

FILED  
May 26, 2015  
Court of Appeals  
Division III  
State of Washington

NO. 330249-III

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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JOSEPH D. HARWOOD, Trustee of MONEY TALKS TRUST;  
MONEY TALKS L.L.C., a Washington limited liability company; and  
C & H BFB, L.L.C., a Washington limited liability company,

Plaintiffs/Respondents

v.

FIRST AMERICAN TITLE INSURANCE COMPANY,  
a foreign insurance company,

Defendant/Respondent

And

BEL FRANKLIN APARTMENTS, LLC,  
a Washington limited liability company,

Defendant/Appellant.

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APPELLANT'S OPENING BRIEF

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## **I. INTRODUCTION**

Appellant Bel Franklin Apartments, LLC and Respondents Joseph D. Harwood, Trustee of Money Talks Trust; Money Talks, LLC; and C&H BFB, LLC (“Respondents”)<sup>1</sup> are parties to the “*Declaration and Covenants, Conditions, Restrictions and Reservations for The Bel, a Condominium*” (“Declaration and Covenants”). The Declaration and Covenants contain a dispute resolution section which requires mediation and arbitration of disputes and, furthermore, vests in the arbitrator – not the courts – the authority to decide whether disputes are arbitrable. Respondents filed a lawsuit in superior court asserting causes of action against Appellant based on the Declarations and Covenants. Appellant filed a motion to compel arbitration which the superior court denied.

Appellant requests that the court of appeals reverse the superior court’s *Order Denying Defendant Bel Franklin Apartments LLC’s Motion to Compel Arbitration* and remand this matter with instructions to enter an order dismissing Respondents’ claims against Appellant and referring the parties to arbitration pursuant to the Declaration and Covenants.

## **II. ASSIGNMENT OF ERROR**

1. The trial court erred by denying Appellant’s motion to compel arbitration and entering the *Order Denying Defendant Bel Franklin*

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<sup>1</sup> First American Title Insurance Company, a Defendant below and Respondent herein, neither opposed nor joined the trial court motion at issue, was not referenced in the trial court motion at issue, and is not referenced in Appellant’s Opening Brief. Appellant’s use of the term “Respondents” herein does not include First American Title Insurance Company.

*Apartments LLC's Motion to Compel Arbitration* on December 15, 2014. (CP 139-141)

### **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Whether the dispute resolution clauses at Section 12.14.1 and Section 12.14.2 of the Declaration and Covenants require arbitration of the disputes asserted by Respondents against Appellant.
2. Whether the binding arbitration clause at Section 12.14.2 of the Declaration and Covenants requires that an arbitrator must determine whether Respondents' disputes are subject to binding arbitration.
3. Whether the Washington Condominium Act ("WCA") applies in this case when Respondent did not allege WCA claims.

### **IV. STATEMENT OF THE CASE**

On or about April 11, 2007, Bell Franklin, LLC, a Washington limited liability company acting through its managing member and Respondent herein Joseph D. Harwood, created The Bel, A Condominium and recorded the Declaration and Covenants. (CP 4, 5) Respondents and Appellant are parties to the Declaration and Covenants. (CP 18)

Respondents sued Appellant on August 15, 2014, asserting claims based on the Declaration and Covenants. (CP 28-108) They sought a declaratory judgment that an amendment to the Declaration and Covenants was void because it was not approved or agreed to in accordance with the

Declaration and Covenants. (CP 17) They sought a declaratory judgment that a survey was void because it was not approved or agreed to in accordance with the Declaration and Covenants. (CP 17-18) They alleged that Appellant breached the Declaration and Covenants and breached the covenant of good faith and fair dealing related thereto. (CP 18-20) They also alleged that Appellant breached an Estoppel and Stipulation Agreement and the covenant of good faith and fair dealing related thereto which both involved the Declaration and Covenants. (CP 20-21)

