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Supreme Court No. ~~80584-9~~

SUPREME COURT OF THE STATE OF WASHINGTON

BLAKELEY COMMONS CONDOMINIUM ASSOCIATION,

Respondent,

v.

BLAKELEY VILLAGE, LLC,

Appellant.

APPLELLANT BLAKELEY VILLAGE, LLC'S OPPOSITION TO RESPONDENT'S MOTION TO SUPPLEMENT RECORD

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I. IDENTITY OF RESPONDING PARTY AND STATEMENT OF RELIEF REQUESTED

Appellant Blakeley Village, LLC ("Blakeley Village"), by and through its undersigned attorneys of record, hereby submits this Opposition to Respondent's Motion to Supplement Record. Blakeley Village respectfully requests that the Court deny Respondent's motion.

Respondent Blakeley Commons Condominium Association (the "HOA") has had continued access to Blakeley Village's files, from which the "new" evidence comes, dating back to no later than November 10, 2006.[1] The "new" evidence consists of contracts signed between the HOA's members and Blakeley Village, and so the HOA has *always* had access to the pertinent agreements. In any event, the HOA failed to take advantage of its access to Blakeley Village's files until October 10, 2007.[2] It apparently did not review and analyze the files, or its own members' records, until very recently. With oral argument in this consolidated appeal now less than two weeks away, the HOA's motion is a belated attempt to supplement the record with "new" evidence that it could have obtained and reviewed almost two years ago.

II. PROCEDURAL BACKGROUND

In July 2006, Blakeley Village moved the trial court to stay all of the HOA's claims — both the Washington Condominium Act ("WCA") claims and the non-WCA claims — based on arbitration provisions in the

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[1] Declaration of Daniel L. Dvorkin in Support of Appellant Blakeley Village, LLC's Opposition to Respondent's Motion to Supplement Record.
[2] *Id.*

original purchase and sale agreements related to each condominium unit at the Blakeley Commons Condominium (the "project").[3] On August 8, 2006, the trial court issued a stay of proceedings and postponed ruling on Blakeley Village's arbitration motion, pending the Court of Appeals' decision in Satomi Owners Association v. Satomi, LLC.[4]

After the Satomi decision was issued by the Court of Appeals, Blakeley Village renewed its motion to stay all of the Association's claims and compel arbitration, and the HOA moved to lift the stay.[5] The motions were fully briefed by both parties. On August 7, 2007, the trial court lifted the stay on proceedings, ruling that "[t]he Satomi decision controls," and denied "defendants [sic] request for mandatory arbitration on the Association's claims for breach of implied and express warranties of the Washington Condominium Act."[6]

The Order Granting Motion to Lift Stay did not expressly rule on Blakeley Village's motion to stay the non-Washington Condominium Act

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[3] *See* Defendant Blakeley Village, LLC's (Incorrectly Identified in Complaint as "Blakeley Commons, LLC") Motion to Stay Trial Court Proceedings and Compel Arbitration at 1:18-24, 3:6-10, 6:18-21, 14:16-19, 16:15-18. Clerk's Papers, pp. 153 – 168.

[4] *See* Order Granting Blakeley Village, LLC's Motion to Stay Trial Court Proceedings. CP, pp. 323-326.

[5] *See* Defendant Blakeley Village, LLC's (Incorrectly Identified in Complaint as "Blakeley Commons, LLC") Response in Opposition to Plaintiff's Motion to Lift Stay and Cross Motion to Compel Arbitration (the "Renewed Motion to Compel Arbitration") at 2:10-13, 6:13-15, 11:19-12:18. CP, pp. 348-554.

[6] *See* Order Granting Plaintiff's Motion to Lift the Stay on Proceedings and Deny Mandatory Arbitration of its WCA Claims (the "Order Granting Motion to Lift Stay"). CP, pp. 739-741.

("WCA") claims, which motion was based on Satomi's holding that the HOA's non-WCA claims in that case are arbitrable. Therefore, on August 8, 2007, Blakeley Village moved for clarification of the Order Granting Motion to Lift Stay.[7] The trial court granted Blakeley Village's motion for clarification and stayed trial court proceedings with respect to the HOA's non-WCA claims, pending arbitration of those claims.[8]

On September 4, 2007, Blakeley Village filed its Notice of Appeal to this Court for Direct Review.[9] Direct review by this Court was accepted and, on or about April 2, 2008, this appeal was consolidated with two other appeals concerning the same or similar issues, Satomi and The Pier at Leschi Condominium Assoc., LLC v. Leschi Corp.

