

COURT OF APPEALS
DIVISION II

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NO. 40767-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
BY ~~STATE OF WASHINGTON~~
DIVISION TWO
REPORT

TACOMA PIERCE COUNTY SMALL BUSINESS INCUBATOR, a
Washington Non-Profit Corporation, d/b/a WILLIAM M. FACTORY,
SMALL BUSINESS INCUBATOR,

Appellants,

v.

SANDRA KENNEDY and JOHN DOE KENNEDY, a marital
community, SCOTT KENNEDY and JANE DOE KENNEDY, a marital
community, d/b/a SK Enterprises, a sole proprietorship, SK
LANDSCAPE, LLC, a Washington limited liability company,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Katherine Stolz, Judge

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court did not err in denying the Incubator's motion to set aside the Kennedy's Request for Trial de Novo. RP (4/16/2010) 3-8; CP 306-208.

2. The Trial court did not err in determining that filing proof of service of the Request for Trial de Novo on April 14, 2010, forty (40) days after the Arbitration Award was filed, constitutes compliance with RCW 7.06.050, MAR 7.1 and PCLMAR 7.1. CP 307 (Finding of Fact 4).

3. The trial court did not err in ruling that all claims between and amongst the parties shall proceed to trial. CP 307 (Finding of Fact 5); CP 357 (Finding of Fact 5).

4. The trial court did not err in denying the Incubator an award of attorney's fees. RP (4/16/2010) 8.6; CP 307.

5. The trial court did not err in denying the Incubator's motion for reconsideration. RP (5/14/2010) 13.2-10; CP 357.

B. Issues Pertaining to Assignments of Error

1. Was it reversible error for the trial court to deny the Incubator's motion to dismiss the Kennedy's Request for Trial de Novo?
2. Did the trial court commit reversible error in determining that filing proof of service of the Request for Trial de Novo on April 14, 2010, constitutes substantial compliance with MAR 7.1 due to electronic filing? (Assignment of Error 2).
3. Did the trial court commit reversible error in ruling all claims between and amongst the parties should proceed to trial? (Assignment of Error 3).
4. Was it reversible error for the trial court to deny the Incubator an award of attorney's fees? (Assignment of Error 4).
5. Was it reversible error for the trial court to deny the Incubator's motion for reconsideration? (Assignment of Error 5).
6. Is the Incubator entitled to attorney's fees and costs on appeal? (Assignment of Error 6).

II. STATEMENT OF THE CASE

A. Factual Background

This appeal arose from a claim for breach of a commercial lease between Tacoma Pierce County Small Business Incubator and Scott

Kennedy, as well as Sandra Kennedy's breach of an alleged personal guarantee in the form of a post-it note for the same. CP 3-57. On July 1, 2005, Respondent Scott Kennedy, doing business as SK Enterprises, entered into a one-year lease agreement with the Respondent to rent Room # 310 in the Incubator. CP 11-22. Scott and Mary Kennedy are now and were then husband and wife. CP 4 (Paragraph 1.5), 112 (Paragraph 5). The Lease provides that SK Enterprises would pay four hundred and fifty dollars (\$ 450.00) per month in rent, and a late fee of five percent (5%) of the monthly rent, and interest at one percent (1%) per month on delinquent accounts. CP 11. Section 36 of the Lease provides that Scott Kennedy gives an unconditional personal guarantee to be responsible for all payments for rent and services. CP 15.

Scott Kennedy, d/b/a SK Enterprises, vacated the leased premises on August 15, 2006. Scott Kennedy is the son of Sandra Kennedy CP 4. CP 5 (Paragraph 2.4). At that time, the Incubator alleges Kennedy owed five thousand one hundred and fifty nine dollars and ninety cents (\$5,159.90) in past due rent and other charges to the Incubator. CP 5 (Paragraph 2.4); 113 (Paragraph 11).

On August 16, 2006, Sandra Kennedy, the managing member of SK Landscape, LLC, entered into a one-year lease agreement with the

Appellant Incubator (hereinafter the “LLC Lease”) to rent (Room Number 310). CP 5 (Paragraph 2.6), 26-37.

