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COURT OF APPEALS
DIVISION II

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No. 40924-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY [Signature]
DEPUTY

SWINERTON BUILDERS NORTHWEST, INC.,
a Delaware corporation,

Plaintiff/Appellant,

v.

KITSAP COUNTY,
a Washington municipal corporation,

Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
THE HONORABLE THEODORE F. SPEARMAN

CORRECTED BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The trial court erred when it denied Swinerton Builders Northwest, Inc.'s ("Swinerton") motion to compel arbitration of the parties' disputes in accordance with a construction contract between Swinerton and Kitsap County ("the County"). (CP 32)

II. ISSUE PRESENTED

The trial court denied Swinerton's Motion to Compel Arbitration based on the County's argument that Swinerton had waived its claims against the County in an unrelated settlement Swinerton reached with one of its subcontractors on the Project.

Did the trial court err in denying appellant's motion to compel arbitration of the County's substantive defense based on Swinerton's settlement of claims with one of its subcontractors?

III. STATEMENT OF THE CASE

A. The Parties' Contract To Arbitrate Disputes.

In April 2004, The County and Swinerton executed a contract for construction of the Kitsap County Administration Building 2004-127 ("the Project"). (CP 54-70) The original agreement consists of two parts, the "Capital Project Contract" (see CP 54-72) and the "General Conditions for Kitsap County Facility Construction." (See CP 74-109) The Capital Project Contract

provided that all claims, counterclaims, disputes and other matters in question between the County and Swinerton be submitted to the Superior Court of Kitsap County, unless the parties otherwise agreed to alternative dispute resolution. (CP 66-67) Each Change Order, however, contained the following sentence providing for arbitration of the parties' disputes:

Note: This Change Order does not include changes in the Contract sum or Contract Time which have been authorized by *Construction Change Directive* for which the cost or time are in dispute as described in Subparagraph 7.3.8 of *AIA Document A201*.

(CP 114-119) (emphasis added).

Neither the General Conditions nor the Capital Project Contract addresses the use of Construction Change Directives ("CCDs"). CCDs were used on the Project (CP 121-22), however, and are addressed by AIA A201 Document under Paragraph 7.3. (CP 147) Subparagraph 7.3.8 of AIA A201 addresses the procedures for payment on Change Orders, including costs that are in dispute, which may be claimed in accordance with Article 4 of the AIA A201. (CP 148) Article 4 of the AIA A201 addresses the Administration of Contracts, including claims and disputes. (CP

140-45) Under Paragraph 4.6, all claims, including claims for unresolved Change Orders or CCDs, are subject to arbitration:

Any Claim arising out of or related to the Contract...shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, *be subject to arbitration.*

(CP 144) (emphasis added).

B. The Trial Court's Ruling On Swinerton's Motion To Compel Arbitration.

The parties filed two separate motions, which had overlapping schedules, in the trial court. Swinerton filed a Motion to Lift Stay of Proceedings and Compel Arbitration on June 16, 2010, with oral argument noted for June 25, 2010. (CP 15, 36-49) Swinerton subsequently re-noted hearing on the motion for July 2, 2010 after receiving a notice of unavailability from the County's counsel. (CP 232-34)

On June 18, 2010, the County filed a Motion for Summary Judgment with oral argument set for July 16, 2010. (CP 163-65; See *also* CP 218-26) Swinerton's opposition brief was due on July 6, 2010. The County filed an opposition to Swinerton's Motion to Compel Arbitration on July 1, 2010. (CP 16-20) In its opposition, the County ignored the arbitration provision incorporated into the parties' contract in each Change Order and argued that all of

Swinerton's claims were barred as a result of the defense of waiver. (CP 18) The County incorporated the arguments made in the County's Motion for Summary Judgment into its opposition to Swinerton's Motion to Compel Arbitration. (CP 18) During oral argument on Swinerton's motion, the County's attorney stated that it did not believe there was a valid arbitration agreement (7/2/10 RP 5), but at no time did the County offer any evidence or any legal theory to support the oral contention of the County's attorney.

On July 2, 2010, the trial court denied Swinerton's Motion to Compel Arbitration, based on the County's argument that Swinerton had waived its claims against the County in an unrelated settlement Swinerton reached with one of its subcontractors on the Project. (CP 32) On the same day, Swinerton filed its notice of appeal of the order denying arbitration. (CP 30) Because the trial court had lost jurisdiction to rule on any pending motions, including the motion for summary judgment during the pendency of an appeal, RAP 7.2(a), Swinerton did not file a response to the County's summary judgment.

