

NO. 42109-7-II

WASHINGTON STATE COURT OF APPEALS

DIVISION II

ALLEN METTLER AND MAY METTLER, D/B/A
ARM CONSTRUCTION,

Appellant,

vs.

GRAY LUMBER COMPANY,

Respondent.

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RESPONDENT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

Gray Lumber assigns no error to the trial court.

II. ISSUES PRESENTED

1. Did the trial court correctly rule that the Credit Agreement between the parties applied to the claims made by Allen and May Mettler, d/b/a ARM Construction ("ARM")?

2. Did the trial court correctly rule that the Credit Agreement was not waived or modified so as to eliminate the disclaimers contained therein?

3. Did the trial court correctly apply the disclaimers contained in the Credit Agreement to dispose of ARM's claim?

4. Did the trial court properly deny ARM's Motion to Strike and base its rulings on admissible evidence?

III. STATEMENT OF THE CASE

This case arises out of the purchase of wood supplies (4"x 4" lumber) by Allen Mettler/ARM Construction from Gray Lumber in May of 2006. The purchase was made under a Commercial Account Application and Agreement ("Credit Agreement" found at *CP 51-52, 155-56*) signed in 2003 between Mettler and Gray Lumber. Its existence and applicability to the transaction at issue is admitted by Allen Mettler in the verified Complaint, *CP 2, ¶ 4, lines 4-6*, and in his Declaration, *CP 73, ¶*

2. The Credit Agreement contains express waivers of warranties including merchantability or fitness for a particular purpose and limitations of damages for breach. *CP 11, 52, 156*. Those terms were repeated on subsequent bills of lading and invoices documenting sales. *CP 49, 84*.

ARM ordered a quantity of lumber graded "No. 2 or better." *CP 47, 151*. See also, *CP 74, ¶ 3-4*. Gray admitted erroneously delivering a different grade. *CP 5, ¶ 5*. ARM's foreman receipted for the lumber, *CP 47*. He had not been told to check it or what grade was expected. *CP 74, ¶ 5*. However, the grade to be delivered was on the bill of lading, *CP 47, 151*, and there were markings on the wood indicating the grade that was actually delivered. *CP 74, ¶ 6 and CP 54*.¹ The lumber was used to build scaffolding. In the process, a 4x4 broke with two men on the plywood platform it was holding up. *CP 74, ¶ 6*. Lacking any fall prevention gear, the two workers fell to the ground below and were injured. *CP 128-131*. The workers sued various parties and their claims were settled. *CP 118-25*. ARM then brought this suit, alleging various damages suffered as a result of the broken lumber and injuries to ARM's workers.

¹ An enlarged color copy of the top photo at CP 54 is attached hereto, due to color and resolution differences in photocopies making the markings on the lumber difficult to read. The topmost two 4x4 pieces shown in the bundle depicted in the photograph shows the destination ("ARM") and the grade marking ("STD/BTR"). A copy of the photograph will also be available for inspection at the oral argument on this matter.

ARM claimed in its Complaint that Gray Lumber breached warranties of merchantability and fitness for a particular purpose. *CP 1-3.*

Gray Lumber moved for summary judgment dismissal of all claims on February 9, 2011, originally setting a hearing for March 18, 2011. *CP 8.* The hearing was continued twice,² eventually to April 29. ARM filed its opposition on March 28, 2011. *CP 57-94.*

In its opposition, ARM argued principally that the disclaimers relied on by Gray Lumber were not part of the parties' contract because they were printed on the back of the invoice, and were not discussed or agreed to during the telephone call during which Mr. Mettler ordered the lumber. *CP 61:15-20, 62-66.* ARM also argued that the disclaimers and exclusions were unconscionable and therefore unenforceable. *CP 67-68.* This argument was based on the position that the only contract in effect was "entered into ... over the phone." *CP 68:24-26.*

