

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

DEPUTY

No. 39921-1-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

BUSINESS SERVICES OF AMERICA II, INC.,
assignee of Natkin/Scott, a joint venture,

Appellant,

v.

WAFERTECH, L.L.C.,

Respondent.

BRIEF OF APPELLANT

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A. Introduction

This appeal raises the issue of whether trial courts are required to follow the civil rules regarding dismissal of an action for want of prosecution. Appellant Business Services of America II (“BSA”) is seeking a ruling that CR 41(b)(1) applied to this action after this court previously remanded the action in 2005. The trial court ruled it did not. If CR 41(b)(1) applied after remand, the trial court erroneously dismissed BSA’s \$1.5 million lien claim for want of prosecution. BSA seeks reversal of the dismissal and remand for adjudication of its claim.

In a prior appeal of this action, this court ruled that the trial court erroneously granted summary judgment in favor of defendant WaferTech on BSA’s lien claim. *BSA v. WaferTech*, No. 28886-9-II (2005). This court remanded the action to the trial court for adjudication of the lien claim.

In 2009, the trial court dismissed the action for want of prosecution, even though BSA had noted the matter for trial prior to WaferTech filing a motion to dismiss. CR 41(b)(1) precludes dismissal for want of prosecution if the party notes the matter for trial prior to a hearing on a motion to dismiss.

The trial court decided it was not bound by the constraints of CR 41(b)(1). Instead, it relied on its inherent authority to dismiss and

purported to exercise its discretion to dismiss BSA's claim. It did so despite unanimous appellate court decisions that CR 41(b)(1) limits a trial court's authority to dismiss for inaction, and precludes the exercise of any discretion. The trial court's apparent basis for ignoring the rule was its erroneous and unsupported determination that CR 41(b)(1) did not apply actions after they are remanded from the appellate court.¹

This brief will show that the trial court erred in not applying CR 41(b)(1) to WaferTech's motion to dismiss. BSA is entitled to a reversal of the dismissal and remand to a different trial court judge.

B. Assignments of Error

Assignments of Error

1. The trial court erred when it dismissed BSA's claim to foreclose its mechanic's lien against WaferTech's property.

2. The trial court erred when it awarded WaferTech \$52,014.50 in fees and \$2,133.51 in costs as the prevailing party under RCW 60.04.181.

¹ The trial court did not give a reason for why it was not bound by CR 41(b)(1). The only basis WaferTech provided to the trial court for not being bound by CR 41(b)(1) was that it did not apply after remand.

Issues Pertaining to Assignments of Error

1. Does CR 41(b)(1) provide the exclusive means for a trial court to dismiss BSA's claim based on Natkin/Scott's failure to prosecute the action? (Assignment of Error No.1)

2. Does CR 41(b)(1) apply to this action after the Court of Appeals remanded BSA's lien foreclosure claim for further adjudication? (Assignment of Error No. 1)

3. Did the trial court have authority or discretion under CR 41(b)(1) to dismiss BSA's claims for want of prosecution? (Assignment of Error No. 1)

4. Does BSA's inaction after remand constitute "dilatatoriness" which would be subject to the trial court's inherent authority to dismiss an action? (Assignment of Error No. 1)

5. Did the court abuse its discretion in determining the amount of reasonable attorney fees and costs awarded to WaferTech as prevailing party under RCW 60.04.181? (Assignment of Error No. 2)

6. Should this action be remanded to a different trial court judge? (Assignments of Error Nos. 1 and 2)

7. Is BSA entitled to attorney fees on appeal? (Assignments of Error Nos. 1 and 2)

C. Statement of the Case

WaferTech is the owner of a semiconductor plant in Clark County. CP 22. One of the subcontractors on the construction of the plant was Natkin/Scott.² CP 71. Natkin/Scott recorded a lien for amounts it claimed it was owed, and initiated this action against WaferTech in the Clark County Superior Court to foreclose its lien. *Id.*

The trial court granted summary judgment in favor of WaferTech on Natkin/Scott's lien claim. CP 22. BSA appealed. *Id.* This court reversed the summary judgment in favor of WaferTech on the lien foreclosure claim. *Id.* In 2005, this court remanded the lien claim to the trial court for further adjudication. *Id.*

BSA's claim was acquired by an entity known as Salem Capital, which also acquired claims by Scott Co., one of the members of Natkin/Scott. CP 71. Salem was pursuing Scott Co.'s multi-million dollar claims on projects in Las Vegas, represented by BSA's former counsel in this action. *Id.*

Salem eventually filed for bankruptcy. *Id.* Joseph Guglielmo, Scott Co.'s former president, acquired the right to pursue BSA's claim in this action, in 2008. *Id.* BSA's former counsel of record withdrew on

² BSA acquired the claims of Natkin/Scott arising out of the WaferTech project, including the lien foreclosure claim that is the subject of this action.