On July 7, 2008, the HOA improperly filed with the trial court its Motion to Set Trial Date. The Motion to Set Trial Date was opposed by Blakeley Village.[10] On August 18, 2008, the trial court issued its Order Denying Motion to Set Trial Date. On August 26, 2008, the HOA moved

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[7] *See* Blakeley Village, LLC's (Incorrectly Identified in Complaint as "Blakeley Commons, LLC") Motion for Clarification of August 3, 2007 Order Granting Plaintiff's Motion to Lift the Stay on Proceedings and Deny Mandatory Arbitration of its WCA Claims. CP, pp. 742-747.

[8] *See* Order Granting Blakeley Village, LLC's (Incorrectly Identified in Complaint as "Blakeley Commons, LLC") Motion for Clarification of August 3, 2007 Order Granting Plaintiff's Motion to Lift the Stay on Proceedings and Deny Mandatory Arbitration of its WCA Claims (the "Clarification Order"). CP, pp. 750-752.

[9] *See* Blakeley Village, LLC's (Incorrectly Identified in the Caption as "Blakeley Commons LLC") Notice of Appeal to the Supreme Court of the State of Washington for Direct Review. CP, pp. 753-762.

[10] A copy of Blakeley Village's Opposition to Plaintiff's Motion to Set Trial Date is provided in the Appendix to this brief at pp. 1-43.

this Court to supplement the record on appeal with the Motion to Set Trial Date and all supporting declarations and exhibits.

Oral argument in this consolidated appeal is set for September 23, 2008.

III. STATEMENT OF GROUNDS FOR OPPOSITION TO RESPONDENT'S MOTION

A. RAPs 9.9 and 9.10 Do Not Apply to Respondent's Request to Supplement the Record with New Evidence.

The HOA seeks to supplement the record with its Motion to Set Trial Date, which was improperly brought before the trial court only two months ago. The Motion to Set Trial Date includes supporting declarations by unit owners, attached to which are portions of the unit owners' Purchase and Sale agreements. The argument the HOA is trying to make, at this late date and for the first time, is that a few unit owners cannot remember signing the Warranty Addendum in the Purchase and Sale Agreements. The HOA disingenuously claims that the portions of the Purchase and Sale Agreements it seeks to introduce were previously undiscoverable due to the stay on trial court proceedings, despite the subject agreements being between the HOA's own members and Blakeley Village, and the access to Blakeley Village's files that was long ago provided to the HOA. RAPs 9.9 and 9.10, relied on by the HOA, do not apply in this circumstance.

RAP 9.9 allows for supplementation of a report of proceedings. *Jackson v. Washington State Criminal Justice Training Commission* 43

Wn.App. 827, 831, 720 P.2d 457 (1986).[11] The trial court motions that led to this appeal were heard without oral argument. As indicated in Blakeley Village's Statement in Lieu of Arrangements, no narrative or verbatim report of the trial court proceedings was submitted to this Court.[12] The trial court record before this Court consists of the Clerk's Papers, containing written motions, responses, replies and trial court orders. RAP 9.9, concerning supplementation of a report of proceedings, does not apply to the HOA's request to supplement the record with its recent Motion to Set Trial Date.

RAP 9.10 allows a party to request that additional portions of an existing trial record be transmitted to the appellate court. *Buckley v. Snapper Power Equipment Co.*, 61 Wn.App. 932, 941, 813 P.2d 125 (1991); *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn.App. 590, 593, 849 P.2d 669 (1993) (RAP 9.10 "...pertains only to additions to the record of earlier trial court proceedings [that were] considered below."). The HOA's Motion to Set Trial Date does not represent "earlier trial court proceedings," nor was the motion "considered below." The Motion to Set

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[11] RAP 9.9 reads as follows:

> The report of proceedings may be corrected or supplemented by the trial court on motion of a party, or on stipulation of the parties, at any time prior to the transmission of the report to the appellate court. The trial court may impose the same kinds of sanctions provided in rule 18.9(a) as a condition to correcting or supplementing the report of proceedings after the time provided in rule 9.5.

[12] *See* Blakeley Village's Statement in Lieu of Arrangements, a copy of which is provided in the Appendix to this brief at pp. 44-45.