ARM further argued that the warranty disclaimer and damage limitation terms were waived or modified out of the contract. *CP 69-71.* In response to Gray's motion for summary judgment, ARM alleged for the first time that Mac Gray had made statements which waived or modified the terms of the Credit Agreement that disclaimed warranties and limited

² At the request of ARM originally, and again later due to the assigned judge recusing herself because Mac Gray's spouse is a Pierce County Superior Court Commissioner.

remedies including consequential damages.³ *CP 74.*

Gray Lumber replied by pointing out that the applicable disclaimer and limitation of damages terms did in fact appear in the original Credit Agreement, and that both the Complaint and the Mettler Declaration acknowledged the contract between the parties that had existed for years. Thus, there was no new contract formed by the telephone order. *CP 96-97.* Gray Lumber also argued that no facts supported either the alleged unconscionability of the warranty waivers or damages limitations, or the argument that the terms had been waived or modified out of the parties' agreement. *CP 98-108.*

On April 21, 2011,⁴ ARM filed a motion to strike some of Gray's materials in support of its motion, on grounds of authenticity. *CP 132-33.* Gray Lumber responded, providing documents authenticated and verified

³ It should be noted that while ARM argues that these statements have not been disputed, *Appellant's Brief*, p. 10, they are also not admitted. See, e.g., *CP 106-108.* It is Gray Lumber's position that for the purpose of the motion and appeal it is not material whether or not the statements are disputed. Even assuming they were made, for the purpose of the motion and this appeal, they do not suffice to raise a genuine issue of fact as to waiver or modification of the underlying Credit Agreement. The statements alleged were raised only in response to the summary judgment, and do not match alleged statements claimed in ARM's discovery responses. See *CP 30, 35-36,* containing alleged statements which are not consistent with those contained in the Allen Mettler Declaration at *CP 73-75.*

⁴ The Court should note that this is **after** the briefing had all been submitted (with the motion, response and reply being the only briefing permitted under CR 56(c)), **after** the originally scheduled hearing date, and only **eight days** before the actual hearing date.

by Mac Gray. *CP 134-160* (see, especially, *CP 146, 155-56*).

Ultimately, at the hearing on April 29, the trial court denied ARM's motion to strike, granted Gray Lumber's motion, and dismissed plaintiffs' claims. *CP 161-62*. This appeal followed. The issues herein focus on whether the Credit Agreement applied to the purchase and sale transaction at issue, and whether its terms were waived or modified by the alleged statements of Mac Gray. ARM also raises an issue regarding whether the trial court properly denied its motion to strike materials offered up (twice) by Gray Lumber.

IV. ARGUMENT

a. Standards on Appeal.

Appellate reviews of summary judgment motions raise questions of law that are generally reviewed de novo. *Parkridge Assocs. Ltd. v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 597-98, 54 P.3d 225 (2002). An appellate court reviewing a summary judgment order places itself in the position of the trial court. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). The moving party must show the absence of a material fact. *Id.*, at 225. A defendant may meet that burden by showing that the plaintiff lacks sufficient evidence to establish an essential element of the plaintiff's case. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In such event, if the plaintiff

fails to offer evidence to establish each element essential to the plaintiff's case, a court should grant the motion. *Young*, 112 Wn.2d at 225.

b. ARM failed to establish evidence sufficient to go forward on the claims made.

ARM's Complaint asserted breach of various warranties and failure to provide conforming goods. The Complaint alleged injuries that resulted "from Gray's breaches of warranty of merchantability, warranty of fitness for particular contract [sic], breach of contract and failure to deliver conforming goods." *CP 2*, ¶ 5. Gray Lumber denied all alleged breaches of warranty. *CP 5*, ¶ 5. Appellant sought various items of damage, none of which related to replacement of or reimbursement for the non-conforming lumber or other direct contract-related damages, but instead are more accurately considered as "consequential damages".⁵ *Id.*, ¶ 6. Gray Lumber asserted defenses that plaintiffs' claims were barred by express waivers in the Credit Agreement, and that their remedies were limited by the same agreement. *CP 5*, ¶ 7.f, g.