May 16, 2008. CP 42. Guglielmo promptly sought counsel to represent him in the prosecution of BSA's claim in this action. CP 71.

No action was taken by any party in this action until BSA retained new counsel in late 2008. *Id.* Present counsel for BSA had a conversation with WaferTech's counsel, and sent him a letter, on January 13, 2009, notifying him that BSA would be pursuing the mechanic's lien claim. *Id.* Present counsel filed a Notice of Appearance on January 15, 2009. CP 45.

Starting in January 2009, BSA's new counsel transferred the voluminous project documents (filling a 10' x 15' storage unit) into his custody and met with BSA's cost accounting expert, Jordan Rosenfeld, to work on trial preparation. CP 71. Mr. Rosenfeld, a CPA, was very busy until April 15th and unable to work on this matter. *Id.* Once Mr. Rosenfeld had time to retrieve his own records and review Natkin/Scott's records, and notified BSA's counsel that he could be ready for trial in a few months, BSA filed a Notice to Set for Trial and Statement of Arbitrability on June 13, 2009. *Id.*

WaferTech moved to dismiss on August 6, 2009. CP 60. Judge Diane Woolard sent a letter to counsel dated August 28, 2009, announcing her ruling, stating:

I am finding that this court is not constrained by CR 41(b)(1) and am using my discretion to grant defendant's Motion to Dismiss.

Appendix. Judge Woolard then signed an order without findings of fact or conclusions of law. CP 97.

WaferTech sought \$52,014.50 in fees and \$2,133.51 in costs as prevailing party under RCW 60.04.181(3). CP 136. Judge Woolard sent a letter to counsel dated October 13, 2009, announcing her ruling, stating:

I am awarding WaferTech the fees and costs requested as they are reasonable and necessary.

Appendix.

Judge Woolard then signed a Supplemental Judgment containing only conclusory findings regarding WaferTech's fees and costs. CP 148.

The findings regarding fees and costs were as follows:

2. Defendant WaferTech incurred attorney fees in the sum of \$52,014.50 obtaining dismissal of BSA's complaint in this matter;

3. Defendant WaferTech incurred litigation costs in the sum of \$2,133.51 obtaining dismissal of BSA's complaint in this matter;

Id.

The conclusions of law were as follows:

6. WaferTech's attorney fees incurred in obtaining the dismissal of BSA's complaint are reasonable, both in terms of the time WaferTech's attorneys expended and WaferTech's attorneys' hourly rates; and

7. WaferTech's litigation costs incurred in obtaining dismissal of BSA's complaint are reasonable.

Id.

The trial court signed and filed the Amended Final Judgment on September 21, 2009. CP 153. BSA filed a notice of appeal on October 21, 2009. *Id.*³

D. Summary of Argument

There are two types of “dilatoriness” that can potentially lead to dismissal of an action. One is inaction, called want of prosecution, which is covered by CR 41(b)(1). Prejudice to the other party or the reasons for the inaction are irrelevant to whether the action will be dismissed or not. The trial court has no discretion.

The other type is impeding the litigation, by failing to comply with court orders or not showing up for hearings, which is covered by the court’s inherent authority to dismiss actions. This requires the application of the trial court’s discretion.

BSA’s “dilatoriness” in this action was the first type, inaction, covered by CR 41(b)(1). BSA noted this matter for trial prior to

³ The Clark County Superior Court received the Notice of Appeal on October 21, 2009, but refused to file it because the check for the filing fee was for \$250, not \$280. BSA promptly resent the Notice of Appeal with a \$280 check, which the Clark County Superior Court received on October 26, 2009. This filing is part of the basis for WaferTech’s Motion to Dismiss the Appeal, and will be addressed in response to that motion.

WaferTech moving for dismissal, so under CR 41(b)(1), the trial court had no authority or discretion to dismiss.

The trial court placed BSA's inaction in the second category, relying on a non-existent and unsupported distinction between actions prior to the first trial and actions after a remand. There is no authority for treating inaction prior to remand differently than inaction after remand.