C. The Basis Of The County's Waiver Defenses.

Two separate lawsuits arose out of the Project. The resolution of the first lawsuit, brought by a non-party to the pending lawsuit, is the basis of the County's waiver defense to Swinerton's Motion to Compel Arbitration.

1. M.B. Diddy Lawsuit Against Swinerton.

On August 18, 2006, Swinerton was sued by a subcontractor, M.B. Diddy, that performed work on the Project. (See CP 204) The subcontractor alleged breach of contract claims against Swinerton. (CP 37, 204) The subcontractor's suit also named the County as a defendant, but only to the extent necessary to recover from the statutory retainage fund for public projects. (CP 37, 204) No cross claims were ever alleged between co-defendants Swinerton and the County. (CP 37)

Swinerton resolved the subcontractor's breach of contract claim through mediation, and stipulated to a settlement and dismissal under CR 2A. (CP 194-99) The trial court in the *Diddy* litigation entered the stipulation and ordered dismissal on January 15, 2008. (CP 194-99) Upon learning that the County was interpreting the order as a broad dismissal in a manner inconsistent with the parties' intent and the parties' bargain, M.B. Diddy and

Swinerton moved the trial court to vacate and modify the order. (CP 205-06) The trial court vacated the earlier order and entered a new order under CR 60. (CP 205) On October 22, 2008, the County appealed the trial court's use of CR 60 to vacate and enter a new order of dismissal. (CP 206)

On October 19, 2009, the Court of Appeals, Division I, in an unpublished decision, reversed the trial court on the grounds that the Court lacked discretion to vacate the order under CR 60. (CP 203-11) The issue of how the original (reinstated) order should be interpreted and whether it would act as a waiver in the separate dispute between Swinerton and the County was not resolved by the Court of Appeals, because it was not before the Court of Appeals. Division One did not address the County's contract-based arguments because of its resolution of the case. (CP 211)

2. Swinerton Lawsuit Against The County.

The lawsuit out of which this appeal arises involves a claim by Swinerton against the County for work performed on the Project. Specifically, Swinerton's claim against the County is for breach of contract and warranties associated with the Project. Swinerton's Complaint was filed on January 4, 2008. (CP 3-6) The County's

answer, which did not include a counterclaim, and which did not assert its current waiver defense as required under CR 12(b), was filed on July 10, 2008. (CP 7-12)

IV. ARGUMENT

Swinerton properly filed its Motion to Compel Arbitration under RCW 7.04A.070. The County's stated defenses, whether characterized as waiver or res judicata, cannot be considered when determining if the parties have agreed to arbitrate their disputes under the parties' contract. The reason for this is simple: in consideration of such defenses, the Court would have to consider the merits of the claims, which is prohibited under RCW 7.04A.070. See *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 886, ¶ 34, 224 P.3d 818 (2009) (a court should not reach the underlying merits of the controversy when determining arbitrability).

Instead of focusing on the merits of the dispute, the law in Washington requires the Court to determine if there is a valid arbitration agreement between the parties. If the Court determines there is, then the merits of the claims shall be decided by the arbitrator. Because the parties' Contract clearly incorporated an arbitration provision, the answer to whether an arbitration

agreement exists here is in the affirmative. As such, arbitration should be compelled.

A. Standard Of Review.

Trial court decisions on motions to compel arbitration are reviewed de novo. **Zuver v. Airtouch Communications, Inc.**, 153 Wn.2d 293, 302, 103 P.3d 753 (2004) (citing **Ticknor v. Choice Hotels Intern., Inc.**, 265 F.3d 931, 936 (9th Cir.2001), cert. denied, 534 U.S. 1133 (2002)). The party opposing a motion to compel arbitration (in this case, respondent County), bears the burden of showing that the arbitration provision is not enforceable. **Satomi Owners Ass'n v. Satomi LLC**, 167 Wn.2d 781, 797, ¶ 19, 225 P.3d 213 (2009). On review, this Court considers only those grounds for denying arbitration established by the pleadings and supported by the record. **Truck Ins. Exchange v. Vanport Homes, Inc.**, 147 Wn.2d 751, 766, 58 P.3d 276 (2002) (citing **Mountain Park Homeowners Ass'n, Inc. v. Tydings**, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994)).