⁵ "Such damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act. Damages which arise from intervention of special circumstances not ordinarily predicable. Those losses or injuries which are a result of an act but are not direct and immediate. Consequential damages resulting from a seller's breach of contract include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise, and injury to person or property proximately resulting from any breach of warranty. U.C.C. § 2-715(2)." *Black's Law Dictionary*, p. 204 (abridged 5th ed., West 1983).

Thus, to avoid summary judgment, ARM was required to show that a valid warranty of merchantability or fitness for a particular purpose existed and was breached, and that it was entitled to seek consequential damages on the basis of delivery of non-conforming goods. Do to this, ARM was required to show that the Credit Agreement was unenforceable in its entirety, or that the waivers and limitations contained in it were waived or modified. Its failure to do so, as discussed below, resulted in the trial court granting summary judgment and dismissing ARM's claims.

c. Gray Lumber established the existence of a contract which governed the transaction at issue.

Gray Lumber presented ample evidence that Allen Mettler ordered the subject lumber pursuant to the Credit Agreement between the parties. Plaintiffs' own verified Complaint acknowledges the Credit Agreement. *CP 1-3*. This is further confirmed by Mr. Mettler's own Declaration, discussing the Credit Agreement and its terms. *CP 73*.

ARM contends that the trial court found – and then ignored – that an issue of fact existed as to whether the credit agreement was in effect at the time of the 2006 lumber purchase. *Appellant's Brief*, p. 19-20. (citing to *RP 24*). However, ARM takes the trial court's remarks out of context and ignores both its own Complaint and the Declaration of Allen Mettler in making this argument. In the sentence discussed by appellants, the trial

court was merely summarizing Mettler's contract expiration argument.⁶ See, *RP 23:23 through 24:16*. The trial court expressly noted the statements made by Mr. Mettler in his Declaration in addressing and rejecting this expiration argument. *RP 24:7-16*. The trial court concluded that it was "very clear that ARM had a credit agreement with Gray Lumber," *RP 24:8-9*, and that Mr. Mettler "was operating under that agreement at the time that this event took place." *RP 24:14-16*. Thus, the suggestion that the trial court acknowledged and then overlooked a genuine issue of fact as to whether the Credit Agreement had expired is incorrect. The only evidence before the trial court is that the Credit Agreement bound the parties at the time of the events at issue.

ARM's assertion that the trial court improperly weighed evidence in determining that the Credit Agreement governed the transaction at issue is also incorrect, because there was no evidence to the contrary. The only evidence put before the trial court – including ARM's evidence – was that the Credit Agreement did in fact apply, so there was no weighing of evidence that occurred.

Although ARM pointed to handwritten notations on the face of the Credit Agreement in contending that the court must infer its expiration,

⁶ This was an argument raised for the first time - after the close of briefing - at the motion hearing, which no doubt spurred the trial court's recap of the argument.

there is no evidence that it in fact expired. Nothing in the verified Complaint or the Mettler Declaration hints at its expiration. To the contrary, those pleadings affirm the existence of the Credit Agreement, as do the attempts to show waiver or modification of its terms. (How can appellant argue the waiver or modification of terms of a contract which had expired?)⁷

Moreover, there is no evidence at all as to what the notations "renew" and "exp 7/05" on the contract mean. The arguments of ARM's counsel are not evidence, and cannot raise a genuine issue of material fact. Mr. Mettler failed to discuss the notations in any way in his Declaration. Appellant even admits that "there was no evidence to explain" the "renew" notation on the contract. *Appellant's Brief*, p. 19. The same is true of the "exp. 7/05" notation.⁸ This renders the notations irrelevant.

Neither party made any claim in the evidence before the trial court that the Credit Agreement had expired. Speculation to the contrary does

⁷ ARM had every opportunity to offer up its own documentary evidence relating to the Credit Agreement, and failed to do so. Gray Lumber expressly requested production of such documents on several occasions, and they were never provided. *CP 37-41, 135:1-16*.