The trial court ruled it had inherent authority to dismiss for "dilatory conduct," independent of the limitation of CR 41(b)(1), in apparent reliance upon *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 750 P.2d 1251 (1988). However, Washington courts have explained in subsequent decisions that such "dilatory conduct" means something other than mere inaction; a party must be guilty of impeding the litigation. *Foss Maritime Co. v. Seattle*, 107 Wn.App. 669, 674-5, 27 P.3d 1228 (2001); *Wallace v. Evans*, 131 Wn.2d 572, 575-8, 934 P.2d 662 (1996). A prior court rule regarding dismissals for want of prosecution, the predecessor to CR 41(b)(1), applied after a mandate was issued from an appellate court. *State ex rel. Wash. Water Power Co. v. Superior Court for Chelan County*, 41 Wn.2d 484, 490, 250 P.2d 536 (1952).

E. Argument

1. CR 41(b)(1) precluded the trial court from dismissing the action for BSA's want of prosecution.

The trial court erroneously dismissed the action for BSA's want of prosecution. The trial court purported to rely on its inherent authority to do so, when CR 41(b)(1) is the exclusive means for such a dismissal. There is no basis for treating want of prosecution prior to an appeal differently than want of prosecution after remand.

a. The history of CR 41(b)(1) shows that it limits the trial court's inherent authority to dismiss a party's claim for want of prosecution.

Superior courts have inherent authority to dismiss a party's claim. However, CR 41(b)(1), adopted in 1967 as part of the new rules of procedure for superior courts, "limits the power of the trial court to dismiss for failure to prosecute after the issue is joined and the case noted for trial." *Wallace v. Evans, supra* at 576.

CR 41(b)(1) provides:

Any civil action shall be dismissed, without prejudice, for want of prosecution, whenever the plaintiff ... neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined *If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.* (emphasis added).

Prior to adoption of CR 41(b)(1) in 1967, the only way to avoid dismissal for want of prosecution was to note the matter for trial within

one year of the issues being joined. CR 41(b)(1) added a protection for plaintiffs. It provides that if the action was noted for trial prior to the hearing on the motion to dismiss for lack of prosecution, the action “shall not be dismissed.”

This provision was included to promote actions being decided on their merits, not on procedural technicalities. The Washington Supreme Court stated:

This sentence [barring dismissal if the action was noted for trial prior to a hearing] was promulgated to encourage cases to be heard on the merits, the courts recognizing that involuntary dismissal for want of prosecution ‘is punitive or administrative in nature and every reasonable opportunity should be afforded to permit the parties to reach the merits of the controversy.’”

Thorp Meats, supra at 168 (quoting *Yellam v. Woerner*, 77 Wn.2d 604, 608, 464 P.2d 947 (1970)). It provides a plaintiff a final opportunity to note its case for trial, even after the one-year period of time has run. *Yellam, supra*.

This court, in *Gott v. Woody*, 11 Wn.App. 504, 524 P.2d 452 (1974), summarized the change that occurred in 1967 to take away the trial court’s discretion to dismiss for want of prosecution:

It is our view that when in 1967 the Supreme Court revised the rules adding to CR 41(b)(1) mandatory language of nondismissal under certain circumstances, that change assumes significance in light of this long-standing

construction. The predecessors to CR 41(b)(1), which were in effect when *State ex rel. Dawson v. Superior Court*, *supra*, and its progeny were decided, did not contain the mandatory language of nondismissal later added to the rule. See RPPP III, 193 Wash. 40-a (1938); RPPP 3, 18 Wn.2d 32-a (1944); RPPP 3, 34A Wn.2d 69 (1951); RPPP 41.04W, 61 Wn.2d xxii (1963).

In our opinion, the 1967 revision contemplates a limitation upon the otherwise inherent discretionary power of the court to dismiss, upon the motion of a party, for failure to bring a case on for trial in a timely fashion.

Thus, where a motion for dismissal for want of prosecution is occasioned by the inaction of the plaintiff (or other party having the affirmative of an issue) in bringing the case on for trial, the trial court may not dismiss on that ground where the cause is noted for trial before the hearing on the motion.

...

Accordingly, we hold that where the mere inaction of a party gives rise to a motion to dismiss for want of prosecution by the adversary, CR 41(b)(1) limits the discretionary authority of the court to dismiss on that ground.