The Declaration and Covenants, however, contains a dispute resolution section in which the Respondents voluntarily relinquished their right to have any dispute decided in court by a judge or jury in favor of alternative dispute resolution. It states, in pertinent part, as follows:

If any party to a dispute determines that the dispute cannot be resolved without intervention, then that party shall give notice (the "Arbitration Demand") to all other parties to the dispute and the Association demanding that the dispute be submitted to mediation and arbitration pursuant to this section. All parties to the dispute shall then participate in a nonbinding mediation for 45 days after the Arbitration Demand. The mediator shall be chosen by the Association. If the mediation is not successful, the dispute shall be resolved by binding arbitration conducted pursuant to Section 12.14.2 below. The parties confirm that by agreeing to this alternate dispute resolution process, they intend to give up their right to have any dispute decided in court by a judge or jury.

(CP 63-64)(underline emphasis added)

The Declaration and Covenants further provides that whether a dispute is subject to arbitration or not is itself a matter for arbitration, not

the Courts. Section 12.14.2 provides, in part:

The arbitrator(s) shall determine whether this dispute is subject to binding arbitration under this section.

(CP 64)

On October 3, 2014, Appellant moved the trial court to compel arbitration. (CP 109-112) Appellant pointed out that Section 12.14 of the Declaration and Covenants, entitled “Dispute Resolution,” required Respondents to arbitrate their causes of action in this case. (CP 110, 130-133) Respondent opposed Appellant’s motion by alleging the following: (1) that Section 12.14 did not apply to the disputes in this case; and (2) that the WCA governs the disputes in this case, and (3) Respondents were entitled to bring their disputes in a judicial proceeding. (CP 121-126) The trial judge denied Appellant’s motion to compel arbitration and entered the *Order Denying Defendant Bel Franklin Apartments LLC’s Motion to Compel Arbitration* on December 15, 2014. (CP 139-141) On December 17, 2014, Appellant timely sought review by this Court of the trial judge’s order denying its motion to compel arbitration. (CP 142-146)

As discussed below, Respondents are contractually required to proceed to nonbinding mediation and, if necessary, binding arbitration of their disputes with Appellant in this case. In fact, whether a dispute is subject to arbitration or not is itself a matter for arbitration. Nonetheless, Respondents filed this lawsuit instead of proceeding with alternative dispute resolution as required by the Declaration and Covenants to which they agreed.

## V. ARGUMENT

### A. **Standard of Review**

The standard of review for a motion to compel arbitration is de novo. *Gordon v. Lloyd Ward & Associates, P.C.*, 180 Wn. App. 552, 562, 323 P.3d 1074 (2014). When a court reviews a denial of a motion to compel arbitration, it “must indulge every presumption in favor of arbitration.” *Verbeek Properties, LLC v. GreenCo Environmental, Inc.*, 159 Wn. App. 82, 87, 246 P.3d 205 (2010). The party opposing arbitration must show that the arbitration clause is inapplicable or unenforceable in order to overcome this presumption. *Id.*

### B. **The Declaration and Covenants Requires Arbitration of Respondents’ Causes of Action Against Appellant.**

Washington courts favor arbitration because “it is a more expeditious and final alternative to litigation.” *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 892, 16 P.3d 617 (2001) (quoting *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995)). “Washington law vests courts with the power to determine ‘whether ... a controversy is subject to an agreement to arbitrate.’” *Saleemi v. Doctor’s Assocs., Inc.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013) (quoting RCW 7.04A.060(2)). “Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate.” RCW 7.04A.070. An arbitration agreement is assumed to be valid and enforceable as long as general contract defenses, such as fraud, duress, or unconscionability, do not apply. *Weidert v. Hanson*, 178 Wn.2d 462, 465, 309 P.3d 435 (2013). The arbitrability of a

