

66032-2

66032-2

NO. 66032-2-I

---

COURT OF APPEALS OF THE  
STATE OF WASHINGTON

---

LIGHTWEIGHT STEEL FRAMING 2007 LTD.,  
a Washington corporation

Appellant,

vs.

W.G. CLARK, CM, INC., a Washington corporation;  
BRIX CONDOMINIUM, LLC, a Washington  
limited liability company; et al.

Respondents.

---

**REPLY BRIEF OF APPELLANT  
LIGHTWEIGHT STEEL FRAMING 2007 LTD.**

---

Sean B. Malcolm, WSBA No. 36245  
VALDEZ MALCOLM PLLC  
Attorneys for Appellant Lightweight Steel  
Framing 2007 Ltd.

5400 Carillon Point  
Kirkland, Washington 98033  
(206) 659-9514

2011 MAY 31 AM 11:03  
FILED  
COURT OF APPEALS  
STATE OF WASHINGTON

Appellant Lightweight Steel Framing 2007 Ltd. (“LSF”) hereby replies to the Response Brief of Respondents.

**A. The Dismissal Without Prejudice On Summary Judgment Is An Appealable Order.**

The trial court’s order dismissing the underlying lawsuit without prejudice on summary judgment, and denying Appellant’s motion to compel arbitration due to alleged failure to comply with procedural requirements is appealable in this case. The issue of compliance with procedural requirements for initiating arbitration is for the arbitrator to decide, not a trial court. *Verbeek Prop., LLC v. GreenCo Environmental, Inc.*, 159 Wn. App. 82, 84-85, 246 P.3d 205 (2010). Appeal of an order denying a motion to compel arbitration (which the trial court implicitly did in this case) is may be filed as a matter of right under RAP 2.2(a)(3). *Id.* at 86. Respondents do not argue that the arbitration clause in the Agreement between the parties is inapplicable or unenforceable; rather, they argue that Appellant failed to comply with a condition precedent to arbitration. The Court dismissed Appellant’s action on that ground and simultaneously implicitly denied Appellant’s motion to compel arbitration (which was the sole purpose of the lawsuit). Respondents seek to delay or avoid the arbitration which they originally demanded in order to avoid paying Appellant for the balance of its previously submitted invoices.

In addition, a dismissal without prejudice is an appealable order under RAP 2.2 when the effect of the order is to render refiling futile or conditions of the order have the effect of making the dismissal with

prejudice. RAP 2.2(a)(3); *Sherry v. Sherry*, 622 P.2d 960 (Ak. 1981). In this case, Appellant contends that it already satisfied any applicable condition precedent under section U.3 by providing Respondents with its summary of claim, including invoices, change orders, and other documentation. Appellant is left without a means to bring Respondents to arbitration as Respondents can simply continue to assert that whatever information Appellant has supplied or may supply in the future does not comply with a condition precedent to arbitration (which is in any event a question for the arbitrator). As such, the Court's dismissal of Appellant's lawsuit and motion to compel arbitration is in effect a dismissal with prejudice.

**B. The Trial Court Erred in Dismissing Appellants' Complaint and Appellant's Motion to Compel Arbitration.**

Respondents argue that Appellant never complied with the condition precedent to filing a lawsuit. In support of this assertion, Respondents cite the Declaration of Mike Ducey (CP 15-16), the President of W.G. Clark; the Reply Declaration of Matt Adamson (CP 89-91), counsel for Respondents who declared that Appellant did not comply with the condition precedent based on counsel's "review of my client's files and my determination, based on experience as an attorney;" and Declaration of Matt Adamson (CP 8-9, 14), attaching an email between counsel wherein Mr. Adamson cites his belief that Appellant has not complied with U.3. There is no declaration in the record from the material party – Respondent Brix Condominium, LLC

– indicating whether BRIX received materials that complied with s. U.3 (which, in any event, is a legal conclusion for the arbitrator). As a result of the Assignment between Respondent W.G. Clark and Brix, Brix assumed the duties and obligations of W.G. Clark prior to completion of Appellant’s contract, and, as a result, notification under s. U.3 was properly made to Brix, as stated in the Declaration of Al Malcolm (CP 61-73), President of Appellant.

