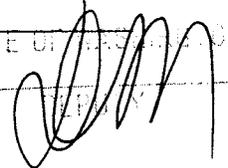


FILED
COURT OF APPEALS
DIVISION II

NO. 37092-1-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY 

S&S CONSTRUCTION, INC., a Washington corporation,

Appellant,

v.

ADC PROPERTIES, LLC, a Washington limited liability company;
HIMANSHU NIGAM, an individual; CHAN HAN, an individual;
Community Property of HIMANSHU NIGAM and ZANQETTA
NIGAM; Community Property of CHAN HAN and KATHY HAN;
and DOES 1-10,

Respondent.

APPELLANT'S REPLY BRIEF

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2 Am. & Eng. Enc. Of Law (2d Ed.) p. 6967
6 Williston on Contracts, § 19296
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I. INTRODUCTION

The arbitrator's only source of authority to issue an award was the contract between Appellant and Respondent. That contract required an award within 30 days. The arbitrator never sought an extension of his contract authority. Appellant never consented to extend the arbitrator's contractual authority and expressly objected, noting both the expiration and revocation of authority. Months later the arbitrator finally sent a notice of award. "Upon the face of the record, the court appeared to be without jurisdiction to affirm the award, because it was made without the time agreed upon by contract." *Jordan v. Lobe*, 34 Wash. 42, 50, 74 P. 817 (1904). However, the trial court here erroneously confirmed the award that was submitted 180 days after the evidentiary hearing.

Arbitrators are required to make disclosures before conducting a hearing. The arbitrator did not make required disclosures until after making an initial ruling and after commencement of the evidentiary hearing. In fact, at least one disclosure was not made until months after the evidentiary hearing when the arbitrator initiated a telephone conference for the express purpose of making an additional belated disclosure, finally revealing that he had previously served as a mediator for defendant. The arbitrator refused to respond to Appellant's request for disclosure regarding the extent of ADR business he performs in disputes

involving Davis Wright Tremaine. The arbitrator's refusal to provide requested disclosures, failure to provide timely disclosures, and non-disclosure of known relationships establishing "justifiable doubt," a reasonable inference of the presence of bias or the absence of impartiality, and circumstances under which the arbitrator "is presumed to act with evident partiality under RCW 7.04A.230(1)(b)" under RCW 7.04A.120.

The arbitrator called his delay "unconscionable." Rather than acknowledge the responsibility of the arbitrator to make disclosures, to perform his obligations in a timely manner, and to request an extension of contractual authority when it expires, Respondent has fashioned arguments that would immunize the arbitrator and make the aggrieved party bear the consequences of the arbitrator's performance failures. This outcome fosters concealment rather than fair disclosure while condoning costly delay where there should be efficient resolution. That type of outcome would discourage Washington citizens from utilizing ADR. Arbitrators should be directed to issue decisions when required by contract or else seek an extension of their contractual authority. Likewise, arbitrators should be required to make requested and known disclosures before a hearing. Reversal and vacatur is necessary here to accomplish that end. There is no harm done by requiring arbitrators to follow the law.

Respondent argues, without authority, that Appellant should have objected sooner. Appellant objected months before the Arbitrator issued a notice of award. The arbitrator's June letter was not a notice of award. The agreement to postpone the trial court's scheduled trial date was not a stipulation to extend additional contractual authority to the arbitrator. The problem here is not that Appellant should have objected sooner; rather, the problem here is that the arbitrator should have made disclosures much earlier, should have issued an award much earlier, and short of that, should have sought an extension of contractual authority.

The prejudice to Appellant is severe. Appellant is insolvent as a direct result of this project. Rather than receive a fair resolution, the trial court saddled Appellants' with an award from an arbitrator who 180 days later had no recollection of what happened at the hearing, failed to recognize the significant testimony of Appellant's first and critical witness William Chang regarding compensable changed conditions on the project, rejected in full Appellant's expert witness while accepting everything from Respondent's expert, and accepted Respondent's counsel's flawed illustration as the factual basis for a damage award while obviously forgetting the arbitrator's own comment when the illustration was presented. This arbitrator issued a biased award unduly favoring the law firm and party for whom the arbitrator previously worked, previously

served as arbitrator, and previously served as mediator, none of which relationships were timely disclosed. This was not justice. This is not the process required by Washington law or the contract entered into by the parties. Reversal and vacatur is necessary and appropriate here.

