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No. 54705-4

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

MATTHEW SETO,
Appellant

v.

AMERICAN ELEVATOR, INC.,
Respondent,

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
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ARGUMENT

A. MAR 6.2 Requires the Arbitrator to Serve the Arbitration Award Before the 20-Day Period for Requesting a Trial De Novo Begins.

Mr. Seto agrees with American Elevator to the extent that the language of MAR 7.1(a) must be interpreted literally and the 20-day period within which to request a trial de novo may not be extended. *See* MAR 7.1(a). As stated in his opening brief, Mr. Seto does not seek such an extension. Rather, he seeks a determination of when the 20-day period begins to run. Mr. Seto asks the Court to interpret MAR 6.2 as requiring the arbitrator to both file and serve the arbitration award before the 20-day period commences.

American Elevator, in contrast, asks that the Court construe MAR 6.2 as imposing only a cursory filing requirement. Such an interpretation is at odds with the plain language of the Rule. Furthermore, it renders filing “proof of service” a redundant and purposeless exercise. If actual service is not required, the proof of service requirement is indeed a nullity. Under any reasonable construction of the Rule, the requirement of proof of service must mean that actual service of the award is also required.

The additional language of MAR 6.2 confirms that filing is not perfected absent service of the award. MAR 6.2 permits the arbitrator additional time in which to file the award in complex cases or in which to

amend the award. MAR 6.2. The provision allowing additional time unequivocally restates the arbitrator's obligation *as both a service and filing requirement*. "On the arbitrator's application in cases of unusual length or complexity, the arbitrator may apply for and the court may allow up to 14 additional days *for the filing and service of the award.*" *Id.* (emphasis added). Similarly, service and filing are required in order for an amended award to have effect. "*The arbitrator may file with the court and serve upon the parties* an amended award to correct an obvious error made in stating the award if done within the time for filing an award ..." *Id.* (emphasis added).

Thus, the arbitrator's duty is stated in two ways within the same Rule. Under the first formulation, the arbitrator must file proof of service with the clerk. Under the second, the obvious inference embedded in the first formulation is added: the arbitrator must not only file proof of service, he or she must actually serve the parties. This, of course, is the only sensible interpretation of the Rule.

The service and filing requirements of MAR 6.2 are identical to those of MAR 7.1(a) and are stated in "virtually the same language."

Roberts v. Johnson, 137 Wash.2d 84, 91, 969 P.2d 446 (1999).

Nevertheless, American Elevator attempts to fashion an argument that the two rules require different acts on the sole basis that the language in the

first sentence of MAR 6.2 does not precisely mirror that in the first sentence of MAR 7.1(a). Brief of Respondent at 13. The Washington State Supreme Court has rejected this argument, finding that the drafters of the Mandatory Arbitration Rules intended that the two Rules have identical meanings and impose identical burdens on the relevant parties. *Id.*

American Elevator's reliance on *Metz v. Sarandos*¹ displays a fundamental misunderstanding of that case and of Mr. Seto's principal argument. Brief of Respondent at 16-18. In *Metz*, the trial court filed an order granting summary judgment for defendant on August 15. *Id.* at 359. At some time after that date, presumably on August 18, plaintiff's counsel received a copy of the order and on August 28 plaintiff filed a motion for reconsideration. *Id.* The trial court chose to start the 10-day period for filing a motion for reconsideration under CR 59(b) from the date on which plaintiff's counsel presumably received a copy of the order rather than on the date of judgment. *Id.* at 360.

The appellate court in *Metz* was not asked to determine whether the 10-day service and filing period could be extended.² Rather, it considered when the 10-day-period began to run. *Id.* at 359-60. At issue

¹ 91 Wn. App. 357, 957 P.2d 795 (1998).

² CR 59(b) provides, in part, "[a] motion for a new trial or for reconsideration shall be served and filed not later than 10 days after the entry of the judgment."

was the trial court's finding that "[i]t is inherently unfair to *commence* the 10-day service and filing requirement of Civil Rule 59(b) on the day judgment is entered where the parties do not receive a copy of such order on the same date the judgment is entered." *Id.* at 360 (quoting the trial court) (emphasis added). The trial court in *Metz* did not extend the 10-day period under CR 59(b); rather, it chose to start the period three days after entry of judgment. *Id.* Similarly, Mr. Seto does not seek an extension of the 20-day period under MAR 7.1(a). Rather, he asks that the 20-day period start only upon service of the award.

The appellate court in *Metz* based its ruling on CR 58(b), a timing and procedural rule providing: "Effective Time. Judgments shall be deemed entered for procedural purposes from the time of delivery to the clerk for filing ..." CR 58(b). The appellate court strictly interpreted this language and held that the trial court erred in postponing commencement of the 10-day period under CR 59(b) until service of the award – the opposite result that Mr. Seto seeks here.

However, Mar 6.2 and CR 58(b) differ in two significant aspects, warranting a contrary outcome here. First, MAR 6.2 states an affirmative obligation of the arbitrator: "The arbitrator *shall* file the award ... with proof of service ..." MAR 6.2 (emphasis added). CR 58(b), in contrast, states no such obligation. It is merely a procedural rule deeming an act as

completed upon the occurrence of an event. Whereas MAR 6.2 requires specific acts, CR 58(b) does no more than note a date on the calendar. Second, MAR 6.2 expressly commands the arbitrator to (1) file the award, (2) serve the award on the parties, and (3) file proof of service of the award. MAR 6.2. *See Roberts*, 137 Wash.2d at 91 (finding arbitrator must file proof of service to perfect arbitration award). CR 58(b) speaks only of the first act: delivery to the clerk for filing. CR 58(b). There is no service requirement under CR 58(b); there is no mention of proof of service.