dispute is determined by examining the arbitration agreement between the parties. *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn.App. 400, 403, 200 P.3d 254 (2009). When looking at the agreement, “the sole inquiry is whether the parties bound themselves to arbitrate the particular dispute.” *Meat Cutters Local #494 v. Rosauer’s Super Markets, Inc.*, 29 Wn.App. 150, 154, 627 P.2d 1330 (1981). Courts will decide that the parties chose to arbitrate their particular dispute unless it is clear that no interpretation of the arbitration clause could cover the dispute. *Heights*, 400 Wn.App. at 402. In other words, “all questions upon which parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication.” *Id.* at 405. If the reviewing court “can fairly say that the parties’ arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration.” *Davis v. Gen. Dynamics Land Sys.*, 152 Wn.App. 715, 718, 217 P.3d 1191 (2009); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn.App. 446, 454, 45 P.3d 594 (2002). Any doubts regarding whether the arbitration clause covers a particular dispute “should be resolved in favor of coverage.” *Heights*, 148 Wn.App. at 405 (citing *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 413–14, 924 P.2d 13 (1996)).

Respondents based their causes of action against Appellant on the Declaration and Covenants which unequivocally requires that disputes be submitted to alternative dispute resolution in the form of mediation and, if

necessary, arbitration. (CP 17-23; 63-64) In addition, Respondents unequivocally agreed “to give up their right to have any dispute decided in court by a judge or jury.” *Id.* As agreed, Respondents are contractually required to submit its causes of action against Appellant to alternative dispute resolution pursuant to the Declaration and Covenants.

This Court should reverse the Superior Court’s *Order Denying Defendant Bel Franklin Apartments LLC’s Motion to Compel Arbitration* (CP 136-140) and remand this matter with instructions to: (1) refer the parties to mediation and, if necessary, arbitration pursuant to the Declaration and Covenants and, (2) dismiss Respondents’ claims against Appellant. *See Heights*, 148 Wn.App. at 403 (“If the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end.”); *see also In re Marriage of Pascale*, 173 Wn.App. 836, 844-45, 295 P.3d 805 (2013) (“Given that any doubts regarding the applicability of the arbitration agreement must be resolved in favor of coverage, and because it may be fairly said ‘that the parties arbitration agreement covers the dispute,’ no further inquiry into the merits was permissible.”)

**C. Whether the Respondents' Claims are Subject to Arbitration is a Matter for the Arbitrator, not the Court.**

In general, courts have been given authority to determine “whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” *Saleemi*, 176 Wn.2d at 376 (quoting RCW 7.04A.060(2)). However, parties may bestow that authority upon an arbitrator if they “clearly and unmistakably” indicate so in their agreement. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 816-17, 225 P.3d 213 (2009).

The Declaration and Covenants provides that whether a dispute is subject to arbitration or not is itself a matter for arbitration, not the Courts.

Section 12.14.2 provides, in part:

The arbitrator(s) shall determine whether this dispute is subject to binding arbitration under this section.

(CP 64) Whether an arbitration clause applies to a particular case or dispute is an issue for judicial determination unless the parties have clearly and unmistakably provided otherwise. *Id.* In *Satomi*, the arbitration provision at issue provided, in part, for the following:

“[d]isputes subject to binding arbitration include [d]isputes concerning the issues that should be submitted to binding arbitration.” *Satomi* at 817, FN 28.

The Washington Supreme Court ruled that the arbitration provision at issue “clearly and unmistakably” provided that disputes regarding the arbitrability of particular claims were matters that must be arbitrated. *Id.* at 816-17. The Washington Supreme Court further ruled that whether the

particular matters were subject for arbitration was a matter for the arbitrators, not for the courts to decide. *Satomi* 167 Wn.2d at 817.

As such, to the extent that Respondents wish to argue that their claims are not subject to arbitration, *even that issue itself* is subject to arbitration pursuant to the Declaration and Covenants to which Respondents agreed.

