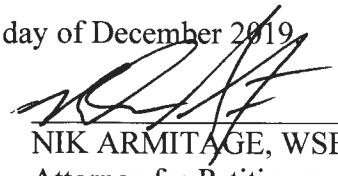
to arbitrate, it would be wasteful to require that party to continue to litigate matters in Superior Court that should instead be decided by the arbitrator. *See Stein v. Geonerco, Inc.,* 105 Wn.App. 41, 17 P.3d 1266 (2001).

Here, Defendants almost immediately invoked the arbitration clause in the parties' agreements by moving the trial court to compel arbitration. Had the trial court properly decided the motion to compel arbitration, it would not have reached Plaintiffs' motion to compel discovery or Plaintiffs' motion to amend the complaint. Reversing the trial court and sending the parties to arbitration requires that the discovery order and amendment order be deemed void ab initio as matters that should be left to the arbitrator.

III. CONCLUSION

The Superior Court erred in failing to compel all parties and all claims to arbitration. Defendants ask that the Superior Court's partial denial of the motion to compel arbitration be reversed. Further, Defendants ask that the Superior Court's orders granting Plaintiffs' motion to amend and Plaintiffs' motion to compel discovery be reversed as matters that should be decided in arbitration. Defendants also request costs as the prevailing party in this appeal.

DATED this __11__ day of December 2019.



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Attorney for Petitioners-Defendants

DECLARATION OF SERVICE

I hereby declare that on December 11, 2019, in Spokane, Washington, I caused the foregoing affixed document to be served on the following parties in the manner indicated:

Michael A. Maurer Lukins & Annis, PS 717 W. Sprague Ave., Ste. 1600 Spokane, WA 99201	VIA FIRST CLASS MAIL ☐ VIA EMAIL ☐ VIA HAND DELIVERY ☑ VIA FACSIMILE ☐
Todd Startzel Kirkpatrick & Startzel, P.S 108 N. Washington St., Ste. 201 Spokane, WA 99201	VIA FIRST CLASS MAIL ☐ VIA EMAIL ☐ VIA HAND DELIVERY ☑ VIA FACSIMILE ☐

I DECLARE UNDER THE PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

NIK ARMITAGE