

COURT OF APPEALS DIVISION I,  
THE STATE OF WASHINGTON

Kimaco, L.L.C., a Washington,  
Limited Liability Company,

Appeal No.  
66453-1-I

versus

Snohomish No.  
10-2-03946-3

Wright Hotel Development, Inc.,  
A Nevada corporation, and  
successor in interest to  
Wright Development West  
Coast, LLC,  
Appellant

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**REPLY BRIEF OF APPELLANT**

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ORIGINAL

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## **I. Introduction**

In reply to Respondents Brief, the Appellant (“Wright”) restates that an agreement for the parties to arbitrate did exist, that legal authority supports Wright’s position, that the trial court erred in finding there is no enforceable agreement to arbitrate, and that Respondents request for attorneys’ fees is improper.

## **II. Argument**

Respondent wrongly asserts the language in the contract does not require Mukilteo Hotel to Arbitrate. The rules of contract<sup>1</sup> construction direct the Court to the opposite conclusion.

### **A. Distinguishing Case Law Cited by Mukilteo Hotel and Highlighting That Parties’ “Agreed” to Arbitrate**

The dispute resolution provision of the contract begins with language of obligation: “In the event that Contractor believes it has a Claim against MHL for additional compensation, additional time

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<sup>1</sup> Wright would be only exhausting the court with contract construction rules (intent of party’s control and must be gathered from the contract as a whole, *Jones v. Strom Const. Co., Inc.*, 84 Wn.2d 518, 520, 527 P.2d 1115 (Wash. 1974)) and Washington’s policy of “indulg[ing] every presumption in favor of arbitration.” *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wash.2d 293, 301, 103 P.3d 753 (2004), as this is certainly standard considerations clear to this Court, and is also briefed in Wright’s original appellate brief.

or some other remedy arising out of or in connection with the Agreement, Contractor shall give written notice to MHL of such Claim . . . .” *CP* at 273, emphasis added. It continues: “A notice of a Claim shall set forth, at a minimum, the following. . . .” *Id.*, emphasis added. And Wright is further obligated thus: “Contractor shall continue to perform the work without interruption or delay, provided the MHL pays all undisputed amounts due contractor.” *Id.*, emphasis added. The foregoing terms created obligations on the part of Wright and outlined the process for Wright to assert its claims. What follows are the obligations regarding arbitration and dispute resolution.

The clause regarding arbitration creates an affirmative obligation to arbitrate. The language, however, is markedly different than the obligation creating language before it. Instead of using “shall” which creates a unilateral obligation such as in the cases where MHL shall pay for the work performed, and where Wright shall maintain builder’s risk insurance, in this instance the

term of obligation is “agrees.”<sup>2</sup> An agreement is a “mutual understanding between two or more persons about their relative rights and duties regarding past or future performances.” *Black’s Law Dictionary* 67 (Bryan A. Garner ed., 7<sup>th</sup> ed. West 1999).

Respondent, as the party opposing arbitration has the burden of proving the agreement is not enforceable. *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 814, 225 P.3d 213 (Wash. 2009). Respondent asserts that there is no mutuality of obligation, but curiously argues that the arbitration clause is a one-sided arbitration agreement, citing *Satomi Owners Ass’n v. Satomi* in support of this assertion. In *Satomi*, the issue was whether the homeowner associations were bound by arbitration agreements signed by individual unit owners. *Id.* at 808. The association argued it was not required to arbitrate because the individual owners were not agents of the association. *Id.* at 809. The association also charged that the arbitration agreement is unenforceable because it is both procedurally and substantively

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<sup>2</sup> Specifically, the clause states: “Contractor agrees to resolve any disputes arising from the agreement . . . by binding arbitration to be held in King County, Washington, in accordance with the rules of the American Arbitration Association then in effect,” where “any disputes” includes all claims, including failure of Mukilteo to pay and subsequent lien claims by Wright. See *CP* at 248 (The Contract defined Claims to specifically liens).

unconscionable and lacks mutuality of obligation. *Id.* at 813. Neither of these issues is instructive in this case. First, unlike *Satomi* there is no agency issue here because Mukilteo executed the Contract for itself and on its own behalf. Second, there is no allegation that the arbitration clause fails for lack of mutuality. In fact, there are no facts to support such a charge. Indeed, the one issue that would have been instructive in this instance, the mutuality of obligation, the *Satomi* court declined to consider. *Id.* at 816.

