

71503-8

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NO. 71503-8-I

WASHINGTON COURT OF APPEALS
DIVISION I

DEATLEY BROS., LLC, *et al.*,

Appellants,

v.

DARLING SONS INT'L, LLC,

Respondent.

APPELLANTS' BRIEF

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ASSIGNMENTS OF ERROR

A. The Court Commissioner, when entering judgment in favor of Respondent, failed to consider lesser sanctions for Appellants' procedural error of failing to confirm the matter for trial.

B. The Court Commissioner abused his discretion when he failed to consider lesser sanctions for Appellants' procedural error of failing to confirm the matter for trial.

STATEMENT OF THE CASE

This matter proceeded through mandatory arbitration under the Mandatory Arbitration Rules in Snohomish County Superior Court. The matter was heard by the arbitrator in September, 2012. Two arbitration awards were issued in favor of the Plaintiff/Respondent named above.

Appellants/Defendants filed for a trial de novo and the matter was tentatively set for trial on January 6, 2014. Counsel for Defendants failed to correctly calendar the procedural requirement of confirming the trial date and believed that the matter would be again rescheduled as a result of ongoing conflicts with civil and criminal cases involving Defendant Alan DeAtley in the State of Colorado. Accordingly, Defendants failed to confirm the matter for trial. Pursuant to Snohomish County Local Mandatory Rule 7.2(b), if the matter is not confirmed for trial, the

opposing party may move for entry of judgment on the arbitrator's award, and Plaintiff did so.

The Motion for Entry of Judgment was noted and heard on January 15, 2013. The Court Commissioner heard arguments from counsel and believing the court had no other option, and without considering lesser sanctions, entered a judgment in favor of Plaintiff.

ARGUMENT

A. Snohomish County Local Mandatory Arbitration Rule 7.2(b) is silent as to what options the court has available when a party fails to confirm a matter for trial.

The Court Commissioner noted that the courts resist forfeiture and deciding cases on the basis of procedural difficulties is hard to do.

“We all went to law school. Probably one of the typical things grilled into our heads is that courts abhor forfeiture, so deciding cases on the basis of procedural difficulties is hard for me to do, but I think under the facts, I think that's what we have to do here. The rules mean what they say, and without getting to the substances of this case, I think the rules justify the request for judgment on the arbitration award.” *Verbatim Report of Proceedings*, p. 5, lines 15-22.

Counsel for Defendants pointed out to the court that the rule is silent as to what course of action is available to the court. The Commission in response stated the following:

“The commissioners don't have any authority on trial matters. But I think it's correct that under the rules, as I understand them, if the trial de novo requested doesn't go forward, I think we're required

to enter judgment on the underlying arbitration award, which is what I've done." *Verbatim Report of Proceedings*, p. 6, lines 3-8.

Snohomish County Mandatory Arbitration Rule 7(b) states:

(b) If the trial de novo is not confirmed, the opposing party may move for entry of judgment on the arbitrator's award upon proper notice.

The rule provides a procedural path forward. The rule is silent on what options are available to the court when a party fails to confirm a trial date beyond the option of granting the prayed for relief. Nothing in the rule states that the court must grant the motion or is precluded from considering other lesser sanctions in response to the procedural error. However, the Commissioner believed that the Rule offered no other option and entered judgment in favor of Plaintiff.

B. The Court Commissioner, when entering judgment in favor of Plaintiff, failed to consider lesser sanctions for Defendants' procedural error of failing to confirm the matter for trial.

Although noting generally the courts' dislike for forfeiture as a remedy, it is clear from the Verbatim Report of Proceedings that the Court Commissioner did not consider lesser sanctions for Defendants' procedural failure to confirm the trial date. Washington courts have made clear their rejection of the most severe sanction without first considering lesser sanctions. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wash.2d 674, 41 P.3d 1175, 1184-1185 (2002).

Additionally, the court is expected to make clear for the record the reasoning behind the sanction so that meaningful review can be had on appeal. *Rivers* at 1180; *Magana v. Hyundai Motor America*, 167 Wash.2d 570, 590, 220 P.3d 191 (2009). The basis for the sanction should be stated on the record and proportional to the violations and circumstances of the case. *Magana* at 590.

C. The Court Commissioner abused his discretion when he failed to consider lesser sanctions for Appellants' procedural error of failing to confirm the matter for trial.

The Appellate Court reviews the use of sanctions under an abuse of discretion standard that gives the trial court wide latitude in determining appropriate sanctions. However, Defendants argue that the absence of any consideration on the record of lesser sanctions is an abuse of that standard. *Smith v. Behr Process Corp.*, 113 Wash. App. 306, 324, 54 P.3d 665 (2002); *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 494, 933 P.2d 1036 (1997).

D. Conclusion

Snohomish County Local Mandatory Arbitration Rule 7.2(b) is silent as to what options are available to the court in the event a party fails to confirm a matter for trial. The Court Commissioner believed that no option existed other than to enter judgment in favor of Plaintiff and failed to consider a lesser sanction. Defendants seek to have the matter

remanded, the judgment vacated, and the court to determine a lesser sanction, if any, for Defendants' inadvertent failure to confirm the matter for trial.

Respectfully submitted this 13th day of June, 2014.

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