⁸ Had ARM raised this argument properly, in its written response and supported by admissible evidence, it could have been addressed by Gray Lumber. For example, it might be shown that the "exp 7/05" notation referred to the expiration of the adjacent contractor license number. But by raising it for the first time at oral argument, without evidentiary support, ARM deprived Gray of any opportunity to respond. ARM should not be – and was not – permitted to defeat summary judgment by raising speculative arguments at the time of the hearing.

not raise a genuine issue of material fact, since the trial court must decide the motion on admissible evidence, not on speculative arguments. The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). ARM correctly notes that the court may not consider inadmissible evidence when ruling on a motion for summary judgment.⁹ This applies to argument of counsel where it is not supported by admissible evidence.

The trial court correctly ruled that the 2003 Credit Agreement remained in effect at the time of the credit purchase at issue here.

d. Appellant failed to establish that the terms of the Credit Agreement were modified or waived.

1. There was no modification of the Credit Agreement.

A party seeking to avoid one contract and enforce a second or different contract may argue that the second constitutes a modification of the first (as is the argument here, after its argument that the only contract was the telephone order fell flat). But to avoid the initial contract and establish a modification, ARM must bear the burden of demonstrating the parties' unambiguous intent to change their bargain, a meeting of the minds, and new consideration. *Wagner v. Wagner*, 95 Wn.2d 94, 103, 621

⁹ *Appellant's Brief*, p. 17.

P.2d 1279 (1980).

"Mutual modification of a contract by subsequent agreement arises out of the intentions of the parties and requires a meeting of the minds." *Jones v. Best*, 134 Wash.2d 232, 240, 950 P.2d 1 (1998). "Without a mutual change of obligations or rights, a subsequent agreement lacks consideration and cannot serve as modification of an existing contract." *Ebling v. Gove's Cove, Inc.*, 34 Wn.App. 495, 499, 663 P.2d 132 (1983). Additionally, mutual assent is required; one party may not unilaterally modify a contract. *Jones*, 134 Wash.2d at 240, 950 P.2d 1. The burden of proving that the parties intended to modify the earlier agreement rests upon the party asserting the modification. *Hanson v. Puget Sound Navigation Co.*, 52 Wash.2d 124, 127, 323 P.2d 655 (1958).

Flower v. TRA Industries, Inc., 127 Wn.App. 13, 27-28, 111 P.3d 1192

(2005). Here, ARM wishes to avoid the written contract by arguing in part that the parties modified its terms. But ARM has not offered any evidence of a mutual and unambiguous intent to change the written contract - a meeting of the minds - and new consideration. Failing any of these elements is fatal to the modification claim; ARM fails each of them.

In our case, the Declaration of Allen Mettler is conspicuously devoid of any suggestion that Mr. Gray referred in any way to the Credit Agreement, its terms, or how they would be modified. There is also no mention of the consideration given for any alleged modification. The Mettler Declaration also lacks any mention that Mr. Mettler said or did anything that indicated consent to a modification of the Credit Agreement, or that he understood that ARM's obligations changed in any way. Silence

is not acceptance. *Jones*, 134 Wn.2d at 240. Nor can it raise a genuine issue of fact about modification. *Alaska Pac. Trading Co. v. Eagon Forest Prod. Inc.*, 85 Wn.App. 354, 360, 933 P.2d 417 (1997).

In short, ARM alleges a modification, but fails to offer a single fact to support any of the prerequisites for a finding of a modification. The trial court correctly rejected ARM's modification argument.