Mr. Adamson’s declaration of his own personal knowledge (presumably under penalty of perjury) as Brix’s counsel based on his “review of the file” and “experience as an attorney” that Brix did not receive Appellant’s materials, pursuant to s. U.3, is not sufficient on summary judgment and in response to Appellant’s motion to compel arbitration to overcome Mr. Malcolm’s declaration to the contrary. This is especially true given the standard of review on summary judgment that requires that the facts be viewed in the light most favorable to Appellant (ie. Mr. Malcolm’s declaration overcomes Respondents’ counsel’s declaration); and Washington’s strong public policy in favor of arbitration. Washington has a strong policy in favor of arbitration and any doubts about arbitration should have been resolved in favor of arbitration to avoid the wasteful litigation and games forced by Respondents. *Heights at Issaquah Ridge v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 403-05, 200 P.3d 254 (2009).

Contrary to the assertion of Respondents, Appellant complied with section U.3, or at least clearly raised material issues of fact concerning compliance (if the issue is even properly before the Court given RCW 7.04A.060(3)), and provided evidence of this compliance in the Declaration of Al Malcolm. The “review” or “experience” of Respondents’ counsel does not meet Respondents’ burden in respect of Respondents’ motion for summary judgment (to provide evidence that Brix, not W.G. Clark, did not receive Appellant’s statement of claim), or Appellant’s motion to compel arbitration. Appellant’s duty in responding to Respondents’ summary judgment was simply to raise a genuine issue of material fact, which is precisely what the Declaration of Al Malcolm did.

**C. Appellants Motion to Compel Arbitration Should Have Been Granted Because Respondents Demanded Arbitration So S. U.3 Of The Agreement Does Not Apply to Appellant**

Respondents seek to avoid arbitration by forcing Appellant to compel arbitration and then arguing that Appellant has not complied with a condition precedent to the litigation brought to compel arbitration, leaving Appellant mired in the very procedural muck that RCW 7.04A.060(3) was written to avoid. Respondents concede that they initiated arbitration. Respondents also concede that both parties have agreed to arbitration. However, despite these circumstances, Respondents now seek to avoid arbitration with procedural games, primarily the assertion that Appellant has not complied with section U.3. Section U.3 clearly states that the requirement of Appellant to

submit its claims prior to mediation or arbitration only applies if Appellant (the “Subcontractor” under the Agreement) files a claim in mediation or arbitration. CP 38. However, in this case, Respondent filed the demand for arbitration, not Appellant (Subcontractor). CP 12. There is no provision in s. U.3, or elsewhere in the Agreement, that requires the Appellant (Subcontractor) to submit its claims prior to arbitration where Respondent files the claim in arbitration, as in this case. This case raises the uniquely strange circumstance where a party demands arbitration, the other party agrees, and the demanding party then subsequently refuses to comply with the provisions of the agreement to arbitrate.

In this case, there is no requirement for Appellant to submit its claim, pursuant to s. U.3 (even though Appellant contends it did, per the Declaration of Al Malcolm), because Respondent demanded arbitration. The condition precedent clause is only activated if Appellant demands arbitration.

**D. The Trial Court Should Have Compelled Arbitration  
Despite Any Alleged Defects In Appellant’s Cross Motion**

Appellants are asking this Court to assist it with compelling the arbitration that the parties agreed to and which Respondents now seek to avoid or delay (likely to sell the development and transfer money to other entities). Washington’s strong public policy in favor of arbitration seeks

to avoid procedural games and costly litigation in favor of an efficient arbitration process.

Respondents assertion that Appellant never responded to Brix's suggestion for arbitration and mediation dates is untrue and offensive. Appellant not only responded but contacted mediators and arbitrators and provided Respondents with dates. CP 75 (Declaration of Sean B. Malcolm). While Appellant's counsel did not print out select emails like Respondents' counsel, Appellant has made repeated attempts to facilitate and effect mediation and arbitration. This Court should award Appellant its attorney's fees expended to bring this appeal to force Respondent to mediate and arbitrate this dispute as agreed.