II. SUMMARY OF FACTS

In early 2007, the arbitrator, Mr. Stew Cogan, recognized the applicable rules for the contractual arbitration of disputes between Appellant and Respondent.¹ Mr. Cogan had been requested to write a reasoned decision and he acknowledged the rules that required an award with 30 days.²

The arbitrator's contract authority expired on May 5, 2007. Having stipulated to arbitrate outside of AAA, the parties had not paid the administrative fee to AAA and AAA was not available to resolve any disputes regarding the arbitration.

The trial court had stayed litigation pending arbitration; however, a trial date continued to exist on the docket nonetheless. In order to preserve the right to return to court when appropriate, the parties twice stipulated to an Order Continuing Trial Date.³

¹ CP at 98-100, 102-03, and 105-110.

² *Id.*

³ CP 5 and 12.

On October 2, 2007, Appellant received the notice of award dated September 28, 2007. Over Appellant's long-standing objections and long since expiration of contractual authority for the arbitrator to issue an award, the trial court confirmed this award on November 9, 2007.⁸

III. REPLY

A. An Arbitrator's Authority Expires At the End of a Time Limitation Fixed By Contract.

Appellant recited the fundamental principle that arbitrators derive their authority from the consent of contracting parties. Respondent presents nothing to the contrary. Respondent's arguments miss the point and are distractions from clearly stated and well established law.

It is, of course, the general rule that persons proceeding under an arbitration, valuation, or appraisal agreement, are limited by the authority conferred upon them by the contract of the parties, and that to be binding, their report must be within the time limit fixed by the contract. 6 Williston on Contracts, § 1929.

Hegeberg v. New England Fish Co., 7 Wn.2d 509, 520, 110 P.2d 182 (1941).

It has long been the law in Washington that an arbitrator's authority terminates at the conclusion of the time period fixed by contract for providing an award.

⁸ CP at 340-43.

On June 25, 2007 the arbitrator sent a letter that by the arbitrator's explanation "is not an award, nor does it form any portion of the award."⁴ On June 29, 2007 Appellant repeated objections that had been previously discussed by lodging formal objections, specifically noting the expiration and revocation of the arbitrator's contractual authority.⁵ All Appellant's submissions from that point forward were under protest of the arbitrator's expired authority.

On July 31, 2007 the arbitrator initiated a telephone conference for the express purpose of making an additional disclosure, this time revealing that the arbitrator had a prior relationship with Respondent having previously served as a mediator in a dispute involving Respondent's principal.⁶ A later submitted declaration from Respondent's Dr. Han failed to create any recollection from the arbitrator of ever having made this disclosure before the July 31 telephone conference.

Appellant requested further disclosures from the arbitrator regarding his ongoing ADR business relationship with the law firm where he was previously employed. The arbitrator refused to respond to this request for further disclosures.⁷

⁴ CP at 119.

⁵ CP at 138.

⁶ CP at 178 and 212.

⁷ CP at 188 and 220.

It is not necessary for us to inquire why this limitation was placed in the contract. The parties agreed to it, and thus limited the time within which the arbitrators were bound to make their award. The rule governing awards where the time is fixed by the contract of submission is stated in 3 Cyc. p. 631, as follows: 'Whenever by the terms of the submission, either at common law or under rule of court, the award is required to be made within a specified time, the authority of the arbitrators terminates upon the expiration of the time specified.' *See, also, 2 Am. & Eng. Enc. Of Law (2d Ed.) p. 696.*

Jordan v. Lobe, 34 Wash 42, 48, 74 P. 817 (1904).

Our courts are diligent to deny to arbitrators authority not conveyed to them by the consenting parties.

Our rationale for denying authority to order consolidation is that arbitration stems from a contractual, consensual relationship. RCW 7.04; *Thorsgaard Plumbing & Heating Co. v. County of King*, 71 Wn.2d 126, 426 P.2d 828 (1967).

Balfour, Guthrie & Company, Ltd. v. Commercial Metals Co., 93 Wn.2d 199, 202, 607 P.2d 856 (1980).

Parties are free to adopt arbitration provisions from other states:

Here Commercial Metals and Balfour agreed to arbitration in Texas, and to be bound by the laws of that state. Balfour and Coeur d'Alene agreed to arbitrate in California and to be bound by the laws thereof. The court should not meddle with those contractual provisions even though we might fashion a more expedient, efficient and economical remedy. "(A) person can be compelled to arbitrate a dispute only ... in the manner in which, he has agreed so to do." *Marsala v. Valve Corp. of America*, 157 Conn. 362, 365, 254 A.2d 469, 470 (1960).