B. The Court Should Compel The Parties To Arbitrate Pursuant To The Controlling Contract Terms.

Strong public policy favors arbitration in Washington law, in order “to avoid the formalities, the expense, and the delays of the

court system.” **Perez v. Mid-Century Ins. Co.**, 85 Wn. App. 760, 766, 934 P.2d 731 (1997) (citing **Barnett v. Hicks**, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992)). In determining whether the parties agreed to arbitrate disputes, a court considers four guiding principles: (1) the duty to arbitrate arises from contract; (2) a question of arbitrability is a judicial question unless the parties clearly provide otherwise; (3) a court should not reach the underlying merits of the controversy when determining arbitrability; and (4) as a matter of policy, courts favor arbitration of disputes. **Stein v. Geonerco, Inc.**, 105 Wn. App. 41, 45-46, 17 P.3d 1266 (2001); **Townsend v. Quadrant Homes**, 153 Wn. App. at 886, ¶ 34.

Although arbitrability is for the court, Washington law favors arbitration even when the contract to arbitrate is ambiguous. See, e.g. **Kamaya Co., Ltd. v. American Property Consultants, Ltd.**, 91 Wn. App. 703, 714, 959 P.2d 1140 (1998), *rev. denied*, 137 Wn.2d 1012 (1999) (holding that a contractual dispute is arbitrable “unless it can be said ‘with positive assurance’ that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute”). In this case, the contract between the County

and Swinerton is not ambiguous. The Contract, as revised by signed Change Orders, *requires* arbitration of “any claim” between Swinerton and the County. (CP 144)

The boilerplate provisions of the agreement between the parties are comprised of three separate documents: (1) Capital Project Contract (CP 54-72); (2) General Conditions (CP 74-109); and (3) the AIA A201. (CP 124-62) The Capital Project Contract and the General Conditions formed the original agreement between the parties. During the course of construction, the parties modified their original agreement by executing multiple separate Change Orders. (CP 114-19) Each of the signed Change Orders unequivocally incorporates the AIA A201. The incorporation of the AIA A201 through not one, but (at least) seven Change Orders to the contract, emphasized the parties’ agreement to submit claims to arbitration. (CP 114-19, 121; *See also*, CP 190)

As set out in the Statement of Facts page 3, *supra*, the parties agreed that “*Any Claim* arising out of or related to the Contract...*shall*, after decision by the Architect or 30 days after submission of the Claim to the Architect, *be subject to arbitration.*”

(CP 144) AIA 201, Subparagraph 4.3.1, broadly defines “Claims”

as:

a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. *The term “Claim” also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.*

(CP 142) (emphasis added) The parties’ “dispute” here is a “claim” subject to arbitration under their Contract.

In seeking to compel arbitration, Swinerton is not asking the Court to determine the underlying merits of the controversy. Swinerton simply wants to have the parties’ disputes resolved in accordance with the required process set forth in the parties’ Contract. Because there are no facts that should cause the court to deviate from the policy of requiring arbitration where the Contract includes an arbitration provision, the trial court’s order should be reversed and the trial court should be directed to compel arbitration.

C. The Court Should Compel Arbitration Because Courts Are Presumptively Required To Enforce Arbitration Agreements.

Washington’s Uniform Arbitration Act, RCW ch. 7.04A, provides that mandatory arbitration clauses are valid, enforceable,

and irrevocable, “except upon a ground that exists at law or equity for the revocation of contract.” RCW 7.04A.060(1). If an agreement to arbitrate exists arbitration should be ordered. RCW 7.04A.070(1).

A motion to compel arbitration invokes special proceedings:

(1) *On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.*

...

(3) *The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.*

RCW 7.04A.070 (emphasis added).

“Washington State has a strong public policy favoring arbitration of disputes.” ***Heights at Issaquah Ridge, Owner Ass’n v. Burton Landscape Group, Inc.***, 148 Wn. App. 400, 403-04, ¶ 5, 200 P.3d 254 (2009). Arbitration agreements are enforced whenever possible. ***Munsey v. Walla Walla College***, 80 Wn. App. 92, 95, 906 P.2d 988 (1995).

