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NO. 54705-4

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

MATTHEW SETO, a single person,
Appellant,

v.

AMERICAN ELEVATOR, INC., a Washington corporation
Respondent.

BRIEF OF RESPONDENT

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I. ASSIGNMENT OF ERROR

Appellant, Matthew Seto, assigns error to (1) the trial court's June 4, 2004, order setting aside his request for a trial de novo, and (2) the June 4, 2004, Judgment Order and Cost Bill.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

MAR 7.1 requires a request for a trial de novo to be filed and served within 20 days after an arbitration award is filed with the clerk, together with proof of service of the award. Mr. Seto did not file his request for a trial de novo until 21 days after the arbitrator filed the award and proof of service with the superior court. Must Mr. Seto's request for a trial de novo be denied?

III. STATEMENT OF THE CASE

Mr. Seto filed suit against respondent, American Elevator, Inc., in King County Superior Court. (CP 11-13) The case was subsequently transferred to mandatory arbitration. (CP 12) Following an arbitration hearing on April 27, 2004, the arbitrator entered an award in favor of American Elevator. (CP 54-55) The arbitrator filed the

award on April 28 together with a certificate of mailing which provided, “I certify under penalty of perjury under the laws of the State of Washington that I mailed on this date [April 28] a copy of the ARBITRATION AWARD, properly addressed and postage prepaid” to counsel. (CP 54-55, 56)

The arbitrator also forwarded copies of the award and the certificate of mailing to counsel by e-mail on April 28. (CP 14) The e-mail stated the arbitrator would file the award no later than April 29. (CP 24) Mr. Seto’s attorney received the e-mail copy of the award on April 28 and received a copy in the mail on April 29.¹ (CP 23-24)

Mr. Seto filed a request for a trial de novo on May 19. (CP 1-3) On May 21, the Arbitration Department issued a Notice of Waiver of Right to Trial De Novo stating that a trial date would not be set because Mr. Seto had not

¹ Mr. Seto asserts he received, on April 28, (1) an unconfirmed copy of the arbitration award stating the date of service as April 29, and (2) correspondence from the arbitrator “expressly indicating the likely date of filing as April 29.” Brief of Appellant at 18. The first statement is not true. No date of service is stated. (CP 56) The second statement is also untrue, in that, according to the sworn declaration filed by Mr. Seto’s counsel, the e-mail did not state a “likely” date as between April 28 and April 29. (CP 24)

filed his request for a trial de novo within 20 days after the filing of the arbitration award. (CP 4) American Elevator then filed a motion to set aside Mr. Seto's request for a trial de novo. (CP 5-7) The court granted American Elevator's motion and entered judgment in favor of American Elevator. (CP 42-43, 44-46) Mr. Seto now appeals from these rulings. (CP 47-53)

IV. SUMMARY OF ARGUMENT

The arbitration rules do not require the arbitrator to show the award has been *received* by the parties; they only require the arbitrator to file proof the award has been *served*. The award was filed on April 28, together with proof of service. According to MAR 7.1, a request for a trial de novo must be served and filed no later than 20 days thereafter, and that deadline may not be extended. It is undisputed that Mr. Seto missed this deadline.

Mr. Seto argues, however, that the date for filing specified in MAR 7.1 is extended by the time required by service to be effected. The argument necessarily fails. Stated another way, the 20-day time period begins to run

from the time of filing, so long as proof of service accompanies the filing, regardless whether the service is not completed until later.

Mr. Seto's other arguments are unavailing. He had actual notice of the award on April 28. He did not know whether filing occurred on April 28 or April 29, but he had ready means to find out if he did not want to assume the earlier date. Literal application of MAR 7.1 is required by statute, supported by case law, and consistent with the evident public policy favoring arbitration and not favoring trial de novo.

In addition, because Mr. Seto did not improve his position following the arbitration, American Elevator is entitled to an award of attorney fees and costs incurred on appeal under MAR 7.3 and RAP 18.1.

V. ARGUMENT

A. Mr. Seto failed to timely file his request for a trial de novo.

MAR 7.1 sets forth the requirements for filing a request for a trial de novo following an arbitration award.