Balfour, Guthrie & Co., 93 Wn.2d at 202. Likewise, parties are free to adopt time limitations established by the Construction Industry Arbitration rules of the American Arbitration Association.

Arbitration is consensual and contractual in nature. *Balfour, Guthrie & Co. v. Commercial Metals Co.*, 93 Wn.2d 199, 607 P.2d 856 (1980). The statute recognizes that the parties may, as they have here, establish a time for the award in the arbitration agreement. The dispute clause of the respective subcontracts did not set forth a time limit in terms of specific days or weeks. However, "The parties to an arbitration fix the time within which an award must be made, either by a specific agreement or by accepting the rules of an agency referred to in their arbitration clause. Parties enjoy considerable freedom in this regard." M. Domke, *The Law & Practice of Commercial Arbitration*, s 29.01 (1968); [citation omitted].

The dispute clause of the subcontracts provide that "either party may demand that the dispute be submitted to arbitration in accordance with the rules of the American Arbitration Association." Further, the stipulation for consolidation of the hearings specified that the Construction Industry Arbitration rules of the AAA were to govern the arbitration, and no claim is now made that those rules are inapplicable.

We must give effect to the parties' clear manifestation of intent to conduct the arbitration in accordance with the CIA rules and to be bound by those rules.

Lent's, Inc. v. Santa Fe Engineers, Inc., 29 Wn. App. 257, 261, 628 P.2d 488 (1981) (holding enforceable 30-day rule from AAA-CIA provisions).

Here, the parties entered a contract that included AAA-CIA's 30-day limitation for arbitrator's to issue their awards. The arbitrator acknowledged that he was bound by the rules that contain that time

limitation. Under applicable law, the arbitration's authority terminated and expired when the time limitation elapsed. Under well established Washington law, any subsequent award was null and void due to the lack of any underlying contractual authority for the arbitrator. *See Jordan v. Lobe*, 34 Wash. 42, 74 P. 817 (1904); *accord Hegeberg v. New England Fish Co.*, 7 Wn.2d 509, 110 P.2d 182 (1941) and *Balfour, Guthrie & Company, Ltd. v. Commercial Metals Co.*, 93 Wn.2d 199, 202, 607 P.2d 856 (1980) and *Lent's, Inc. v. Santa Fe Engineers, Inc.*, 29 Wn. App. 257, 261, 628 P.2d 488 (1981). The arbitrator was notified that his authority had expired and was revoked. The arbitrator exceeded his contractual authority by proceeding to produce a notice of award months after expiration of his authority and after being notified that Appellant did not consent to extend the arbitrator's authority. The arbitrator exceeded his authority and RCW 7.04A.230(1)(d) requires vacatur.

Respondent's argument fails to acknowledge the line of Washington cases that recognizes and upholds the right held by parties to provide by contract a time limitation for arbitration awards. *Godfrey v. Hartford Casualty Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001) is not contrary because it says nothing to upset this line of cases and did not itself involve a time limitation. Instead, that dispute involved a question of whether certain subjects had been submitted to arbitration and the

ramifications of a *trial de novo* clause. The Supreme Court recited approvingly of *Thorsgaard Plumbing*, 71 Wn.2d 126, a case relied upon by *Balfour, Guthrie & Company, Ltd. v. Commercial Metals Co.*, 93 Wn.2d 199. The Supreme Court in *Godfrey* said nothing contrary to its decisions in *Jordan v. Lobe*, 34 Wash. 42, 74 P. 817 (1904), *Hegeberg v. New England Fish Co.*, 7 Wn.2d 509, 110 P.2d 182 (1941), or *Balfour, Guthrie & Company, Ltd. v. Commercial Metals Co.*, 93 Wn.2d 199, 202, 607 P.2d 856 (1980). It would have been a dramatic reversal of established authority to say that parties can no longer specify the time limitation for an arbitrator to provide an arbitration award, that issue was not presented in *Godfrey*, and it would be inappropriate to deem *Godfrey* to have overturned that line of cases *sub silentio*. Likewise, Respondent's recitation to *St. Paul Insurance Companies v. Lysis*, 6 Wn. App. 205, 492 P.2d 575 (1972) is similarly misplaced. That decision did not involve a time limitation agreed upon by contract. Instead, *St. Paul* considered "procedural safeguards" but the long established substantive right to fix time limitations is not a mere procedural safeguard.