This result comports with the explicit rule of *State ex rel. Dawson v. Superior Court*, *supra*, which recognizes that the inherent discretion of the trial court to dismiss for want of prosecution is subject to modification by court rule. It also conforms to the stated purpose of the Civil Rules, i.e., to provide a single trial manual to the bar and to eliminate procedural traps. See *Foreword to Civil Rules for Superior Court*, 71 Wn.2d xxiv (1967). This is also the spirit of interpretation enunciated by the Supreme Court and the effect which the rules are to be given where conflicts with older modes of procedure appear. See *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 522 P.2d 822 (1974).

We do not believe, as defendants contend, that this interpretation will seriously invade the discretionary power of the Superior Court to manage its affairs, so as to achieve the orderly and expeditious disposition of cases, to assure compliance with the court's rulings and observance of hearing and trial settings which are made. In these areas the trial court's inherent discretion is not questioned by our interpretation. *See Wagner v. McDonald*, 10 Wn.App. 213, 516 P.2d 1051 (1973) (dismissal for want of prosecution where plaintiff failed to appear at trial). *See also Link v. Wabash R.R.*, 370 U.S. 626, 8 L. Ed. 2d 734, 82 S.Ct. 1386 (1962); (FRCP 41) (dismissal where failure to appear at pretrial conference was combined with general dilatoriness).

11 Wn.App. at 507-8.

So prior to 1967, trial courts had the power to dismiss actions for want of prosecution if the plaintiff did not note it for trial within one year of the issues being joined. CR 41(b)(1) limited that power. The following will show how that limitation precluded the trial court's dismissal of the action.

- b. The trial court did not have authority or discretion under CR 41(b)(1) to dismiss BSA's claim for BSA's want of prosecution.

The trial court did not have any authority or discretion to dismiss the action for BSA's want of prosecution. CR 41(b)(1) prohibited the trial court from dismissing BSA's claims once BSA noted the action for trial. A trial court has no discretion to grant a motion to dismiss for want of

prosecution if the matter is noted for trial prior to a hearing on the motion to dismiss. *Thorp Meats, supra* at 170.

Here, BSA noted this matter for trial prior to WaferTech filing its motion to dismiss for want of prosecution. The trial court had no authority to dismiss the action.

In *Thorp Meats, supra*, the plaintiff took no action in a case for 18 months. The plaintiff then noted the matter for trial, while the defendant moved for dismissal under CR 41(b)(1). The court held that CR 41(b)(1) controlled over the trial court's inherent discretionary authority, and precluded dismissal for want of prosecution. 110 Wn.2d at 166.

CR 41(b)(1) applies and precludes dismissal for want of prosecution. Washington courts agree that want of prosecution is not "dilatatoriness" outside the scope of CR 41(b)(1). This is true even if the want of prosecution occurs after remand.

c. CR 41(b)(1) applies after remand.

CR 41(b)(1) applies to actions after remand. It allows a defendant to bring a motion to dismiss whenever a party has failed to bring an action to trial within one year after "any issue of law or fact has been joined." The issue of BSA's lien claim was "joined" upon remand by this court in 2005. An issue of fact is joined, for purposes of dismissal for want of

prosecution, when an appellate court issues its mandate. *State ex rel. Wash. Water Power Co. v. Superior Court for Chelan County, supra.*

The issues are usually joined upon the filing of the answer, or any pleading to which no responsive pleading is required. *Id.* The joinder of issues, for purposes of starting the one-year time period after which an action is subject to dismissal for want of prosecution, can occur more than once in an action. Every time an issue is joined, a new time period commences. As the court in *Washington Water Power, supra*, applying Rule 3 (the predecessor to CR 41(b)(1)), stated, “each case moves in and out of the operation of the time limit ... as issues of law or issues of fact are raised and decided.” 41 Wn.2d at 490. The time period is terminated when issues are decided. *Id.* It commences again when another issue is raised. *Id.* An issue was joined in that action upon the issuance of a mandate. *Id.* at 491.

Here, the issue of the amount BSA is entitled to recover for its lien claim was joined, for purposes of CR 41(b)(1), several times, and each time, the one-year time period for a motion to dismiss started running again. The lien claim issue was joined most recently in 2005 upon the issuance of the mandate from this court. It will be joined again when this court issues another mandate.