The LLC Lease provides that SK Landscape, LLC, will pay four hundred and fifty dollars (\$ 450.00) per month in rent, pay a late fee of five percent (5%) of the monthly rent, and interest at one percent (1%) per month on delinquent accounts. CP 26.

Section 36 of the LLC Lease provides that Sandra Kennedy pledges an unconditional personal guarantee to make all payments for rent and services. CP 30. Section 37 of all the LLC Lease provides that, in the event a disagreement arises between the parties, the prevailing party is entitled to attorneys fees and costs. CP 30.

On July 1, 2007, SK Landscape, LLC, entered into a lease with the Incubator (hereinafter the “Second LLC Lease”), by and through Sandra Kennedy. CP 41-53. The Second LLC Lease provides that SK Landscape, LLC, will pay eight hundred and thirty dollars (\$ 830.00) per month in rent, plus a late fee of five percent (5%) of the monthly rent, and interest at one percent (1%) per month on delinquent accounts. CP 41. Section 24 of the Second LLC Lease provides that “[a]ny payment, where appropriate, may be in the form of service to the project. Only the Executive Director, at his or her discretion, will authorize service in lieu of

payment.” CP 44. Section 39 of the Second LLC Lease provides that Sandra Kennedy pledges an unconditional personal guarantee to make all required payments for rent and services. CP 45. Section 40 of the Second LLC Lease provides that, in the event a dispute arises between the parties, the prevailing party is entitled to attorney’s fees and costs. CP 45.

The main issue in dispute in this matter was The Incubator’s allegation that the LLC and Sandy Kennedy personally promised to pay the prior rental obligation of Scott and Mary Kennedy through an unsigned post-it note. The rent under the LLC’s lease was not at issue. All rent under the LLC’s lease was paid in full.

SK Landscape, LLC, vacated the premises at the end of September 2008. CP 7 (Paragraph 2.19), 57. After being credited to last month’s rent paid in advance, but before accounting for the debt of Scott Kennedy/SK Enterprises, SK Landscape, LLC, had a credit in the amount of five hundred and ninety-one dollars and eighty-two cents (\$ 591.82). CP 7 (Paragraph 2.19), 57. Scott Kennedy, Sandra Kennedy, and SK Landscape, LLC, did not pay the five thousand one hundred and fifty-nine dollars and ninety cents (\$ 5,159.90) alleged past due balance on the Enterprises Lease, plus applicable late fees and accrued interest. CP 5 (Paragraph 2.4); 7 (Paragraph 2.20), 113 (Paragraph 11).

B. Procedural History

The Incubator commenced suit against Sandra and Jack Kennedy (hereinafter “the Kennedys”), SK Landscape, LLC, and Scott and Mary Kennedy, husband and wife, for past due rent of Scott and Mary Kennedy and the alleged personal guarantee related thereto. CP 1-57. Steven M. Bobman appeared as attorney of record for the Kennedys (Sandra and Jack only) and SK Landscape, LLC, on September 3, 2009. CP 224-225. Scott and Mary Kennedy appeared and represented themselves pro se. CP 66-69. The Kennedys and SK Landscape, LLC, filed several counterclaims against the Incubator. CP 207-221. All counterclaims were dismissed prior to the arbitration, with the exception of a claim for payment for bird spikes installed at the Incubator, and a claim that the Incubator withheld SK Landscape, LLC’s mail after it vacated the premises. CP 260-262.

The matter was arbitrated on February 18, 2010, and the Arbitration Award was filed March 5, 2010. CP 282, 289. Counsel for the Kennedys electronically filed a Request for Trial de Novo and a Note for Trial Setting and For Sealing Arbitration Award on March 22, 2010. CP 292-294.