Thus, the basis upon which the appellate court in *Metz* denied the plaintiff's request to toll the 10-day filing period is inapplicable here. The *Metz* plaintiff argued that she was entitled to impose a service requirement under a court rule that states no such requirement. This request was properly denied. Mr. Seto, on the other hand, asks that this Court interpret the *express* service requirement of MAR 6.2 as such. Mr. Seto does not dispute that the arbitrator filed the arbitration award on April 28, 2004. But unlike CR 58(b), MAR 6.2 does more than mark a date on the calendar. It sets forth specific duties the arbitrator must fulfill. One of those duties is service of the award upon the parties. Here, that duty was not fulfilled until April 29. Mr. Seto's request for a trial de novo, filed and served on May 19, is therefore timely.

B. Mr. Seto did not Receive Notice of the Award on April 28.

American Elevator argues that an ambiguous e-mail Mr. Seto received on April 28 started the 20-day period for filing and serving his request for a trial de novo under MAR 7.1(a). Brief of Respondent at 16. American Elevator believes this e-mail constitutes notice of the arbitration award under the Mandatory Arbitration Rules and the Civil Rules. This e-mail did not affirm a filing date – in fact it stated two *possible* dates. It also did not comply with service requirements under the Civil Rules.

An arbitrator's compliance with MAR 6.2 triggers a party's right to essentially appeal the arbitrator's award. The Washington State Supreme Court has likened this function to conferring jurisdiction upon a court and has separately declined to interpret MAR 6.2 as requiring less than actual service of the award. *Nevers v. Fireside*, 133 Wash.2d 804, 812 n.4, 947 P.2d 721 (1997); *Roberts*, 137 Wash.2d at 91. American Elevator has framed its Response in terms of an alleged failure on Mr. Seto's part to timely fulfill a filing duty. This argument ignores the fact that MAR 6.2 and 7.1(a) are more than mere procedural rules. These Rules also concern Mr. Seto's substantial rights that are indeed fundamental in nature. Proper notice, or at the very least notice that precisely stated the filing date, was essential in light of what is at stake for Mr. Seto. American Elevator's assertion that an informal and imprecise

communication is sufficient to deprive Mr. Seto of his right to access the courts not only contravenes the plain language of the Rules, it also offends the most fundamental concepts of fairness.

The California cases relied upon by Mr. Seto in his opening brief illustrate the folly of interpreting MAR 6.2 as requiring any less than service upon the parties. *See Domingo v. Los Angeles County Metro. Transp. Auth.*, 74 Cal.App.4th 550 88 Cal.Rptr.2d 224 (1999); *Oats v. Oats*, 148 Cal.App.3d 416 196 Cal.Rptr. 20 (1983). *Domingo*, in particular, demonstrates that a party might not receive notice of the award until after the 20-day period for filing a request for a trial de novo has expired. *Domingo*, 74 Cal.App.4th at 552. The *Domingo* court reached the obvious conclusion, under a rule nearly identical to MAR 6.2, that service of the award must be required so as to prevent the absurd result of penalizing a party for not appealing an arbitration that it did not know it had lost. Mr. Seto asks that this Court interpret MAR 6.2 in the same way so as to prevent similarly absurd outcomes.

American Elevator also suggests that the purpose of the Mandatory Arbitration Rules would be better served by interpreting MAR 6.2 as requiring Mr. Seto to check the court docket to ascertain the date on which the arbitrator filed the award. Brief of Respondent at 16, n.23. This would place an unnecessary burden upon Mr. Seto and potentially upon

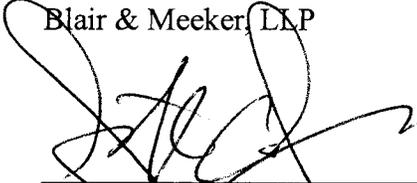
the court clerk. It also ignores the express language of MAR 6.2. The better construction of the Rule is to require the arbitrator to reconcile filing and service such that all parties, including the court, understand their rights and obligations without the necessity of collateral inquiry. *See Domingo*, 74 Cal.App.4th at 554, 88 Cal.Rptr.2d 224. Mr. Seto should not have to turn to the court docket or clerk to determine his right to a trial de novo. He should instead be able to rely on the plain language of the Court Rules and on papers and pleadings provided to him by the arbitrator. Here it was the arbitrator's e-mail that directly contributed to Mr. Seto's uncertainty about the filing deadline. Mr. Seto should not have to take on an extra burden to compensate for the arbitrator's mistake.

CONCLUSION

For all of the above reasons, Mr. Seto respectfully requests that this Court reverse the lower Court and grant his request for trial de novo.

DATED this 3RD day of DECEMBER, 2004.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 3rd day of December, 2004, I caused to be served this document to:

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I declare under penalty of perjury under the laws of the State of Washington this 3rd day of December, 2004, at Seattle, Washington.



Esther M. Booker

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