The trial court apparently interpreted the joinder of “any issue of law or fact” under CR 41(b)(1) narrowly, deciding it could not occur after remand, so the rule did not apply. However, the Washington Supreme Court has stated that the phrase “any issue of law or fact” was not used in a narrow and technical sense, but rather “the broader and more accurate sense of having reference to every issue of law or fact, however raised.” *State ex. rel. Goodnow v. O’Phelan*, 6 Wn.2d 146, 150-2, 106 P.2d 1073 (1940).

In addition to prior case law supporting the application of CR 41(b)(1) to actions after remand, the context in which the phrase “any issue of law or fact has been joined” in CR 41(b)(1) shows it applies after remand. To construe CR 41(b)(1) to not apply after remand would ignore the beginning of CR 41(b)(1), which begins, “[a]ny civil action ...” It also ignores CR 1, which provides that the civil rules apply to “all suits of a civil nature ...” It also ignores CR 40, which requires that one of the parties must note the matter for trial after remand in order for the court to set a trial date. In short, the civil rules in general apply to a remanded action such as this.

There is no other civil rule that would apply to dismissals for want of prosecution after a remand. CR 41(b)(1) allows a motion to dismiss if an action is not noted for trial within a year “after any issue of law or fact

has been joined.” In the remand situation, the one-year period after which a motion to dismiss could be brought would begin to run upon the date of remand. That date of remand is the date the issues were joined, for purposes of CR 41(b)(1).

If CR 41(b)(1) did not apply after remand, a plaintiff would lose the protection provided by the rule. Prior to any appeal and remand, a plaintiff would be protected from a dismissal for want of prosecution by being able to note the matter for trial prior to a hearing on the motion. However, if the trial court wrongly disposes of the plaintiff’s claim, which is later reversed and remanded by the appellate court, that plaintiff would no longer have the protection of the rule.

The defendant would also lose the protection of being entitled to a dismissal after one year of inaction by the plaintiff, if the plaintiff did not note the matter for trial prior to the hearing on the motion to dismiss. The defendant would be at the mercy of the trial court’s discretion. There is no indication in the rules that parties should have less protection after remand than before remand.

- d. BSA has not engaged in “dilatatoriness” outside the scope of CR 41(b)(1) by failing to note this action for trial.

BSA has not engaged in “dilatatoriness” that would invoke the court’s inherent authority to dismiss this action. “Inaction” does not

become “dilatoriness” just because the inaction occurred after remand. “Dilatoriness” outside the scope of CR 41(b)(1) means unacceptable litigation practices other than mere inaction, whatever the duration. *Wallace v. Evans, supra* at 577.

CR 41(b)(1) precludes dismissal for want of prosecution if the case is noted for trial prior to a hearing. This does not “destroy a trial court’s inherent authority to manage its calendar,” and where “dilatoriness *of a type* not described by CR 41(b)(1) is involved,” the court retains inherent authority to dismiss. *Thorp Meats, supra* at 169 (emphasis added).

Thorp Meats cited *Gott v. Woody, supra*, to support its decision that CR 41(b)(1) controls dismissal for want of prosecution. *Gott* provides that the trial court retained inherent authority to dismiss actions for failures to comply with court rulings, or failing to observe hearing and trial settings. 11 Wn.App. at 508.

Thorp Meats limited a trial court’s inherent authority to dismiss claims for inaction after remand. Courts focus on the type of conduct (inaction), not when it occurred (before or after remand), in determining whether CR 41(b)(1) applies.

In *Wallace v. Evans, supra*, neither party took any action for six years after the answer was filed. When the defendant moved to dismiss

for want of prosecution, the plaintiff noted the matter for trial. The court had no power to dismiss.

In *Foss Maritime v. Seattle*, *supra*, the defendant argued the trial court retained inherent authority to dismiss an action for the plaintiff's inaction. 107 Wn.App. at 674. The court disagreed, citing *Thorp Meats* and *Wallace v. Evans*. It explained that such inherent authority to dismiss for "dilatatoriness" no longer exists for mere inaction.

In *Foss*, neither plaintiff nor defendant took any action in the case for two years after it was filed. When the plaintiff finally noted the matter for issuance of a writ of review, the defendant sought dismissal, arguing it was prejudiced by the plaintiff's delay. The court noted the defendant could have moved for a show cause hearing and/or dismissal, or urged opposing counsel to move the case forward. Having done nothing, "it acquiesced in the deferral of the case." 107 Wn.App. at 676.