**D. Respondents' Claims are not Based on the Washington Condominium Act, but Rather the Declaration and Covenants which Requires Arbitration of Disputes.**

Respondents argued to the trial court that the WCA expressly authorizes their lawsuit against Appellant. However, Respondents misconstrued the WCA and the case law interpreting it.

The WCA's judicial proceeding and arbitration provisions apply to claims for violations of the WCA. However, Respondents' Complaint neither alleges any violation of the WCA nor contains a single reference to the WCA. Instead, Respondents' six claims against Appellant are each based on contract and the controlling contract in question (the Declaration and Covenants) contains a provision that mandates arbitration of disputes between and among Unit Owners. As Unit Owners, Respondents agreed – and are contractually obligated – to submit non-WCA disputes against other Unit Owners like Appellant to mandatory arbitration. Appellant respectfully requests that this Court reverse the trial court and require Respondents to honor their contractual obligation “that by agreeing to this

alternative dispute resolution process, they intend to give up their right to have any dispute decided in court by a judge or jury.” (CP 63-64)

In *Satomi Owners Ass'n v. Satomi, LLC*, 139 Wn.App. 175, 159 P.3d 460 (2007), *rev. on other grounds*, 167 Wn.2d 781, 225 P.3d 213 (2009), the Complaint alleged numerous construction defects, breach of contractual warranties, breach of express and implied warranties under the WCA, breach of the implied warranty of habitability, and violation of the Consumer Protection Act. *Satomi*, 139 Wn.App. at 178. In short, the *Satomi* plaintiffs asserted both WCA claims and non-WCA claims (*i.e.*, claims outside of, or not based on, the WCA). The *Satomi* defendant demanded arbitration of both WCA and non-WCA claims pursuant to an arbitration clause in an addendum to the purchase and sale agreements. *Id.* The salient issue for purposes of this case is whether non-WCA claims are subject to arbitration pursuant to the contractual arbitration clause. In *Satomi*, the Court of Appeals held that the non-WCA claims were subject to arbitration: “We hold that the WCA statutory warranty claims are not arbitrable, that the contract and common law claims are, and remand for further proceedings consistent with this opinion.” *Id.* at 190 (underline emphasis added).

In stating their Complaint, Respondents did not assert any claims under the WCA, did not invoke the WCA, and did not mention that any claims were being brought under the WCA. As was held by the Court in *Satomi*, all contractual and common law claims are subject to arbitration.

The parties in this case contractually agreed to arbitrate their disputes and, as such, Respondents' claims are subject to arbitration.

**E. Respondents Referenced Sections of the Declaration and Covenants that Either Support Arbitration or are Inapplicable to this Case.**

In opposing the motion to compel arbitration before the trial court, Respondents cited one section of the Declaration and Covenants that supports arbitration and two sections that don't apply.

**1. Section 18.1 supports arbitration.**

Respondents argued to the trial court that the following portion of Section 18.1 expressly authorized judicial action: "Failure to comply [with the Declaration, the Bylaws and Rules, and the decisions adopted pursuant thereto] shall be grounds for an action to recover sums due for damages, or injunctive relief, or both." (CP 123, 87) To the contrary, this provision is entirely consistent with the requirement in the Declaration and Covenants that disputes between Unit Owners must be arbitrated. As referenced above, failure to comply with the Declaration and Covenants shall be grounds for an action for damages and/or injunctive relief – remedies that Respondent specifically authorized the arbitrator(s) to award in the event of a dispute. Although injunctive relief might typically be considered within a trial court's province, Respondents specifically agreed at Section 12.14.3 that "The arbitrator(s) may award injunctive relief or any other remedy available from a judge . . ." (CP 63-64) Despite Respondents' urgings to the contrary, Section 18.1 works in harmony with Section

12.14.1 and expressly requires that disputes between Unit Owners must be arbitrated.