2. *There was no waiver of terms in the Credit Agreement.*

ARM would have the Court find that simply by stating "We sent the wrong stuff. We'll be responsible for the consequences," Gray Lumber, through Mac Gray, waived valuable disclaimers of warranty and exclusions of consequential or other damages in the parties' written agreement.¹⁰ But ARM has offered no authority which supports this proposition, and the case law is otherwise:

The waiver of a right is a voluntary and intentional relinquishment of a known right. *Caterpillar Tractor Co. v. Collins Mach. Co.*, 286 F.2d 446 (9th Cir. 1960). Waiver will not be implied on doubtful factors; and for a waiver to be found, there must be evidence, inconsistent with any other intention, of an intent to relinquish the right. *White Pass Co. v. St. John*, 71 Wash.2d 156,

¹⁰ As discussed in fn. 3 above, the nature and content of the alleged statements are not consistent, changing between the time of ARM's discovery answers to the time of Allen Mettler's Declaration. Gray Lumber disputes all of the statements being alleged, but addresses them as if they were made for the sake of this motion and appeal, since by disputing them nothing would change. ARM would still be entitled to the inference that they were made. The fact that they are inconsistent, however, makes ARM's claim that they were unambiguous even more problematic.

427 P.2d 398 (1967); *Birkeland v. Corbett*, 51 Wash.2d 554, 320 P.2d 635 (1958).

Bonanza Real Estate v. Crouch, 10 Wn.App. 380, 386-87, 517 P.2d 1371 (1974). A bare statement that Gray Lumber would "be responsible for the consequences" or make ARM whole is subject to more than one interpretation; it could mean what ARM argues, but it could also mean that Gray Lumber would cure the non-conforming tender with the correct wood – which it did. It could also mean something in between, or something entirely different in scope and effect. The central point, however, and the one that is fatal to ARM's argument, is that where the purported statement is ambiguous, it cannot be the foundation of a waiver as a matter of law. And an ambiguous statement cannot through application of an inference be rendered unambiguous, saving ARM from summary judgment.

The lack of any conversation as to the existence of waiver, the terms waived, and the resulting obligation being assumed by Gray Lumber is critical. Mr. Mettler's Declaration addressed none of this. His response is not described. He did nothing to ascertain Mac Gray's intention or meaning in making the statements (if made). And the purported statement(s) is/are not inconsistent with any intention other than waiver of warranties or exclusions. All of this is fatal to the claim of waiver.

Nor has ARM offered any evidence of any action on the part of Gray Lumber which is inconsistent with an intent to maintain its rights under the Credit Agreement. ARM pointed in its summary judgment opposition to Gray's replacement of the lumber, and its defense of the suit by the injured workers, as conduct evidencing waiver. That argument was absurd, and appears to have been abandoned on appeal. ARM no longer even argues that any of Gray's conduct was consistent with waiver. *Appellant's Brief*, 9-12.

Instead, ARM now appears to argue that the "consequences" of the accident in which two workers were injured are somehow the same as the "consequences" of delivering the wrong grade of lumber, and therefore must have been within Mac Gray's contemplation when he made the statements attributed to him. This, too, is absurd.

There is no evidence that at the time of the purported statements Mac Gray had knowledge of the extent of the workers' injuries, or the negligence of ARM or the injured workers in failing to use fall arresting gear, or the failure of Allen Mettler to properly engineer the scaffolding and comply with safety regulations, or any number of other issues that might have contributed to the fall incident. Nor could Mr. Gray possibly have known anything about ARM's future insurance premiums, Labor & Industries penalties for safety violations (why in the world would Mr.

Gray even contemplate paying such penalties?), or other damages that ARM did not even specify in the Complaint years later. It is nonsensical to assume or infer that any of these considerations were within anyone's contemplation at the time that Mr. Gray went to the site and confirmed that his company had sent the wrong grade of lumber and would correct the error.

Gray Lumber's statements and actions are reasonably susceptible to at least two interpretations, if not more, and therefore cannot reasonably be deemed unequivocal and inconsistent with any other intention than to relinquish rights specified in the Credit Agreement. Thus, as a matter of law, no waiver can be found to have occurred. ARM is not entitled to an inference that only one of two possible interpretations of Mac Gray's purported statement applies; if there exists more than one reasonable interpretation, then as a matter of law, the statement is not unequivocal and the claim of waiver fails.

e. The trial court correctly denied ARM's motion to strike.