Here, WaferTech never noted the matter for trial under CR 40 or moved for dismissal under CR 41(b)(1) prior to BSA noting the matter for trial. WaferTech never urged BSA to take any action. WaferTech never inquired of BSA to find out what BSA intended to do in the action. WaferTech did nothing to move this action to a resolution. In essence, WaferTech acquiesced to BSA's inaction.

Given that dismissal is such a harsh sanction, federal courts, applying a similar dismissal rule, are hesitant to dismiss for dilatory conduct. Dismissal is the most severe sanction, and reserved for the most egregious misconduct. *Ruiz-Rosa v. Rollan*, 485 F.3d 150, 154 (1st Cir. 2007). Dismissal is proper only “upon a serious showing of willful default.” *Gill v. Stolow*, 240 F.2d 669, 670, (2nd Cir. 1957). Except in the most extreme circumstances, courts should resort to a lesser sanction than dismissal. Wright & Miller, *Fed. Prac. & Proc.: Civ.3d* § 2369, p. 625 (2008).

The sanction of dismissal for BSA’s inaction was not proper, either under CR 41(b)(1) or as an exercise of discretion. It must be reversed.

WaferTech recovered its attorney fees and costs as the prevailing party in the action under RCW 60.04.181(3). The reversal of the dismissal will mean WaferTech is not yet the prevailing party in the action. That will require vacating the award of attorney fees and costs to WaferTech as the prevailing party.

Even if this court does not reverse the dismissal, it should reverse the award of attorney fees as an abuse of discretion.

2. The trial court abused its discretion in determining the amount of attorney fees and costs awarded to WaferTech as prevailing party under RCW 60.04.181.

The trial court abused its discretion in determining the amount of attorney fees it awarded WaferTech based on RCW 60.04.181. The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Mayer v. City of Seattle*, 102 Wn.App. 66, 79, 10 P.2d 408 (2000).

Washington law requires parties seeking an award of attorney fees to prove a lodestar figure, representing a reasonable hourly rate multiplied by the reasonable attorney hours necessary to achieve the result. *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1997). A lodestar requires exclusion of unnecessary or duplicative hours. *Id.* at 434. Findings of fact and conclusions of law on the fee calculation are required. *Id.* at 435. Fee decisions are reviewed on an abuse of discretion standard, but such discretion must be “exercised on articulable grounds.” *Id.*

If the dismissal was proper, WaferTech was entitled to its reasonable attorney fees and costs, but the trial court abused its discretion in three ways: (1) it failed determine whether the hours spent and amount of work done by the attorneys was reasonably necessary to achieve the result, as required by the lodestar method, (2) it failed to determine whether the costs were reasonably necessary, and (3) it did not make

findings of fact to support an award, to enable this court to review the award.

The court abused its discretion by not determining whether the hours asserted by WaferTech were reasonably necessary. The Washington Supreme Court stressed the need for the trial court to “take an *active* role in assessing the reasonableness of fee awards,” rather than treating them as an afterthought. *Mahler*, 135 Wn.2d at 434 (emphasis in original). The trial court should not unquestioningly accept fee affidavits from counsel. *Id.* at 435.

The trial court made only conclusory findings of fact and conclusions of law in support of its award. The findings of fact state “WaferTech incurred” the fees and costs it sought to recover. The conclusions of law state those fees and costs “are reasonable.” That’s it. There was no showing the trial court took an active role in determining the reasonableness of the fees and costs, and no effort to show “articulable grounds” for the trial court’s decision.

This Court should rule that it is an abuse of discretion for a trial court to not apply the lodestar method by making an independent determination regarding the reasonable number of hours expended, and to award fees and costs after entering a conclusion of law that a party is not

entitled to recover those fees and costs. The trial court's award of attorney fees and costs under RCW 60.04.181 must be reversed.

3. The action should be remanded to a different trial court judge.

Upon remand, BSA is entitled to have a different trial court judge adjudicate its claim. Judge Woolard, by flouting CR 41(b)(1) to deny BSA an adjudication on the merits, and purporting to exercise discretion to dismiss without making any findings whatsoever or offering any reasons, appears biased against BSA. This appearance of partiality against BSA and/or its claim supports remand to a different trial court judge. There must be no question of impartiality or fairness of a judge. *State v. Madry*, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972). When there is, remand to a different judge is "the safest course." *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1996).

Here, Judge Woolard ignored the constraints of CR 41(b)(1), instead usurping the authority to dismiss BSA's claims in violation of the rule. She purported to be exercising her discretion, yet made no findings in support of that exercise of discretion. She dismissed a claim valued at one point at \$1.5 million on a whim.