Where Respondent has attempted to instruct the Court regarding mutuality of obligation, Respondent directs the Court to *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (Wash. 2004). In *Keystone*, the court examined three types of agreements: (1) an agreement to agree, (2) an agreement with open terms, and (3) a contract to negotiate. *Id.* at 175-78. Specifically, Respondent directs the Court to the latter. Although only tangentially related to agreements to arbitrate, one may be able stretch the contract to negotiate to include arbitration agreements.

In *Keystone* the Court concluded that “under Washington contract law, a specific course of conduct agreed upon for future

negotiations is enforceable when it is contained in an existing substantive contract.” *Id.* at 177 (Citing *Badgett v. Security State Bank*, 116 Wash.2d 563, 807 P.2d 356 (1991)). Here the two minimum elements required under a contract to negotiate are present: (1) a specific course of action is indicated by the rules of the American Arbitration Association; and (2) an existing substantive contract in the form of the Contract. *CP* at 262. Respondents cite *Keystone* as legal support of their contention that the obligations of the parties are indefinite. The plain language of the agreement contained in the Contract shows an agreement to arbitrate and a specified course of action that Contractor and Mukilteo as signatories to the Contract are to follow to arbitrate any disputes under the agreement.

B. Construction of the arbitration provisions and the contract as a whole requires finding an enforceable agreement to arbitrate so as to be reasonable and to carry out intent and the purpose of the arbitration agreement.

To carry out the purpose of the arbitration clause and the dispute Resolutions Section of the Contract, Respondent’s mutual promise to submit to arbitration must be implied in construction of the Contract. The foundation of Respondent’s argument is that because MHL was not specifically named in the clause agreeing to

arbitration, that it has no obligation to arbitrate. This interpretation of the law is incorrect. As the Washington Supreme Court in *Reeker v. Remour* observed:

"It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied." 40 Wn.2d 519, 523, 244 P.2d 270 (Wash. 1952) (quoting *Lewis v. Atlas Mutual Life Ins. Co.*, 1876, 61 Mo. 534, 538).

This clause before the Court is such occasion. Here, the consideration of Wright's promise to arbitrate was the implied promise of Respondent to likewise agree to arbitrate - a promise for a promise. The argument that it was lacking in mutuality, and that, therefore, the appellant cannot be required to perform it, makes no legal sense. In this instance, Wright's obligation to arbitrate as described in the arbitration clause can only be satisfied by Respondent's corresponding act of submitting to arbitration. This is precisely the instance where contract law will clearly and conclusively presume or imply such a promise on the part of the promisee as if it had been expressly set forth. See *J. D. Harms, Inc. v. Meade*, 186 Wash. 287, 291, 57 P.2d 1052 (Wash. 1936) (Where

the court concluded that “If the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do, or allow to be done, the act or things necessary for the completion of the contract, will be necessarily implied.” Quoting *Black v. Woodrow*, 39 Md. 194).

C. Under recognized Washington law all ambiguities must be resolved in favor of arbitration and against Mukilteo Hotel, because Mukilteo Hotel Drafted The Contract.

If there exists within a contract an ambiguity, that ambiguity must be resolved against the party who prepared the contract. *Jones, Inc.*, 84 Wn.2d 520.

Following the rules of contract construction, when an ambiguity exists that ambiguity must be resolved against the party who drafted the contract. In this instance, the contract was drafted by Mukilteo Hotel, L.L.C. CP at 245, Affidavit of Wright Hotel Development, Inc., Paragraph 5. While Respondent maintains that the contract was mutually drafted, Mukilteo Hotel’s Shaiza Damji stated that Wright through its attorney made multiple edits and mark ups to the contract. CP at 175, Declaration of Shaiza Damji, Paragraph 5. However exhibit C of her Affidavit, an email

from Mr. Goodman, Mukilteo's attorney to Mr. Cohen, Wright's attorney, indicates that Contract originated with Mukilteo and Mukilteo should be assumed to be the drafter of the Contract for the purposes of contract construction absent Respondent meeting its burden of proof to show otherwise. *CP* at 222, Shaiza Damji Affidavit Ex. C, see *Chemical Processors, Inc. v. Port of Seattle*, 67 Wn.App. 74, 834 P.2d 88 (Wash.App. Div. 1 1992) (where the Port was assumed to be the drafter of the lease because they drafted the initial version of the lease although evidence showed that Chemical Processors reviewed the draft, had its attorneys review the draft, proposed several changes, and there was no evidence showing who was the source of the ultimate language).