The rule provides:

Within 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 a trial de novo in the superior court along with proof that a copy has been served upon all other parties appearing in the case. *The 20-day period within which to request a trial de novo may not be extended.*²

It is undisputed the arbitrator in this case filed his award on April 28. It also is undisputed Mr. Seto did not file his request for a trial de novo until May 19, 21 days later. As both the Arbitration Department and the trial court correctly recognized, Mr. Seto's failure to comply with the requirements of MAR 7.1 precludes a trial de novo in this case.

B. The arbitration rules do not require actual receipt of the arbitration award or completion of service before the 20-day period set forth in MAR 7.1 begins to run.

Mr. Seto contends he complied with MAR 7.1 because the 20-day period to file a request for a trial de novo did not begin to run until he received the copy of the

² Emphasis added.

award served on him by the arbitrator.³ Alternatively, Mr. Seto asserts the 20-day period did not begin to run until service was complete—i.e., three days after the arbitrator mailed the award. Mr. Seto’s arguments are not supported by the plain language of the arbitration rules or Washington case law and must be rejected.

Mr. Seto cites both MAR 6.2 and MAR 1.3 in support of his assertion that the 20-day period to file his request for a trial de novo did not begin to run until April 29, the day he received the copy of the arbitration award served by the arbitrator. MAR 6.2 provides, “Within 14 days after the conclusion of the arbitration hearing, the arbitrator shall file the award with the clerk of the superior court, with proof of service of a copy on each party.” The arbitrator complied with MAR 6.2 by filing both the arbitration award and a certificate of mailing on April 28, one day after the arbitration hearing.

³ As noted above, Mr. Seto concedes he received an e-mailed copy of the arbitration award April 28.

Mr. Seto asserts, without citation to authority that MAR 6.2, “plainly require[s] the completed act of service rather than a mere statement of intent to serve or a statement that service has been attempted. Under MAR 6.2, the act of filing a certificate of mailing, absent completed service, is insufficient.” Brief of Appellant at 10. In fact, the plain language of MAR 6.2 requires no such thing. MAR 6.2 requires proof of service. The arbitrator complied with this rule by showing that he served Mr. Seto by mail. There is nothing in the language of MAR 6.2 requiring the arbitrator to show Mr. Seto received the arbitration award.⁴

The arbitrator also complied with the requirements of MAR 1.3. MAR 1.3(b)(2) provides, “After a case is assigned to an arbitrator, all pleadings and other papers shall be served in accordance with CR 5 and filed with the arbitrator.” MAR 1.3(b)(3) states, “Time shall be computed in accordance with CR 6(a) and (e).” It is not clear that MAR 1.3(b)(2) applies here, as the rule apparently

⁴ In fact, Washington law has long recognized that a certificate of mailing need not state that the addressee received the documents mailed. *See Shumate v. Ashley*, 46 Wn.2d 156, 159, 278 P.2d 787 (1955).

contemplates pleadings prepared by the parties, not the arbitrator. Regardless, the arbitrator complied with the requirements of MAR 1.3(b)(2). CR 5, which is incorporated in the rule, provides for service by mail.⁵ The rule further provides, “The service shall be deemed complete upon the third day following the day upon which they are placed in the mail” The rule also sets forth the requirements for proof of service by mail.⁶

There is no dispute that (1) the arbitrator could mail the arbitration award to the parties’ counsel or (2) the certificate of mailing filed by the arbitrator complied with the requirements of CR 5. Moreover, contrary to Mr. Seto’s apparent assertion, the incorporation of CR 5 into the arbitration rules does not mean that service must be “complete” before the 20-day period to file a request for a trial de novo begins to run. As noted above, MAR 7.1

⁵ CR 5(b)(2)(A) states, “If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid.”

⁶ CR 5(b)(2)(B) states, “Proof of service of all papers permitted to be mailed may be by . . . certificate of an attorney.” The rule then provides a format for a certificate of mailing, which is virtually identical to the certificate of mailing filed by the arbitrator in this case.

states such a request must be filed within 20 days “after the arbitration award is *filed* with the clerk.” If the 20-day period began to run when the award was *served*, Mr. Seto might have an argument. However, it clearly does not, and there is no basis for extending the 20-day period an additional three days because the arbitrator served Mr. Seto by mail.