She then went on to award over \$50,000 in attorney fees and costs to WaferTech, again without making adequate findings as to the

reasonableness of the hours spent, as required by the application of the lodestar method. Judge Woolard has shown an unwillingness to treat BSA fairly.

The fact that Judge Woolard has no known bias or reason for prejudice against BSA does not alter the need for remand to a different judge. That she “appears” prejudiced, based on her judicial performance in this action, is sufficient.

4. BSA is entitled to its attorney fees on appeal.

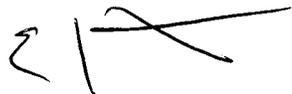
In the event BSA is successful in this appeal, and then is the prevailing party in the trial court on remand, BSA will be entitled to an award of attorney fees from the trial court, pursuant to RCW 60.04.181(3). Natkin/Scott requests that this Court’s remand provide that Natkin/Scott is entitled to recover its attorney fees in this appeal pursuant to RAP 18.1, as part of a subsequent award of attorney fees by the trial court.

F. Conclusion

The sole basis for the trial court’s dismissal of BSA’s claim was inaction by BSA. CR 41(b)(1) precluded the trial court from dismissing the action. CR 41(b)(1) requires reversal of the trial court’s dismissal. Based on such reversal, this court should also vacate the judgment for WaferTech’s attorney fees and costs. Even without a reversal, this court should reverse the award of attorney fees and costs for abuse of discretion.

DATED this 2nd day of January, 2010.

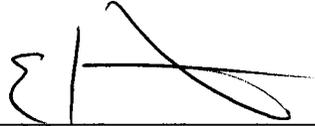
HULTMAN LAW OFFICE

By 
Eric R. Hultman, WSBA #17414
Attorney for Appellant Business
Services of America II, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by overnight mail, properly addressed and prepaid, on the 24 day of January, 2010, to:

James T. McDermott
Ball Janik LLP
One Main Place
101 SW Main St., Suite 1100
Portland, OR 97204



Eric R. Hultman

FILED
COURT OF APPEALS
DIVISION II
10 JAN -4 PM 1:48
STATE OF WASHINGTON
BY _____
DEPUTY

APPENDIX

1. CR 41
2. RCW 60.04.181
3. Letter from Judge Woolard to counsel, dated August 28, 2009
4. Amended Final Judgment, filed September 21, 2009
5. Letter from Judge Woolard to counsel, dated October 13, 2009

RULE 41 DISMISSAL OF ACTIONS SUPERIOR COURT CIVIL RULES 6. TRIALS

RULE 41 DISMISSAL OF ACTIONS

(a) Voluntary Dismissal.

(1) Mandatory. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) By stipulation. When all parties who have appeared so stipulate in writing; or

(B) By plaintiff before resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.

(2) Permissive. After plaintiff rests after his opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

(3) Counterclaim. If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

(4) Effect. Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

(1) Want of Prosecution on Motion of Party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

(2) Dismissal on Clerk's Motion.

(A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.

(B) Mailing notice; reinstatement. The clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.

(C) Discovery in process. The filing of a document indicating that discovery is occurring between the parties shall constitute action of record for purposes of this rule. (D) Other grounds for dismissal and reinstatement. This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise.

(3) Defendant's Motion After Plaintiff Rests. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then

determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross Claim, or Third Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to subsection (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Notice of Settlements. If a case is settled after it has been assigned for trial, it shall be the duty of the attorneys or of any party appearing pro se to notify the court promptly of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk.

60.04.181**Title 60 LIENS****Chapter 60.04 MECHANICS' AND MATERIALMEN'S LIENS**

60.04.181 Rank of lien -- Application of proceeds -- Attorneys' fees.

(1) In every case in which different construction liens are claimed against the same property, the court shall declare the rank of such lien or class of liens, which liens shall be in the following order:

- (a) Liens for the performance of labor;
- (b) Liens for contributions owed to employee benefit plans;
- (c) Liens for furnishing material, supplies, or equipment;
- (d) Liens for subcontractors, including but not limited to their labor and materials; and
- (e) Liens for prime contractors, or for professional services.