D. All presumptions must favor arbitration and support a finding that an enforceable agreement to arbitrate exists.

In this instance, all presumptions favor arbitration. Respondent correctly stated that Washington State has a strong policy in favor of arbitration. Respondent's Brief 8 (Apr. 11, 2011). The party opposing arbitration is the party who bears the burden to show that the agreement to arbitrate is not enforceable. *Zuver*, 153 Wn.2d 302.

Washington Courts indulge every presumption in favor of arbitration. In cases such as this one, where the construction of the contract language is at issue or whether some other defense to arbitrability is asserted, if the dispute can fairly be said to assert a claim covered by the arbitration agreement, any court inquiry must and the parties ordered to arbitrate. *Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Group, Inc.*, 148 Wn.App. 400, 403, 200 P.3d 254 (Wash.App. Div. 1 2009), RCW 70.04A.070(2). Here, as described above, the plain language of the contract and a fair and reasonable application of established contract construction principles and law indicate that a valid and enforceable agreement to arbitrate exists.

Respondent has failed to meet its burden of proof to show that the agreement to arbitrate is not enforceable. Respondent has failed to identify any particularity in the agreement that renders the agreement to arbitrate unenforceable, rather Respondents seeks only to excuse itself from performing as promised. Respondent has failed to raise contractual defenses to the agreement, except perhaps a passing reference to unconscionability, which even if properly made, would fail. Unconscionability is a defense for the promisor to avoid a contract, not the promisee. Further, unconscionability

requires lack of mutuality. Mutuality exists in this instance. Both parties are signatories to the contract. Both parties exchanged promises predicated upon performance of the other party. The promise to arbitrate is another such promise exchanged for a promise.

In light of the above presumptions in favor of arbitration and against the party opposing arbitration, the trial court erred in granting Respondent's Motion Regarding No Obligation to Arbitrate.

E. Attorneys Fees:

Mukilteo Hotel requests an award of reasonable attorney fees and expenses in the event it prevails on this appeal. In such event, this request should be denied.

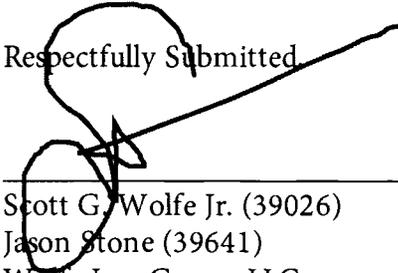
RCW 4.84.330 provides that "In any action on a contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party...shall be entitled to reasonable attorney's fees." Importantly, however, this

statute also defines the term “prevailing party” as “the party win whose favor *final judgment* is rendered.” *Emphasis ours.*

Wright and Mukilteo Hotel are in the middle of a \$4 million construction lien dispute, and this Court’s decision on the issue of arbitration will in no way be a final judgment on the merits of their case.

Dated: May 11, 2011

Respectfully Submitted,



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**DECLARATION OF SERVICE**

Scott Wolfe Jr. declares as follows: (1) That I am over the age of eighteen and not a party herein; and (2) On the 11<sup>th</sup> day of May, 2011, I caused to be served copies of the foregoing Reply Brief by Appellant, addressed as follows:

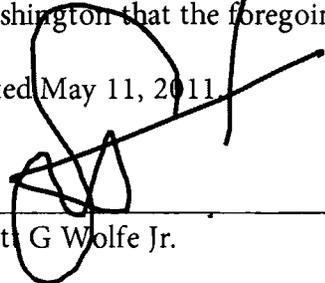
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated May 11, 2011

  
\_\_\_\_\_  
Scott G Wolfe Jr.