There is nothing that prevents Respondent from agreeing to mediate and arbitrate this dispute today, as they demanded and to which they agreed, other than Respondent's obvious disingenuous attempts to delay, obfuscate and avoid having to address Appellants meritorious claims amounts on unpaid invoices. Respondents' counsel disingenuously attempts to argue that Respondents are ready to "set dates for mediation and arbitration" (despite not selecting any of the dates Appellant's counsel previously provided) "if LSF complies with U.3 in the next month." In reality, Respondents have no intention of setting dates to arbitrate, as s. U.3 is inapplicable and Appellant already provided Respondents with its claim. Respondents rest on the creation of a phantom condition precedent, Appellant's compliance with which Respondents will never concede. Respondents argue that Appellant has refused to comply with s. U.3, yet

gloss over the fact that Respondents demanded arbitration and in that circumstance U.3 is entirely inapplicable to Appellant by its clear limiting language.

Whether or not Appellant's cross-motion to compel arbitration was properly noted (which it was), the trial court still should have compelled arbitration. While Appellant demanded a stay of proceedings and arbitration in s. 7.2 of its Complaint, Courts have even compelled arbitration even where a contractual right to arbitration was not referenced in a Complaint. *Verbeek*, 159 Wn. App. at 84. "Courts must indulge every presumption in favor of arbitration, whether the problem at hand is construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 87, *citing Issaquah Ridge*, 148 Wn. App. at 407. In this case, the Court should have simply determined that the parties had an enforceable right to arbitrate (not to mention that Respondent conceded at oral argument that it demanded arbitration and the parties had agreed to arbitration), and let the arbitrator decide whether procedural requirements had been met. *Verbeek*, 159 Wn. App. at 88. As in *Verbeek*, the trial court in this case exceeded its authority by ruling on a procedural issue and failing to compel arbitration in concert with Washington's overriding public policy in favor of arbitration.

**E. Respondent Brix Waived Its Right To Demand Compliance With U.3 By Demanding Arbitration**

Respondent Brix demanded arbitration, as Brix conceded at oral argument, and the parties have agreed to arbitrate. As such, the parties should be compelled to arbitrate and, pursuant to RCW 7.04A.060(3), it shall be for the arbitrator to determine whether s. U.3 applies to a claim by Appellant and, if so, whether Appellant has satisfied the provision.

**F. Appellant Is Entitled To An Award Of Costs And Fees**

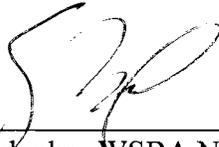
Appellant should be awarded its costs and fees incurred in bringing this appeal, including its attempts to compel Respondents to arbitration. The basis for an award of costs and fees is CR 11, RAP 14, and RAP 18.1, and RAP 18.9. Respondents continued attempts to engage in extended litigation simply to avoid the mediation and arbitration to which they previously agreed and thereby avoid Appellant's meritorious claim on unpaid invoices, warrant an award of costs and fees to Appellant.

This appeal is not frivolous for the reasons stated herein. Section U.3 does not apply to the parties' agreement to mediate and arbitrate because Respondents demanded the arbitration. In any event, Appellant submitted its claim to Respondents, as indicated in the Declaration of Al Malcolm; yet, Respondents have conveniently and arbitrarily determined that those submittals do not comply with s. U.3, notwithstanding its inapplicability. Respondents are clearly playing games in contravention of Washington's strong public policy in favor of efficient mediation and arbitration of disputes, and Respondents irresponsibly obfuscated the procedural issues sufficiently before the trial court to prevail on summary

judgment and avoid being compelled to arbitrate. This behavior, which makes a mockery of Washington's policy in favor of arbitration, should not be permitted to continue.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of May, 2011.

VALDEZ MALCOLM PLLC

By  \_\_\_\_\_  
Sean B. Malcolm, WSBA No. 36245  
Attorneys for Appellant Lightweight Steel Framing  
2007 Ltd.

### **Certificate of Service**

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 27<sup>th</sup> day of May, 2011:

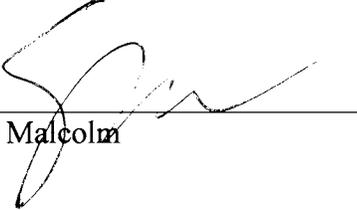
**Fax and U.S. Mail, First Class, postage prepaid:**

**Counsel for For Respondents W.G. Clark, et al.**

Matt Adamson, Esq.  
Jameson Babbitt Stites & Lombard, PLLC  
999 Third Avenue, Suite 1900  
Seattle, WA 98104-4001  
FAX: (206) 292-1995

I declare that I am employed in the office of Valdez Malcolm PLLC, and I am over the age of eighteen years.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Sean B. Malcolm