Finally, MAR 1.3(b)(3) is not relevant here. As noted above, this rule incorporates CR 6(e), which states:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

In this case, Mr. Seto was required to file his request for a trial de novo within 20 days after the filing of the arbitration award and proof of service. Neither MAR 7.1 nor MAR 6.2 provides the deadline will begin to run upon service of the award; the deadline is triggered by filing. Thus, CR 6 simply does not apply here.

The cases cited by Mr. Seto do not support a contrary conclusion. In *Roberts v. Johnson*,⁷ the court considered whether an arbitrator's failure to file proof of service as required by MAR 6.2 tolled the time period to file a request for a trial de novo. The court concluded it did, stating, "The 20-day period begins to run only when both the award and proof of service thereof have been filed."⁸

In this case, it is undisputed the arbitrator filed both the arbitration award and the proof of service on April 28. Thus, there was no reason to toll the 20-day time period, and Mr. Seto's request for a trial de novo, filed 21 days later, was therefore untimely.

Mr. Seto also relies upon *Nevers v. Fireside, Inc.*,⁹ which is similarly distinguishable. In that case, the arbitrator entered an award in favor of the defendant on April 5. The plaintiffs filed a request for a trial de novo on April 25. They apparently mailed a copy of the request to

⁷ *Roberts v. Johnson*, 137 Wn.2d 84, 969 P.2d 446 (1999).

⁸ *Roberts*, 137 Wn.2d at 92.

⁹ *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 947 P.2d 721 (1997).

the defendant that same day but did not file a proof of service with the court. The trial court rejected plaintiffs' request for a trial de novo as untimely, and plaintiffs appealed.¹⁰

The supreme court upheld the trial court's decision, explaining that the plaintiffs' failure to comply with the strict requirements of MAR 7.1 precluded consideration of their request for a trial de novo. The court explained, "We are of the view that timely filing of a request for trial de novo of an arbitrator's decision in court ordered arbitration is necessary for the superior court to conduct a trial de novo."¹¹ The court added:

If we were to conclude that it is not necessary to timely file proof of service of the request for trial de novo in order to obtain a trial de novo in superior court, we would in essence be extending the time within which to request a trial de novo. This we cannot do because we would be contradicting the additional language in MAR 7.1(a) that "[t]he 20-day period within

¹⁰ *Nevers*, 133 Wn.2d at 807-08.

¹¹ *Id.* at 811.

which to request a trial de novo may not be extended.”¹²

The *Nevers* court also noted that the plaintiffs could have complied with the service requirement by mailing a request for the trial de novo. However, because both filing and service had to be accomplished within 20 days, and service by mail is not complete until the third day after mailing, the proof of service would need to state that the request was mailed no later than three days before the expiration of the 20-day deadline.¹³

This case is distinguishable from *Nevers* for a number of reasons. First, unlike the plaintiffs in *Nevers*, the arbitrator filed a proof of service with the trial court. Second, the issue in *Nevers* involved the *parties'* failure to timely file proof of service, not the *arbitrator's*. The *Nevers* court based its decision, at least in part, on the language in MAR 7.1 prohibiting extension of the 20-day deadline to file a request for a trial de novo. No such

¹² *Id.* at 812. The court also cited MAR 6.3, which allows the prevailing party in an arbitration to present a final judgment if no party has sought a trial de novo under MAR 7.1 within 20 days after the award is filed.

¹³ *Id.* at 810 n.3.

limiting language is included in MAR 6.2. Finally, the statement in *Nevers* that the language of MAR 7.1 “leads logically to a conclusion that copies of the request [for a trial de novo] must be served on the parties”¹⁴ does not apply to MAR 6.2 because of the differing language between the two rules. MAR 7.1 requires service of a request for a trial de novo within 20 days after the arbitration award has been filed. MAR 6.2 requires only that the arbitration award and proof of service be filed by the arbitrator within 14 days after the conclusion of the arbitration hearing. It does not require that service take place within that 14-day period.¹⁵ Stated another way, both MAR 6.2 and MAR 7.1 require that proof of service be filed with the court. However, MAR 7.1 requires service within a specified period of time, while MAR 6.2 does not. Mr. Seto fails to appreciate this distinction, and his reliance on the *Nevers* case is therefore misplaced.