On April 1, 2010, the Incubator filed a motion to set aside the Request for Trial de Novo, unseal the Arbitration Award, and award the

Incubator its attorney's fees, based upon the failure to file proof of service of the Request for Trial de Novo. CP 272-277, 281-288. The Kennedys filed a response on April 14, 2010, as well as a Certificate of Service. CP 289-298. The Certificate of Service states that the Request for Trial de Novo was delivered on March 23, 2010, to Nicole Bolan, attorney for the Incubator, and the Pierce County Superior Court Arbitration Department. CP 298-299.

The trial court heard the Incubator's motion to set aside the Request for Trial de Novo, unseal the Arbitration Award and award attorney's fees on April 16, 2010. RP (4/16/2010) 3-8; CP 306-308. The trial court denied the Incubator's motion on the basis that the Request for Trial de Novo and Note for Trial Setting were electronically filed and that such filing constituted compliance. RP (4/16/2010) 8.

The Incubator then filed a motion for reconsideration of the trial court's decision on April 19, 2010, CP 311-329. The Kennedys argued that counsel for the Incubator was personally and automatically electronically served with the Request for Trial de Novo when it was filed. In reply, the Incubator submitted evidence that there was no separate proof that its counsel was electronically served with the Request for Trial de Novo, and the Note for Trial Setting. CP 339 (Paragraph 4), 344.

On May 14, 2010, the trial court heard the Incubator's motion for reconsideration. RP (5/14/2010) 3-13; CP 345-347. At the hearing, Mr. Bobman indicated he was representing Scott and Mary Kennedy so it was not necessary to send them a copy of the Request for Trial de Novo. RP (5/14/2010) 11, 12. There is no indication in the record that Scott and Mary Kennedy participated further in the post-arbitration process.

The trial court denied the Incubator's motion for reconsideration. RP (5/14/2010) 12-13; CP 345-247. This appeal followed. CP 350-358.

III. ARGUMENT

- A. THE PROOF OF SERVICE OF THE REQUEST FOR TRIAL DE NOVO IS NOT DEFECTIVE BECAUSE IT WAS NOT FILED OR SERVED WITHIN 20 DAYS OF THE ARBITRATION AWARD, NOR IN THIS CASE WAS IT NECESSARY THAT ALL PARTIES WERE SERVED WITH THE REQUEST FOR TRIAL DE NOVO.

The arbitration of civil cases in Washington state is controlled by RCW 7.06.010, and the filing requirements for a Trial de Novo are outlined in RCW 7.06.050(1):

Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.

Also applicable is MAR 7.1(a):

Within 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may serve and file with the clerk a written request for a trial de novo in the superior court along with proof that a copy has been served upon all other parties appearing in the case.

MAR 8.2 provides:

The arbitration rules may be supplemented by local superior court rules adopted and filed in accordance with CR 83.

PCLMAR I.1.1(a) provides:

The purpose of mandatory arbitration of civil actions under RCW 7.06, as implemented by the Mandatory Arbitration Rules, is to provide a simplified and economical procedure for obtaining the prompt and equitable resolution of disputes involving claims of \$50,000 or less. The Mandatory Arbitration Rules, as supplemented by these local rules, are not designed to address every question which may arise during the arbitration process, and the rules give considerable discretion to the arbitrator. The arbitrator should not hesitate to exercise that discretion. Arbitration hearings should be informal and expeditious, consistent with the purpose of the statutes and rules.

PCLMAR 7.1(a) provides:

A written request for trial de novo shall be accompanied by a note of issue placing the matter on the assignment calendar. Failure to submit the note for assignment is not grounds for dismissal; however, the court may impose terms in its discretion.

CR 81(a) provides:

Except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings.

CR 83(a) provides:

Each court by action of a majority of the judges may from time to time make and amend local rules governing its practice not inconsistent with these rules.

A reading of all of the above-cited authority must result in the conclusion that the purpose of mandatory arbitration is to provide a simple, economical procedure for the prompt and fair resolution of certain claims, and to avoid delay and unnecessary proceedings. Additionally, as a Special Proceeding in Title 7, mandatory arbitration rules and state statutes should prevail if inconsistent with state rules. Thus, the notice and service requirements of the applicable statute and the local rule should govern practice. Presumably, local court administrators and judicial officers, in promulgating local rules, do so with the most accurate knowledge and information regarding the best methods for insuring prompt, economical and fair resolution.