B. Formal Objections Were Lodged Long Before the Notice of Award Was Issued And This Is Not a Waiver Case.

A waiver is a voluntarily relinquishment of a known right. This is not a waiver case. In contrast, Appellant took express action to formally

record objections regarding expiration and revocation of contractual authority. Appellant took these actions months before a notice of award was finally issued by the arbitrator. Respondent attempts to argue waiver by implication, but that argument fails in light of Appellant's express and open act of recording ongoing objections to the arbitrator's authority. Washington caselaw provides guidance on when a waiver by implication or silence argument might be argued. In *Lent's, Inc. v. Santa Fe Engineers, Inc.* the AAA acknowledged the expiration of its contractual authority and sent a letter requesting an extension. 29 Wn. App. At 263. There, the party neither agreed nor objected. On those facts, where there had been a specific acknowledgment of the expiration of authority and request for an extension, the party that failed to agree or object was deemed to have waived rights and extended additional authority. That is not this case. Here, the arbitrator failed to recognize the expiration of his authority, failed to seek additional authority, and Appellant lodged an express objection regarding the expiration and revocation of the arbitrator's authority.

C. The Arbitrator Has Burden to Make Disclosures Before Hearing And the Facts Here Are Sufficient to Establish a Presumption of Partiality.

“[T]he affirmative duty of disclosure lies with the arbitrator.”
Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197, 1204 (11th Cir.

1982)(affirming vacation of arbitration award). Further: "An arbitrator must disclose a potential conflict as soon as it becomes apparent; otherwise, delay and concealment would be encouraged." *University Commons-Urbana, Ltd. V. Universal Constructors, Inc.*, 304 F.3d 1331, 1344 (11th Cir. 2002)(vacating and remanding arbitration award).

Defendant ADC concedes that disclosures were not made at least until the time of the evidentiary hearing. By this point in time, parties had invested substantial time and money. On those facts, it is inappropriate to burden an aggrieved party with an obligation to make an immediate objection because there are more practical considerations at play.

Also relevant is whether Meyerson delayed disclosing the meeting until it was unreasonable for Universal and Reliance to object to his participation in the arbitration. An arbitrator must disclose a potential conflict as soon as it becomes apparent; otherwise, delay and concealment would be encouraged. *Cf. Levine*, 675 F.2d at 1204 ("To hold ... that [a party] waived [its] right to contest the alleged impartiality prior to arbitration would put a premium on concealment.") ...Meyerson claims he met with Chapmen after he was appointed to the arbitration panel, but the parties disagree on when Meyerson informed them of this meeting; both University Commons and Meyerson claim that this disclosure occurred at the onset of the arbitration, while Universal and Reliance assert that Meyerson's announcement came during the second set of hearings. If the district court finds that Meyerson delayed making his disclosure until the arbitration had proceeded to the point that, given the amount of funds and resources they had invested in the proceeding, Universal and Reliance, could not, as a practical matter, afford to object to Meyerson continuing as a member of the arbitration panel,

then the court may well decide that Meyerson's disclosure was insufficient to avoid vacatur.

University Commons-Urbana, Ltd. v. Universal Constructors, Inc., 304 F.3d at 1344. The correct viewpoint for a waiver determination is what facts were known prior to arbitration. "The court also correctly found that appellees did not waive their objection because: (1) they possessed insufficient knowledge of facts possibly indicating bias prior to arbitration, ... and (3) the affirmative duty of disclosure lies with the arbitrator." *Middlesex Mutual Ins. Co. v. Levine*, 675 F.2d at 1204.

This is not a case where the issue is waiver of objections that should have been made before an arbitration. Instead, this is a case where an arbitrator refused and failed to make disclosures. Under RCW 7.04A.120 the non-disclosure of a "known relationship" means that the arbitrator "is presumed to act with evident partiality under RCW 7.04A.230(1)(b)." Here, vacatur is appropriate for the disclosure failures.

IV. CONCLUSION

The trial court's decision to confirm the arbitration award should be reversed, the award vacated, and the matter remanded for further proceedings.

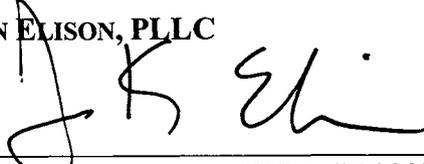
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DATED this 21 day of ~~May~~ ^{June} 2008.

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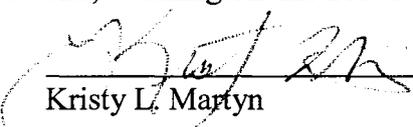
PROOF OF SERVICE

I certify under penalty of perjury that on the 21st day of July, 2008,
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