¹⁴ *Nevers*, 133 Wn.2d at 811.

¹⁵ It is undisputed the arbitrator in this case filed the award and proof of service the day after the arbitration hearing, and counsel received a copy of the award by e-mail that day and received a copy by regular mail the next day.

On appeal, Mr. Seto also relies upon two cases from California to support his assertion that he timely filed a request for a trial de novo. These cases are factually distinguishable and conflict with Washington law. Thus, they do not provide support for Mr. Seto's position.

In *Oats v. Oats*,¹⁶ the arbitrator filed an arbitration award on November 13; he did not file a proof of service and did not, in fact, serve the parties at that time. On December 4, the superior court arbitration clerk served copies of the award on the parties by mail and filed a proof of service. On December 15, the superior court clerk served notice of entry of judgment on the parties by mail. Two days later, the defendant served and filed a request for a trial de novo. The defendant subsequently filed a motion to vacate the judgment against him, arguing his request for a trial de novo was timely. The trial court denied the defendant's motion, and he appealed.¹⁷ The court of appeals reversed, holding the 20-day period within which to

¹⁶ *Oats v. Oats*, 196 Cal. Rptr. 20 (Cal. Ct. App. 1983).

¹⁷ *Id.* at 21-22.

file a request for a trial de novo did not begin to run until “service of the award.”¹⁸

In *Domingo v. Los Angeles MTA*,¹⁹ the arbitrator filed an arbitration award June 17 and served it by mail that same date. However, the arbitrator sent defendant’s copy to an incorrect address. After the copy was returned by the post office, the arbitrator sent the award to defendant’s attorneys at their former address. On July 24, the attorneys learned of the award and immediately filed a request for a trial de novo. The court rejected the request as untimely and denied defendant’s subsequent request to set aside the arbitrator’s award and an ensuing judgment in favor of plaintiff.²⁰

On appeal, the defendant argued the 30-day period to file a request for a trial de novo did not begin to run until it received actual notice of the award. The court of appeals agreed, explaining “before a court can enter an arbitrator’s

¹⁸ *Id.*

¹⁹ *Domingo v. Los Angeles County Metro. Transp. Auth.*, 88 Cal. Rptr. 2d 224 (1999).

²⁰ *Id.* at 552.

award as its judgment, the parties must have notice of the award.”²¹

In this case, unlike *Oats* and *Domingo*, there can be no dispute Mr. Seto received actual notice of the arbitration award on April 28.²² There also is no dispute the arbitrator filed the award, together with proof of service, that same day. Thus, Mr. Seto was aware the arbitrator had ruled against him on April 28. Although he was not, on April 28, certain the award had been filed that day, he had notice of the award and that it would be filed then or the next day.²³

Moreover, Washington law makes clear that deadlines such as that set forth in MAR 7.1 may not be extended. In

²¹ *Id.* at 554.

²² Mr. Seto contends he did not receive “actual notice” of the arbitration award until he received a copy served in accordance with the requirements of CR 5. Brief of Appellant at 14. In support of this assertion, he cites a footnote in the *Nevers* decision. The footnote simply states that arbitration pleadings should be filed in accordance with the requirements of CR 5 and that service by mail is not deemed complete until the third day after mailing. *Nevers*, 133 Wn.2d at 810 n.3. The footnote says nothing about “actual notice.”

²³ Mr. Seto does not explain why he failed to check the court docket to ensure his assumption that the award would be filed April 29—even though the arbitrator’s e-mail clearly stated the award would be filed *no later than* April 29—was correct.