Appellant claims that "Gray's only evidence of the terms of the contract was inadmissible and should have been stricken." *Appellants' Brief*, p. 14. This is incorrect because, as discussed above, ARM's Complaint admitted the contract and ARM offered no alternate contract or declaration challenging the validity of the contract. It is also incorrect

because ARM (untimely) moved to strike the contract and that motion was denied because any defect in authenticating the document had been remedied.¹¹

The trial court correctly denied plaintiff's motion to strike the contract. ARM failed to raise any objection to the supporting materials offered by Gray Lumber in its initial response pleadings. *CP 57-72*. To the contrary, in its recitation of facts, ARM acknowledged that it "had a credit agreement with Gray Lumber" and went on to discuss the warranty disclaimers and exclusion of consequential damages. *CP 58:13-17*. In its argument, ARM contended that,

The disclaimers and exclusions were not a part of the contract. They are unconscionable and unenforceable. In any event, the parties modified the contract, eliminating the disclaimers and exclusions. Defendant's actions also constituted a waiver of the disclaimers and exclusions. ARM is entitled to relief for Defendant's admitted breach of contract, including incidental and consequential damages.

CP 60:16-20. Clearly, ARM's argument sought to avoid the terms of the Credit Agreement, not to show that it had expired.

¹¹ ARM apparently fails to realize that if the Court of Appeals were to accept the argument that the written contract was expired or otherwise inapplicable because the only contract was the one reached on the phone (see *Appellant's Brief* at p. 18), ARM's claims would be subject to dismissal on statute of limitations grounds. In the absence of the written contract, ARM's claims would be based on an oral contract, which carries a 3-year limitations period. RCW 4.16.080(3). Only if they are based on the written Credit Agreement do ARM's claims survive under the 6-year limitation period of RCW 4.16.040, given the passage of over 4 years between the May 2006 incident and the August 2010 filing of this action.

Nearly a month later, appellant raised, for the first time, the issue of authenticity of the Credit Agreement. But rather than offer a different version that was claimed to be the actual contract, ARM attacked the admissibility of the agreement. This motion came after ARM's responsive pleadings, and after the deadline for filing opposition papers under CR 56(c). *CP 132-33*. Gray Lumber immediately (the next day) filed and served a supplemental discovery response in which Mac Gray verified and authenticated exhibits which include the same documents previously offered.¹² That authentication is valid under ER 901(a) and (b)(1), as well as GR 13. The trial court accepted the documents.

ARM argues that the *Int'l Ultimate* case¹³ cited by Gray Lumber does not support admission of the documents verified by Mr. Gray via supplemental discovery responses, because the discovery answers are not from an opposing party. *Appellant's Brief*, p. 16. But this position ignores other holdings found in *Int'l Ultimate*, including the following:

Underlying CR 56(e) is the requirement that documents the parties submit must be authenticated to be admissible. Because the proponent seeking to admit a document must make only a prima facie showing of authenticity, **the rule's requirement of authentication or identification is met if**

¹² Compare CP 45 with CP 149; CP 47 with CP 151; CP 49 with CP 153; CP 51-52 with CP 155-56; and CP 54-56 with CP 158-160.

¹³ *Int'l Ultimate Inc. v. St. Paul Fire & Marine Inc. Co.*, 122 Wn.App. 736, 745-48, 87 P.3d 774 (2004), review denied, 153 Wn.2d 1016 (2005).

the proponent shows proof sufficient for a reasonable fact-finder to find in favor of authenticity. The rule does not limit the type of evidence allowed to authenticate a document; it merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be. ... If the challenged documents were properly authenticated under ER 901 or 902, then for summary judgment purposes it is irrelevant whether the insurers' attorneys had personal knowledge of the proffered documents.