Trial Date was improperly brought before the trial court, which currently lacks jurisdiction in these matters, *over a year after the trial court proceedings at issue in this appeal had concluded.* Moreover, the materials included in the HOA's untimely Motion to Set Trial Date obviously were not considered by the trial court in issuing the order on review, for the trial court properly held that it lacked jurisdiction in light of the appeal pending for a year. RAP 9.10 clearly does not apply.

The HOA's Motion to Supplement the Record is a belated attempt to introduce evidence and make new arguments that it inexcusably failed to bring before the trial court at the appropriate time.

B. Respondent's Request to Introduce New Evidence Does Not Meet the Narrow Criteria Enumerated in RAP 9.11.

As noted above, the HOA is attempting to supplement the record with its Motion to Set Trial Date, and supporting declarations, attached to which are portions of four Purchase and Sale Agreements relating to units at the project. The Motion to Set Trial Date was improperly brought before the trial court only two months ago.

Although the HOA has not invoked RAP 9.11, that provision also does not permit the too late and improper supplementation now sought by the HOA. RAP 9.11 is a limited remedy under which this Court may allow the record to be supplemented with new evidence if *all* of the following six criteria are met: (1) additional proof of facts is needed to fairly resolve the issues on review; (2) the additional evidence would probably change the decision being reviewed; (3) it is equitable to excuse a party's failure to

present the evidence to the trial court; (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive; (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive; and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court. *Harbison*, 69 Wn.App. at 593-94; *see also Lamon v. Butler*, 112 Wn.2d 193, 199, 770 P.2d 1027 (1989)("...we deny the LaMons' motion to supplement the record with this evidence pursuant to RAP 9.11, there being no excuse for their failure to present the evidence to the trial court below.").

The HOA's request does not satisfy several of RAP 9.11's mandatory criteria.

The HOA's request does not meet the first necessary factor, additional proof of facts being needed to fairly resolve the issues on review. ***The issue of whether each original unit purchaser signed a Warranty Addendum is not on review.*** Attached to the Declaration of Lis Soldano in Support of Blakeley Village, LLC's (Incorrectly Identified in the Caption as "Blakeley Commons LLC") Motion to Compel Arbitration and Stay Proceedings are signature pages on the Warranty Addendum relating to the original purchase of 103 of the 106 residential units at the project.[13]

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[13] *See* Declaration of Lis Soldano in Support of Blakeley Village, LLC's Motion to Compel Arbitration and Stay Proceedings, CP, pp. 13-130. In its Motion to Set Trial Date, the HOA claims that four people do not recall signing Warranty Addendums. Two of the four of these people purchased *commercial* units. Only the residential units at the project are at issue in the lawsuit. Blakeley Village requests further opportunity to brief this issue, if necessary.

Ms. Soldano's declaration states that it was Blakeley Village's standard practice to require a signed Warranty Addendum in relation to each sale and the remaining three signature pages have apparently been misplaced. The HOA, in response to Blakeley Village's initial motion to compel arbitration and in response to Blakeley Village's renewed motion to compel arbitration, filed approximately one-year later, did not attempt to rebut Ms. Soldano's declaration. Accordingly, the trial court, in ordering arbitration, held on the record before it that arbitration was required "based on (1) the arbitration provisions in the Warranty Addendums to the Purchase and Sale Agreements entered into by the Blakeley Commons owners..."[14] In short, the trial court held that each owner signed a Warranty Addendum.

RAP 5.1(d) requires that a party seeking cross review must file a notice of appeal or a notice for discretionary review within the time allowed by rule 5.2(f). The HOA has not filed a notice of appeal or notice of discretionary review and has thus not complied with RAPs 5.1(d) and 5.2(f). A party seeking cross review must also include in its brief a separate concise statement of each error it contends was made by the trial court, together with the issues pertaining to the assignments of error. RAP 10.3(a)(4); *see also Fluor Enters., Inc. v. Walter Constr., Ltd.*, 141

[14] *See* Order Granting Blakeley Village, LLC's (Incorrectly Identified in Complaint as "Blakeley Commons, LLC") Motion for Clarification of August 3, 2007 Order Granting Plaintiff's Motion to Lift the Stay on Proceedings and Deny Mandatory Arbitration of its WCA Claims (the "Clarification Order"). CP, pp. 750-752.