Metz v. Sarandos,²⁴ the court rejected the plaintiff's argument that the 10-day period for filing a motion for reconsideration began to run when the plaintiff received a copy of the order granting summary judgment in favor of the defendant. The trial court filed the order August 15. The plaintiff filed her motion for reconsideration 13 days later, on August 28. The trial court accepted the plaintiff's motion anyway, stating the 10-day service and filing requirement of CR 59 would be deemed to commence on August 18, the date the court assumed the plaintiff received the summary judgment order.²⁵ The trial court explained, "It 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."²⁶

The court of appeals reversed the trial court's decision, stating that the court had no discretionary

²⁴ *Metz v. Sarandos*, 91 Wn. App. 357, 957 P.2d 795 (1998).

²⁵ *Metz*, 91 Wn. App. at 359.

²⁶ *Id.* at 360.

authority to extend the time period for filing a motion for reconsideration.²⁷ In reaching this conclusion, the court noted that (1) judgments shall be deemed entered when they are filed and (2) CR 6(b) did not permit enlargement of the time for filing a motion for reconsideration.²⁸

In this case, MAR 7.1 provides that the 20-day period to file a request for a trial de novo begins to run when the arbitration award is *filed*. The rule further provides that the time period *shall not be extended*. Thus, as the court reasoned in *Metz*, the time to the request for a trial de novo began to run on April 28 and *cannot* be extended.

Finally, contrary to Mr. Seto's assertion, allowing him to file his request for a trial de novo one day late does not serve the purposes of the arbitration rules. As noted above, MAR 7.1 specifically states the deadline for filing such a request cannot be extended. Moreover, as Mr. Seto acknowledges, the purpose of the arbitration rules is to

²⁷ *Id.*

²⁸ *Id.*

reduce congestion in the courts.²⁹ See Brief of Appellant at 17.

The arbitration rules also evidence an intent to discourage parties from seeking a trial de novo. For example, MAR 7.3 states, “The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party’s position in the trial de novo.” The Washington courts have recognized that this provision is intended to “discourage meritless appeals.”³⁰

In this case, the purposes of the arbitration rules are best served by adhering to the plain and unambiguous language of MAR 7.1 requiring a request for a trial de novo to be filed within 20 days after filing of an arbitration award.

C. **American Elevator is entitled to recover its attorney fees and costs on appeal.**

As noted above, MAR 7.3 authorizes an award of attorney fees and costs when a party who appeals from an

²⁹ See also *Tran v. Yu*, 118 Wn. App. 607, 611, 75 P.3d 970 (2003).

³⁰ *Hedlund v. Vitale*, 110 Wn. App. 183, 187, 39 P.3d 358 (2002).

arbitration award fails to improve his position in a trial de novo. In *Wiley v. Rehak*,³¹ the Washington Supreme Court explained that this rule applies when a party requests a trial de novo but does not improve his position because he fails to comply with the requirements for proceeding to a trial de novo such as those contained in MAR 7.1.³²

In this case, as explained above, Mr. Seto is not entitled to a trial de novo because he did not comply with the 20-day time requirement set forth in MAR 7.1. Accordingly, he has not improved his position, and American Elevator is entitled to recover its attorney fees on appeal pursuant to MAR 7.3 and RAP 18.1.

VI. CONCLUSION

For the reasons set forth above, American Elevator respectfully requests that (1) the trial court's decision setting aside Mr. Seto's request for a trial de novo be DENIED, and (2) American Elevator be awarded its

³¹ *Wiley v. Rehak*, 143 Wn.2d 339, 20 P.3d 404 (2001).

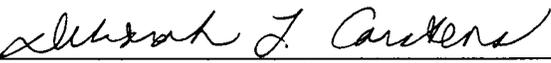
³² *Wiley*, 143 Wn.2d at 348; *see also Boyd v. Kulczyk*, 115 Wn. App. 411, 417, 63 P.3d 156 (2003).

attorney fees and costs on appeal.

DATED this 3rd day of November, 2004.

Respectfully submitted,

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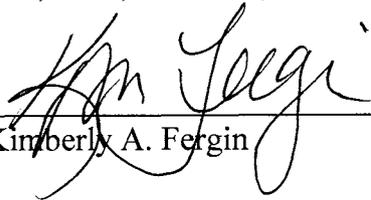
CERTIFICATE OF SERVICE

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

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- via hand delivery.
- via first class mail.
- via facsimile.

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



Kimberly A. Fergin

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