Case law reflects the need for prompt resolution and prevention of unnecessary delay. The Incubator cites Nevers v. Fireside, Inc., 133 Wn. 2d 804, 947 P.2d 721 (1997) as the controlling case. However, Nevers was decided in 1997, over thirteen years ago and well before the Courts began to use electronic filing of documents. In Nevers, the Court found as follows:

Nevers and Anderson filed their request for a trial de novo within 20 days of the date the arbitration award was filed. They did not, however, accompany that filing with proof that they had served Fireside with a copy of the request. Indeed, there is no indication in the record that proof of such service has ever been filed with the superior court. The most that can be said is that on the 20th day after the arbitrator's award was filed with the clerk of the superior court, counsel for Nevers and Anderson mailed copies of their request for a trial de novo and their motion to reinstate their right to trial de novo to Fireside's counsel. We are satisfied that even if proof of such a mailing had been filed with the clerk of the superior court on April 25, 1995, it would not have constituted "proof" that Nevers and Anderson served Fireside with a copy of their request for a trial de novo within the 20-day time limit set forth in MAR 7.1(3).

Id. at 810. The Nevers court additionally stated:

The mandatory arbitration of civil actions is provided for in chapter 7.06 RCW. RCW 7.06.030 indicates that the procedures to implement the mandatory arbitration of civil actions are as provided in rules adopted by the Supreme Court. Those rules, which are known as the SUPERIOR COURT MANDATORY ARBITRATION RULES (MAR), like all other court rules, are interpreted as though they were drafted by the Legislature. As such, we construe them in accord with their purpose. *State v. Wittenbarger*, 124 Wn.2d 467, 484, 880 P.2d 517 (1994) (citing *PUD No. 1 v. WPPSS*, 104 Wn.2d 353, 369, 705 P.2d 1195 (1985)). Furthermore, just as the construction of a statute is a matter of law requiring de novo review, so is the interpretation of a court rule. See *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 409, 936 P.2d 1175 (1997).

The primary goal of the statutes providing for mandatory arbitration (RCW 7.06) and the MANDATORY ARBITRATION RULES that are designed to implement that chapter is to "reduce congestion in the courts and delays in hearing civil cases."

In light of that fact that Nevers and Anderson failed to serve copies of the request for trial de novo on Fireside within 20 days, much

less file proof of service within that period, we can conclude only that the superior court correctly declined to conduct a trial de novo. Therefore we hold that the trial court correctly denied their request for a trial de novo as well as their motion to reinstate their right to a trial de novo. Consequently, we need not address Nevers and Anderson's argument that they substantially complied with the filing of proof of service requirement of MAR 7.1(a).

Id. at 815-816. The purpose of the arbitration procedures is to insure that the Court and the parties are aware of the Request for Trial de Novo and that the case will be set for trial in a prompt manner. In this case, the Arbitration Award was filed March 5, 2010. The Request for Trial de Novo and Note for Trial setting were electronically filed on March 22, 2010 and served on Appellant's counsel on March 23, 2010. CP 294, 298. On April 16, 2010, pursuant to Respondent's Request, the Court issued an Order that the matter should go to trial and a date was set by the Court on that day. CP 306-307. Thus, only forty-five days elapsed from the time the award was filed and a trial date was set. Unlike the Nevers case, proof of service was filed with the Court and the Incubator had actually been served. Certainly, the process was prompt, economical and no one was unduly prejudiced, and the case should be tried on the merits.

The Court in Christensen v. Atlantic Richfield Co., 130 Wn. App 341, 122 P.3d. 937 (2005). When reviewing a case involving the MARs, indicated that

The meaning of a statute is a question of law that is reviewed de novo. Through statutory interpretation, a court attempts to give effect to the legislature's intent and purpose. To achieve this goal, the court considers the statute as a whole, gives effect to the statutory language, and compares related statutes. The mandatory arbitration rules are construed consistently with their purpose. A court's application of the mandatory arbitration rules is reviewed de novo.