Courts are presumptively *required* to enforce arbitration agreements. See ***Barnett v. Hicks***, 119 Wn.2d 151, 154, 829 P.2d 1087 (1992). “It is the evaluation and conclusion of the arbitrator, and not those of the courts, that the parties have promised to abide by. There is no reason why, in the face of their solemn agreement, the parties should be given an alternative of invoking time consuming and costly machinery of the courts in lieu of the relative expedience of an arbitration proceeding.” ***Tombs v. Northwest Airlines, Inc.***, 83 Wn.2d 157, 161, 516 P.2d 1028 (1973) (quoting ***Hanford Guards Union of America, Local 21 v. General Elec. Co.***, 57 Wn.2d 491, 498, 358 P.2d 307 (1961)) As a rule, a contractual dispute is arbitrable unless the court can say “with positive assurance” that no interpretation of the arbitration clause could cover the particular dispute. ***Kamaya Co., Ltd. v. American Property Consultants, Ltd.***, 91 Wn. App. at 714.

In this case, the parties repeatedly incorporated the provisions of the AIA A201 when they executed (at least) seven separate Change Orders that referenced the AIA A201. (CP 114-19, 121; See *also* CP 190) This incorporation bars any court from stating “with positive assurance” that no interpretation of the

arbitration clause could cover this particular dispute. Therefore, the Court should reverse the trial court decision and remand back to the trial court with directions to compel arbitration of the parties' disputes.

D. The County Did Not Meet Its Burden Of Showing That The Arbitration Agreement Is Not Enforceable.

The party opposing a motion to compel arbitration bears the burden of showing that the arbitration provision is not enforceable. ***Satomi Owners Ass'n v. Satomi, LLC***, 167 Wn.2d at 797, ¶ 19. Here, the County never disputed the existence of the arbitration provision in its response to Swinerton's Motion to Compel Arbitration. (CP 16-20) Instead, the County's entire response to Swinerton's Motion to Compel Arbitration was based upon a misguided attempt to expand the terms of the Stipulation and Order of Dismissal in the *M.B. Diddy* matter into a waiver of all of Swinerton's claims. (See CP 16-20)

The County's failure to dispute that the modified Contract required *all disputes* be submitted to arbitration requires arbitration of its waiver defense. In fact, the County's failure to dispute that arbitration is the required venue for the resolution of all disputes between the County and Swinerton arising out of the Project

undermines the County's reliance on the *M.B. Diddy* Order of Dismissal. The Order of Dismissal provides:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that *all claims asserted herein, or which could have been asserted herein*, by and between Plaintiff M.B. Diddy Construction, Inc. and Defendants Swinerton Builders Northwest, Fidelity & Deposit Co. of Maryland, United States Fidelity and Guaranty Co., Liberty Mutual Insurance Company, Federal Insurance Co., and Kitsap County Administration, are hereby dismissed with prejudice, without admission of liability, and without costs to any party.

(CP 197-198)

Thus, the dismissal was limited to claims that *could* have been asserted in the *M.B. Diddy* litigation. This language tracked the first paragraph of the stipulation, which was also limited to claims "which could have been asserted" in the *M.B. Diddy* litigation. (CP 195) Because the County did not dispute the applicability of the AIA arbitration provision to the Swinerton/Kitsap Contract in its opposition to the Motion to Compel Arbitration, it is clear that Swinerton *could not* have asserted Swinerton's claims in the *M.B. Diddy* litigation, as those claims were subject to the arbitration agreement, and the conditions precedent, in a totally separate contract.

Any attempt by the County to claim that any other language in the Order resulted in an expanded release and discharge of claims, inevitably leads to an ambiguity and a disputed question of fact. Reading the Order as a whole, several potential interpretations exist. Given the varied interpretations, the scope of any release or waiver, is a question of fact that must be resolved in arbitration. ***Adler v. Fred Lind Manor***, 153 Wn.2d 331, 342, 103 P.3d 773 (2004) (citing ***Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.***, 460 U.S. 1, 25, 103 S.Ct. 927 (1983)).

The only point at which the County articulated that it disputed an agreement to arbitrate was during oral argument below when the County's counsel simply stated, without any supporting declaration or affidavit, that the County denied there was an arbitration provision. (See 7/2/10 RP 5) The County never offered any factual evidence or legal support for the statements of its counsel. Instead, the County's attorney merely argued that the County did not focus on the issue of arbitrability because it was relying on the *merits* of the County waiver defense.