**2. Despite Respondents' Urgings to the Trial Court, Section 12.11 and Section 12.13 don't apply to this case.**

Respondents argued to the trial court that additional provisions contained within Article 12 "undermine [Appellant's] claim that the CCR Declaration 'contains a dispute resolution section'" (CP 123) and then cite Section 12.11 and Section 12.13, both of which have no application to the facts of this case.

First, despite Respondents' argument that the Declaration and Covenants contains no dispute resolution section, no one can dispute that the Declaration and Covenants contains the following dispute resolution section: "12.14 Dispute Resolution." (CP 63-64)

Second, despite Respondents' argument that Section 12.11 somehow supports judicial proceedings, it doesn't pertain to this case. Section 12.11 only applies "Whenever this Declaration requires that an action of the Board be taken after 'Notice and Opportunity to be Heard' . . . ." (CP 61) This case does not involve an action of the Board after "Notice and Opportunity to be Heard;" even if it did, the Declaration and Covenants expressly requires related disputes to be arbitrated pursuant to Section 12.14. (CP 61) As such, Section 12.11 doesn't apply to this case and any arguments based on it should be disregarded.

Lastly, despite Respondents' argument that Section 12.13 contemplates judicial proceedings because it contains the term "litigation,"

it also doesn't pertain to this case. Respondents referenced Section 12.13 as if it applies to actions brought by Unit Owners against other Unit Owners. It doesn't. Section 12.13 only pertains to legal proceedings brought by the Association – which isn't a party to this case. Pursuant to that section, the Association must evaluate the consequences to, and must receive approval from, Unit Owners before it pursues legal proceedings on their behalf. (CP 62) Because the Association is neither a party to this case nor is it pursuing legal proceedings, Section 12.13.1 doesn't apply to this case and any arguments based on it should be disregarded.

Section 12.14.1, however, *does* apply and requires arbitration of the claims against Appellant because it governs “any party to a dispute” and mandates “that party shall give notice (the “Arbitration Demand”) to all other parties to the dispute and the Association . . .” (CP 63-64)(underline emphasis added) Because this case was brought by Respondents as Unit Owners against Appellant as a Unit Owner, Section 12.14.1 applies and mandates arbitration of their disputes.

Nothing in the Declaration and Covenants clearly implies negation of or expressly negates Appellant's interpretation of Section 12.14.1. Even if there was some doubt about whether Section 12.14.1 covered the disputes in this case, that doubt should be resolved in favor of coverage.

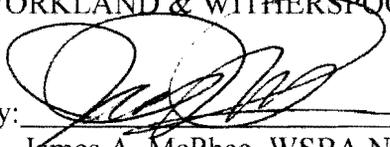
## VI. CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse the Superior Court's *Order Denying Defendant Bel Franklin*

*Apartments LLC's Motion to Compel Arbitration* (CP 139-141) and remand this matter with instructions to: (1) refer the parties to mediation and, if necessary, arbitration pursuant to the Declaration and Covenants and, (2) dismiss Respondents' claims against Appellant.

RESPECTFULLY SUBMITTED this 26th day of May, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was served by the method indicated below to the following this 26th day of May, 2015.

<input type="checkbox"/> U.S. MAIL <input checked="" type="checkbox"/> HAND DELIVERED <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> TELECOPY (FAX) TO: <input checked="" type="checkbox"/> EMAIL TO: <a href="mailto:bchildress@dunnandblack.com">bchildress@dunnandblack.com</a>	Bil G. Childress Dunn, Black & Roberts, P.S. Banner Bank Building 111 North Post, Suite 300 Spokane, WA 99201
<input type="checkbox"/> U.S. MAIL <input checked="" type="checkbox"/> HAND DELIVERED <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> TELECOPY (FAX) TO: <input checked="" type="checkbox"/> EMAIL TO: <a href="mailto:jking@ecl-law.com">jking@ecl-law.com</a>	James B. King Evans, Craven & Lackie, P.S. 818 W. Riverside Ave., Suite 250 Spokane, WA 99201

  
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