122 Wn.App. at 745-46 [emphasis added; internal footnotes omitted.].

Nothing in *Int'l Ultimate* states that only discovery documents provided by an opposing party are properly authenticated. Here, the proponent, Gray Lumber, provided its President's verification that the proffered documents are what they are purported to be. The trial court was satisfied, and its decision was well within its discretion.

Moreover, there was no reason why ARM could not have made a timely objection to evidence as part of its response briefing, rather than waiting until only a few days before the hearing to do so. This tactic smacks of pure gamesmanship.

ARM could have offered evidence that the contract offered by Gray Lumber was not authentic, or that it had expired, or that it had been replaced by another contract with different terms. Instead, Mr. Mettler offered a declaration which acknowledged the contract, admitted the waiver terms, and argued that its terms should not be enforced. This is

insufficient reason to conclude that the Credit Agreement was not properly authenticated and considered by the trial court. The Mettler declaration simply contained nothing which permitted the trial court to find a genuine issue of fact as to the authenticity of the contract.

Finally, ARM's argument that the supplemental documents (at *CP 143-160*) are not properly considered because they were not filed with the original moving papers (*Appellant's Brief*, 16-17) is incorrect. The trial court is permitted the discretion to accept affidavits at any time before issuing its final order on summary judgment. Whether to accept or reject untimely filed affidavits lies within the court's discretion. CR 6(b); *Brown v. People's Mortgage Co.*, 48 Wn.App. 554, 559, 739 P.2d 1188 (1987). The trial court could have disregarded the Motion to Strike as untimely, under CR 6(b) and *Brown*, or it could have granted the motion, or it could have considered and denied the motion; each was within its discretion. It chose the latter. *RP 15*. ARM has failed to show (or even argue) that the trial court abused its discretion.

ARM's citation to *White v. Kent Med. Center*, 61 Wn.App. 163, 810 P.2d 4 (1991) is not helpful. ARM claims that *White* precludes the trial court's consideration of the "late declaration" which included the Supplemental Response #2 to Requests for Production and its exhibits. *Appellant's Brief*, p. 16-17. This ignores the fact that the documents

offered therein were not new. They had already been offered in the initial moving papers, and ARM had already submitted its response brief without any evidentiary objections, well before any challenge was made to the authenticity of the documents. There was no surprise and no prejudice to ARM involved in authenticating the same identical documents that had been served and filed almost six weeks earlier, with no objection in ARM's response pleadings.

Thus, there is no genuine issue of fact as to the admissibility of the Credit Agreement and its contents, and the trial court's enforcement of the terms of the agreement, after finding that waiver and modification did not apply, was proper and should be affirmed.

V. CONCLUSION

The trial court correctly dismissed plaintiff's claims. The trial court correctly held that the evidence conclusively showed that appellant admitted the existence of the contract between the parties in the Complaint and in Allen Mettler's Declaration. The trial court correctly held that the terms of the Credit Agreement had not been waived or modified, and therefore the relief requested in the Complaint had been expressly waived or excluded in the contract. As a result, the claims made and the relief requested in the Complaint were not valid.

Appellant made creative arguments that portions of the Credit

Agreement were waived or modified, but failed to produce evidence that supported each required element of either waiver or modification. Thus, the credit agreement remained enforceable on its terms, and its express disclaimer of the remedies sought by appellant is dispositive of plaintiff's Complaint.

The trial court's dismissal of ARM's claims should be affirmed.

Respectfully submitted on this 8th day of Aug., 2011.