(2) The proceeds of the sale of property must be applied to each lien or class of liens in order of its rank and, in an action brought to foreclose a lien, pro rata among each claimant in each separate priority class. A personal judgment may be rendered against any party personally liable for any debt for which the lien is claimed. If the lien is established, the judgment shall provide for the enforcement thereof upon the property liable as in the case of foreclosure of judgment liens. The amount realized by such enforcement of the lien shall be credited upon the proper personal judgment. The deficiency, if any, remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against any party liable therefor.

(3) The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.

(4) Real property against which a lien under this chapter is enforced may be ordered sold by the court and the proceeds deposited into the registry of the clerk of the court, pending further determination respecting distribution of the proceeds of the sale.

[1992 c 126 § 12; 1991 c 281 § 18.]

SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR CLARK COUNTY
DEPARTMENT NO. 8
PO BOX 5000
VANCOUVER, WA 98666-5000



TELEPHONE (360) 397-2068
FAX (360) 397-6078
TDD (360) 397-6172

DIANE M. WOOLARD
JUDGE

August 28, 2009

James McDermott
Attorney at Law
101 SW Main street, Suite 1100
Portland, OR 97204-3219

Eric Hultman
Attorney at Law
611 Market Street, Suite 4
Kirkland, WA 98033

Kerry Lawrence
One Union Square
600 University Street, Suite 902
Seattle, WA 98101

Re: 98-2-02045-1 Business Services of America v. Wafertech

Dear Counsel,

After having reviewed the pleadings and having heard the argument of counsel, I am finding that this court is not constrained by CR 41(b)(1) and am using my discretion to grant defendants Motion to Dismiss. Thus there will be no trial setting.

Prevailing party will please prepare appropriate pleadings.

Sincerely,

A handwritten signature in black ink that reads "Diane M Woolard".

Diane M. Woolard
Judge

3

COPY
ORIGINAL FILED
SEP 21 2009

Sherry W. Parker, Clerk, Clark Co

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

BUSINESS SERVICES OF AMERICA II,
INC.,

Plaintiff,

v.

WAFERTECH, LLC,

Defendant.

CASE NO. 98-2-02045-1
(CONSOLIDATED CASES)
TRACK A

Amended
**FINAL JUDGMENT FOR
WAFERTECH ON WAFERTECH'S
MOTION TO DISMISS**

JUDGE: DIANE M. WOOLARD

This matter came before this Court on defendant WaferTech, LLC's ("WaferTech") presentation of a judgment on the Court's September 15, 2009 order, which granted WaferTech's motion to dismiss plaintiff Business Services of American II, Inc.'s ("BSA") complaint. This Court reviewed the party's briefs and heard oral argument on WaferTech's motion to dismiss, for which Eric R. Hultman appeared for BSA, and James T. McDermott appeared for WaferTech.

Based on the argument of counsel, the pleadings, and this Court's September 15, 2009 order, judgment is entered as follows:

1. BSA's complaint is DISMISSED WITH PREJUDICE;
2. WaferTech shall file a cost bill by September 30, 2009; and

1 3. WaferTech shall file a petition for an award of reasonable attorney fees and
2 litigation expenses beyond statutory costs by September 30, 2009.

3 Dated: September 15, 2009

4 
Superior Court Judge Diane M. Woolard

5 Presented by:

6 
7 James T. McDermott, WSBA 30883
8 Dwain M. Clifford, WSBA 39911
9 Ball Janik LLP
10 101 SW Main St., Ste. 1100
11 Portland, OR 97204
12 Tel: (503) 228-2525
13 Fax: (503) 226-3910
14 Attorneys for Defendant WaferTech, LLC

15 Approved as to form and Notice of Presentation waived:

16 
17 Eric R. Hultman, WSBA 17414
18 Hultman Law Office
19 611 Market Street, Suite 4
20 Kirkland, WA 98033
21 Tel: (425) 943-0649
22 Fax: (206) 203-0338
23 Attorneys for Plaintiff Business Services of America II, Inc.

SUPERIOR COURT OF
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DIANE M. WOOLARD
JUDGE

October 13, 2009

James T. McDermott
Attorney at Law
101 SW Main Street, Suite 1100
Portland, OR 97204-3219

Eric Hultman
Attorney at Law
611 Market St., Suite 4
Kirkland, WA 98033

Re: BSA of America II, Inc. V. WaferTech LLC, 98-2-02045-1

Dear Counsel,

I am awarding WaferTech the fees and costs requested as they are reasonable and necessary.

Sincerely,

A handwritten signature in cursive script that reads "Diane M. Woolard".

Diane M. Woolard
Judge