Wn.App. 761, 771, 172 P.3d 368 (2007)("But Fluor did not file a cross-appeal or assign error to the trial court's consolidation order as required by RAP 5.1(d) and RAP 10.3(a)(4). Thus, this issue is not properly before us."). The HOA's Counterstatement of Issues in its Brief of Respondent does not assign error to the trial court's finding that each original unit owner signed a Warranty Addendum.[15] The HOA notes, in passing and without challenging Ms. Soldano's testimony that each owner signed a Warranty Addendum, that Blakeley Village acknowledges that three of the signed Warranty Addendums can no longer be located.[16] The HOA's three-sentence observation, made in passing in the body of its appeal brief, without assigning error to the trial court's decision on the issue and without filing any notice of cross appeal, is not sufficient to bring the issue within the scope of review before this Court. The first necessary factor under RAP 9.11 is plainly not met.

Thus, the evidence with which the HOA seeks to supplement the record does not speak to any issue on review. In its motion, the HOA makes no argument to the contrary. As the evidence the HOA seeks to introduce does not speak to any issue on review, there is no probability

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[15] The HOA's Counterstatement of Issues reads, in its entirety, as follows:

A. Does the FAA preclude judicial remedies for Washington Condominium Act claims?

B. Do arbitration agreements entered into by original condominium purchasers bind a condominium association that is not a party to the agreements?

C. Is a unilateral arbitration provision unconscionable?

Brief of Respondent, p. 3.

[16] Brief of Respondent, p. 11

that the evidence will change any decision concerning an issue on review, and so the second necessary factor under RAP 9.11 is also not met.

The third necessary factor under RAP 9.11 is whether it is equitable to excuse the HOA's failure to present the "new" evidence to the trial court at the appropriate time. This factor is also not met. The portions of the Purchase and Sale Agreements attached as exhibits to the unit owner declarations in support of the HOA's Motion to Set Trial Date come from Blakeley Village's files, without any explanation for why the HOA did not simply use the copies in the possession of its own members! Further, despite the stay on formal discovery in the trial court proceedings, Blakeley Village was amenable to providing the HOA access to Blakeley Village's files from the time of completion of a privilege review prior to November 10, 2006.[17] To arrange for a review of Blakeley Village's files, all the HOA had to do was ask. The HOA waited until October 10, 2007 to begin its review of Blakeley Village's files.[18] Had it diligently pursued a review of Blakeley Village's files, the HOA would have obtained the "new" evidence up to eight months prior to Blakeley Village's Renewed Motion to Compel Arbitration (putting aside, again, the fact that the HOA could simply have obtained the documents from its own members) and it could have presented the evidence to the trial court at that time. It is not

[17] Declaration of Daniel L. Dvorkin in Support of Appellant Blakeley Village, LLC's Opposition to Respondent's Motion to Supplement Record.
[18] *Id.*

equitable to allow the HOA to supplement the record with this "new" evidence at this extremely late date. The third necessary factor is not met.

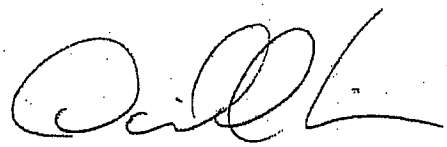
It would not be unfair to decide the case solely on the evidence already taken in the trial court. The sixth necessary factor is not met. In its original Motion to Compel Arbitration and Stay Proceedings, Blakeley Village submitted to the trial court executed Warranty Addendum signature pages for 103 of the 106 units at the project. The declaration of Lis Soldano, to which the signatures pages were attached, states that it was Blakeley Village's standard practice to require a signed Warranty Addendum for the completion of each sale and that the 3 missing signature pages had been misplaced. Despite having continued access to Blakeley Village's files since approximately November 10, 2006 and having finally begun its document review on October 10, 2007, the HOA made not one argument regarding missing signatures on the Warranty Addenda until it filed its belated, improper Motion to Set Trial Date. With only fourteen days remaining before oral argument in this appeal, the HOA seeks to introduce additional evidence concerning signatures on the Warranty Addendum. Under these circumstances, it is appropriate and fair to decide the case solely on the evidence previously taken in the trial court.

Blakeley Village respectfully requests that the Court deny the HOA's motion to supplement the record.

C. **If the Court is Inclined to Allow the "New" Evidence, Blakeley Village Should be Afforded the Opportunity to File a Supplemental Brief Regarding the Same.**

As a matter of fairness, if the Court is inclined to allow the record to be supplemented as requested by the HOA, Blakeley Village requests the opportunity to file a supplemental brief with this Court regarding the "new" evidence.

RESPECTFULLY SUBMITTED this 9th day of September, 2008



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