As the court is aware, it is the County's position that this suit, as a whole, is inappropriate and that the plaintiff has waived any and all rights that they have

under the claim...The plaintiff waived their rights under the contract.

(7/2/10 RP 5-6) Focusing on the merits of a defense does not satisfy the rule articulated in *Satomi*, in which the court held that “[a] party opposing arbitration bears the burden of showing that the agreement is not enforceable.” 167 Wn.2d at 797, ¶ 19. Because the County never even addressed the underlying contract and agreement to arbitrate, the County did not satisfy its burden of showing that the agreement to arbitrate was not enforceable.

E. The County's Waiver Argument Is Based On The Merits Of The Underlying Claim And Is For The Arbitrator To Decide.

The County argued to the trial court that Swinerton was not entitled to arbitrate its claims against the County because a release of a subcontractor's claim was a binding waiver of Swinerton's arbitrable claims against the County. The analysis of such a waiver defense, however, requires an inquiry into the merits of the claims and defenses. The merits of the claims and defenses are not for the court to decide in this case where the parties have a valid and enforceable arbitration agreement. To the extent the County argues that Swinerton waived or released rights under the contract, a dispute exists between the parties that is subject to arbitration.

Stated differently, under the arbitration agreement the arbitrator decides if Swinerton's claims have been waived or if Swinerton's claims are still valid.

Arbitrators are just as capable as courts to determine whether claims have been waived or claim preclusion applies. In ***Storey Const. Inc. v. Hanks***, 148 Idaho 401, 224 P.3d 468 (2009), for instance, the Idaho Supreme Court held that res judicata is a defense that is necessarily a component of the dispute to be considered and decided by the arbitrator. 224 P.3d at 478. The ***Storey*** case considered an AIA standard contract that included the same arbitration clause as the arbitration provision in this case. The Idaho Supreme Court reversed the trial court's decision denying arbitration on the basis of the defense of res judicata. 224 P.3d at 478; See also ***North River Ins. Co. v. Allstate Ins. Co.***, 866 F. Supp. 123, 129 (S.D.N.Y. 1994) (arbitrators are equally capable of addressing and applying doctrines of preclusion); ***Chiron Corp. v. Ortho Diagnostic Systems, Inc.***, 207 F.3d 1126, 1132 (9th Cir. 2000); ***Transit Mix Concrete Corp. v. Local Union No. 282***, 809 F.2d 963, 969-70 (2nd Cir. 1987); ***Sharp v. Ryder Truck Lines, Inc.***, 465 F. Supp. 434, 437 (E.D.Tenn. 1979).

Our Supreme Court has taken a very similar position that a party's defenses are issues to be decided by arbitrators. Washington courts indulge every presumption "in favor of arbitration, whether the problem at hand is the construction of contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." **Adler v. Fred Lind Manor**, 153 Wn.2d 331, 342, 103 P.3d 773 (2004) (citing **Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.**, 460 U.S. 1, 25, 103 S.Ct. 927 (1983)) By denying the motion to compel arbitration not on the absence of an agreement to arbitrate, but instead on its conclusion that the County's waiver defense was valid, the trial court considered the merits of the underlying claim and violated RCW 7.04A.070. The County's waiver argument is based on the merits of the underlying claim and is for the arbitrator to decide.

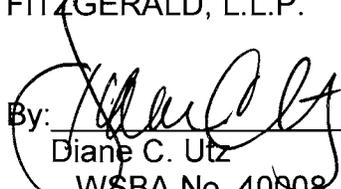
V. CONCLUSION

This Court should reverse and remand with instructions that the trial court shall sign an order compelling arbitration.

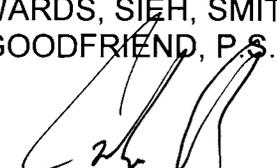
Dated this 7th day of October, 2010.

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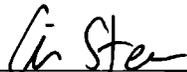
DECLARATION OF SERVICE 10 OCT -8 PM 1:56

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 7, 2010, I arranged for service of the foregoing Corrected Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> E-Mail <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED at Seattle, Washington this 7th day of October, 2010.



Carrie Steen