Id. at 341.

In Haywood v. Aranda, 143 Wn. 2d 231, 19 P.3d 406 (2001)

The MAR 7.1(a) requirement of proof of service of a request for a trial de novo is not jurisdictional; i.e., a trial court is not deprived of jurisdiction to conduct a trial de novo just because the party requesting the trial failed to timely file proof of service of the request as required by MAR.

Id. at 238.

In Kim v. Pham, 95 Wn.App. 439, 975 P.2d 544 (1999)

The application of a court rule to a particular set of facts is a question of law and is subject to de novo review.

Id. at 441.

In Sorenson v. Dahlen, 136 Wn.App. 844, 149 P.3d 194 (2006) the Court

held that:

Under CR 83(a), a superior court may adopt local rules that are "not inconsistent" with the statewide civil rules for superior courts. A local rule is consistent with the statewide rules unless the local rule is so antithetical that it is impossible as a matter of law for both the local rule and the statewide rules to be effective. The ultimate test is whether the rules can be reconciled and give effect.

Id. at 845.

When read as a whole, the above case law, and court rules should be interpreted to effectuate the intent of the legislature. The reviewing court may approach the application to specific facts in specific cases and that is subject to de novo review:

1. Filing proof of service of the Request for Trial de Novo within twenty (20) days of the Arbitration Award is a requirement to obtaining a trial de novo only in the mandatory arbitration rules, not in the applicable statute or local court rules and the Kennedys substantially complied with the letter and the intent of the state rules and statute.

As noted above, the governing statute and the local court rule do not require that proof of service be filed within a certain time period. When analyzed in consideration of the intent of the rules on arbitration and the Court's (even in Nevers) indications of the purposes of those rules, one must conclude that the Kennedys were in compliance with the statute and the local court rule, in substantial compliance with the State Court rule and were well within the parameters of the stated purpose of the legislative intent as well as the subsequent interpretations of the legislative intent embodied in the local and state court rules. The Court, in Nevers, did leave open the question of "substantial compliance," as set forth above.

Id. at 825-826.

2. The Request for Trial De Novo and Note for Trial Setting were served on all necessary parties of record, and therefore the Request for a Trial de Novo should not be dismissed.

There is no evidence in the file that Scott and Mary Kennedy were contesting the arbitrator's decision. Therefore, the Trial de Novo had no applicability to them, and their not having received it in no-way prejudiced them or the Incubator. These parties did not participate in the process subsequent to the filing of the arbitration award. The only parties involved in that process were the Incubator and the Kennedys.

B. THE FACT THAT THE REQUEST FOR TRIAL DE NOVO WAS ELECTRONICALLY FILED HAS BEARING ON WHETHER PROOF OF SERVICE WAS PROPERLY FILED WITHIN TWENTY DAYS OF THE ARBITRATION AWARD.

The filing notification in this matter was emailed by the Court on March 22, 2010, and indicates that the Request for Trial de Novo and the Notice of Trial Setting were submitted for filing on March 22, 2010. CP 294. The copies of the documents themselves also show e-filing dates of March 22, 2010. CP 292-293. Unlike the facts in Nevers, there was proof of actual and timely service of the Request for Trial de Novo and of the Note for Trial Setting on the Incubator, as well as proof of service in the Certificate of Service subsequently filed with the Court. Thus, the

purpose of the applicable rules and statute were fulfilled. The Court and all parties involved were on notice of the Request for Trial de Novo well within the twenty (20) day time period.

1. PCLMAR 7.1 and RCW 7.06 do not require that a party filing a Request for Trial de Novo file proof of service of the request within twenty (20) days of the Arbitration Award, regardless of how the Request for Trial de Novo was filed.

As set forth above, the rules are to be interpreted with the purpose of furthering the statutory intent. Additionally, local courts may adopt or supplement the state court rules as long as they are not antithetical to the State Court Rules.