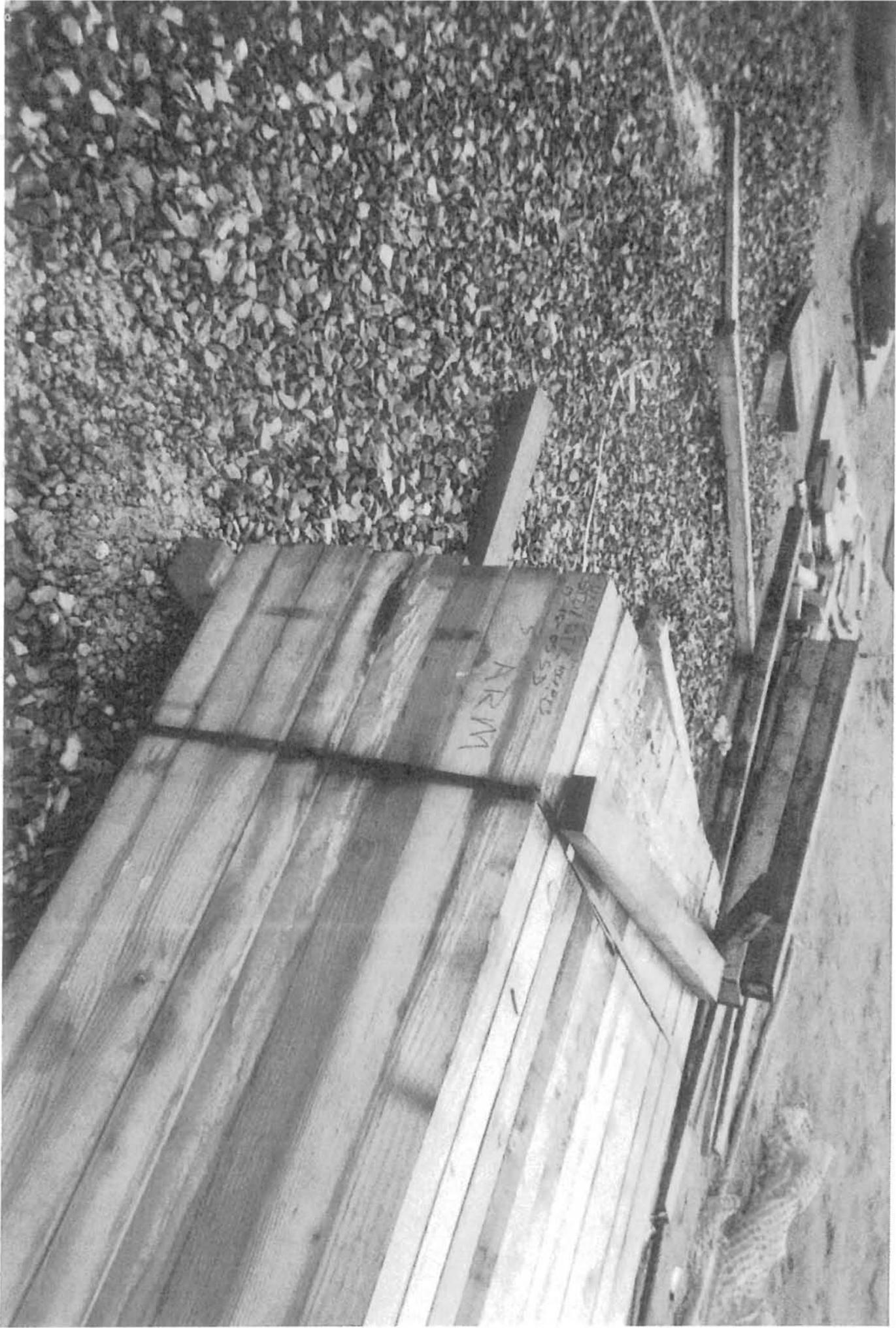
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APPENDIX



ARM

SPALDING
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NO. 42109-7-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

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COURT OF APPEALS
DIVISION II



ALLEN METTLER AND MAY METTLER, D/B/A
ARM CONSTRUCTION,

Appellant,

vs.

GRAY LUMBER COMPANY,

Respondent.

**CERTIFICATE OF SERVICE
Of
RESPONDENT'S OPENING BRIEF**

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ORIGINAL

CERTIFICATE OF SERVICE

The undersigned declares under penalty or perjury under the laws of the State of Washington, that on the below date, I mailed a true and accurate copy of Respondents ' Opening Brief to the following:

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Dated this 8th day of August, 2011, at Seattle, Washington.



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