2. The Request for Trial de Novo and Note for Trial Setting were timely served on counsel for the Incubator and timely electronically filed with the Court, service was sufficient, and there was no need for proof of service filed to be within twenty days of the Arbitration Award.

The Incubator does not dispute that the Request for Trial de Novo and the Note for Trial Assignment were timely and adequately filed with the Court and served upon the Incubator. Further, the Incubator does not dispute that these documents were electronically filed. The purpose of proof of service would be to notify the Court and involved parties that the Request had been filed and served. The Kennedys' actions fulfilled that

requirement and followed the statutory requirements as well as the requirements of the local court rules.

C. THE TRIAL COURT HAS AUTHORITY TO CONDUCT A TRIAL ON THE CLAIMS BETWEEN AND AMONGST THE PARTIES.

The Court, the legislature and the local court rules all favor the prompt and economic resolution of matters. The Nevers court has made it clear that the filing and service requirements of MAR 7.1 are not jurisdictional and that these matters should proceed. Assuming that the technicality of the lack of a paper filing and service of certificate of service in a certain time period did not prevent the expeditious resolution of this case, then the trial court may proceed.

D. THE INCUBATOR IS NOT ENTITLED TO ITS ATTORNEY'S FEES INCURRED AFTER THE ARBITRATION AWARD AS THE KENNEDYS DID NOT FAIL TO IMPROVE THEIR POSITION AT TRIAL.

The Kennedys prevailed on the Incubator's motion and on the Motion for Reconsideration. Until trial occurs, as ordered by the trial court, which party prevails is unknown. Until the trial, the issue of attorneys fees is premature.

E. THE INCUBATOR'S MOTION FOR RECONSIDERATION SHOULD NOT HAVE BEEN GRANTED.

The trial court did not err in denying the Appellant's Motion for Reconsideration. The Court did not err in its first order, and there were no bases for reconsideration such as abuse of discretion. The Court's ruling reflected an interpretation of all of the rules regarding the process for requesting a Trial de Novo.

F. THE INCUBATOR IS NOT ENTITLED TO AN AWARD OF FEES AND COSTS ON APPEAL.

The award of fees and costs is dependant upon who prevails. This Court shall determine the prevailing party on appeal.

IV. CONCLUSION

The intent of the arbitration process is to provide an alternative to court proceedings that might resolve matters. In the event of one or both parties being "aggrieved" by the decision, the statute provides for an additional process. Throughout, the stated purpose and policy is to provide a prompt, economical, and equitable process for post-arbitration resolution. The case law has shown a desire to prevent technicalities from substantively interfering with a litigant's rights to a trial on the merits.

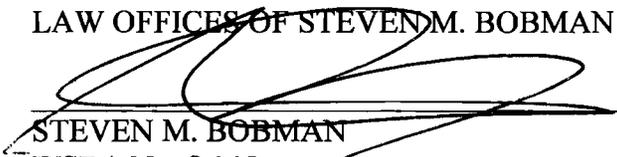
In this case, the Kennedys complied with all of the purposes and stated policies behind the rules and statutes were complied with. The only issue is that of a document stating (reiterating) what had already been done being filed only nineteen (19) days late. This was only a requirement of the state Court Rules, not of the Local Rules or of the governing statute. Arguably, the local rules and the statute should prevail. Additionally, Filing Notification (Electronic Filing) was accomplished well within the prescribed time and, under the particular circumstances of this case as well as of contemporary court procedures. This should fulfill the purpose of the proof of filing and notice requirements and allow the Trial de Novo to go forward.

For all of the above-stated reasons the trial court's ruling should be upheld. The Respondents are entitled to a Trial de Novo.

DATED this 15 day of November, 2010.

Respectfully Submitted,

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SIGNED IN UNIVERSITY PLACE, WASHINGTON, ON THIS 15TH
DAY OF NOVEMBER, 2010.

X


STEVEN M. BOBMAN