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Court of Appeals
Division III
State of Washington

No. 33242-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

GORDON SCHUSTER, on behalf of himself, individually, and on behalf of the Estate of RONALD SCHUSTER; DIANA YECKEL, individually; PAT SCHUSTER, individually; KARL W. LAMBERT, ARNP; REDIMEDI CLINIC; and HOUSECALL, PLLC,

Respondents/Cross-Appellants.

vs.

PRESTIGE SENIOR MANAGEMENT, L.L.C., et al, Defendants

vs.

LA VIDA COMMUNITIES, INC.; LSREF GOLDEN OPS 14 (WA), LLC; SERVCO OPERATING LLC; SRG LAVIDA OPPTS NW SERIES; and SRG SERVCO LLC,

Appellants/Cross-Respondents.

LA VIDA APPELLANTS/CROSS-RESPONDENTS' REPLY BRIEF

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I. INTRODUCTION

The Schusters attempt to avoid the consequences of an arbitration agreement they signed as part of the care provided to their late father. The Schusters had the burden of demonstrating that LaVida's actions unequivocally demonstrated nothing, but a clear intent to forgo arbitration. The brief history of this litigation demonstrates they cannot. Furthermore, the Schusters must demonstrate that they were prejudiced because of the alleged delay in the assertion of arbitration. Instead, the Schusters pursued and obtained the same discovery they would have obtained in arbitration. But they only present specters of harm that were not a result of time.

II. REPLY

A. **Pursuit of Settlement and Mediation Is Not Inconsistent With an Intent to Forgo Arbitration.**

Until recently, the Schuster's case has been about medication mismanagement. CP 4-30; 1045-47. It is undisputed in this case that LaVida did not prescribe or otherwise manage Mr. Schuster's medications.¹ As early as 2010, the Schuster's were offering to mediate the case which they believe was focused on medication mis-management. CP 970-71. LaVida took the tact that many back-burner defendants would take with these set

¹ Plaintiffs indicate that they are uncertain of the appealing parties. The notice of appeal clearly indicates that "LaVida" is LSREF Golden Ops 14; ServCo Operating, LLC; ServCo Operating, LLC acting through SRG La Vida Ops NW Series; and La Vida Communities, Inc.

of actions – attempt to remove itself from the case as quickly as possible and with as little cost as possible.

LSREF only answered when forced to through a motion for default. When faced with a mountain of discovery – the same discovery that would be allowed in any arbitration – LaVida tried to limit the extensive amount of personal third party and proprietary information provided until motions to compel and court orders forced otherwise. When the Schusters and Mr. Lambert noted depositions, LaVida’s attorneys – who represented other parties, as well – attended them. As it would be able to do in arbitration, LaVida issued a set of basic discovery requests. Notably, LaVida never submitted a dispositive issue to the trial court (except, of course, the motion to compel arbitration). Throughout the elapsed time, the Schusters continued to lead LaVida along with expressions of a desire to mediate. CP 1323-24.

The landscape of the suit changed when the Schusters filed their Third Amended Complaint on January 23, 2014. CP 521-544. Contemporaneously, the Schuster’s emailed LaVida’s counsel affidavits elicited from LaVida’s former employees – affidavits which the Schusters have not filed publically and are not part of the record despite their desire to use

them to demonstrate “prejudice” from the alleged waiver.² At this point, LaVida was made aware that the Schusters had switched tactics and pulled LaVida from the backburner. The Schusters suddenly cared about more than medication, and now believed the cards they held at mediation represented a much stronger hand.

While arbitration had not been raised as an issue until July of 2014, it was not a result of long-standing bait and switch by LaVida to manipulate the Schusters, but it was when the Schusters began changing their focus from mediation to a public trial. In other words, arbitration was asserted when the Schusters charged their strategy for mediation over an alleged medication mis-management case to the “choice” between mediation with trumped up declarations, and/or a public trial. Despite representations otherwise, the Schusters apparently never intended “good faith” mediation of the case, but were merely buying time to build their case against as many entities they could find. LaVida did not “decide” to “make” the Schusters’ case “much more difficult.” It elected to pursue the right it possessed to arbitrate and which it did not waive by pursuing an efficient resolution through mediation.

It is uncontested that waiver is established when a party’s actions are consistent only with an intent to abandon arbitration. Van Ness

² The strong inaccuracies in the content of these affidavits are a battle for a different day.

Townhouses v. Mar Indus. Corp., 862 F.2d 754, 758 (9th Cir. 1988). Moreover, waiver is an equitable relief only available to those with clean hands. Go2net, Inc. v. Freeyellow.com, Inc., 158 Wn.2d 247, 143 P.3d 590 (2008); Miller v. Paul M. Wolff Co., 178 Wn. App. 957, 965, 316 P.3d 1113, 1117 (2014).

At the trial Court, as here, the Schusters attempt to ignore LaVida's logical explanation presented as to why it never abandoned its intent to arbitrate the case. The Schusters argue that these facts only demonstrate an intention to waive arbitration. A cursory dismissal of LaVida's position, however, is not enough to shift the Schuster's burden of proof intent. See, Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 694 (9th Cir. 1986). LaVida had reasons for its actions completely unrelated to arbitration waiver, and the Schusters were equally instrumental in encouraging LaVida to pursue mediation over any other course in this suit. Respectfully, the trial court erred by finding that these repeated cursory statements and limited timeline was sufficient to meet the Schuster's heavy burden, and the finding should be reversed.

B. There Was No Evidence of Harm To the Schusters Because of the Alleged Delay In Asserting Arbitration Rights.

In attempting to distract the Court with a tortured timeline in support of their waiver argument, the Schusters present a limited picture of what occurred, they present no evidence of prejudice in the alleged delay.

1. Speculation Relating to Costs or Different Actions Which “May” Have Been Taken Are Not Evidence of Prejudice.

After arguing that arbitration is an inexpensive option, the Schusters argue that arbitration will cost twice what trial will cost. This is premised on the fact that an arbitrator would be paid by the parties. However, nothing establishes how the delay made arbitration more expensive. Accordingly, this cannot be considered “prejudice”.

Similarly, the Schusters argue prejudice in having to prepare for arbitration when trial is “a mere nine months away”. But trial was not set until after the motion to compel arbitration was denied. CP 1499. Again, the prejudice they allege was not related to the alleged delay.

Next, the Schusters speculate about illogical conditions that might apply: perhaps the discovery slate will be wiped clean, they argue, or all motions (Motion for Default? Motion to Compel over documents they now possess?) will have to be re-litigated. Similarly, they “may well be forced to re-conduct depositions”. Opposition Brief, p. 17. Clearly, no party would benefit from re-litigating the case from square one a second

time and it is hard to imagine an arbitrator acting unreasonably by committing what is clearly economic waste.

Moreover, the law is clear: speculation cannot establish prejudice, and the “self-inflicted wound” of Plaintiffs who choose to pursue litigation instead of complying with an arbitration clause they agreed to, cannot establish prejudice. See, Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90-92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000); Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 698 (9th Cir. 1986). The Schusters cannot present speculation to satisfy their burden of proof to demonstrate prejudice. The trial court’s reliance on this speculation, strengthened by its own comments on the ability of Supreme Court justices to consider the merit of these speculations, was respectfully in error.

2. The Schusters Misunderstand Arguments Relating To Their Self-Inflicted Wounds.

The Schusters incorrectly claim that the “self-inflicted wound” standard discussed in Green Tree would amount to any behavior of someone involved in litigation who opposes arbitration. Green Tree Fin. 531 U.S. at 90-92. LaVida does not take issue with the fact that the Schusters moved their case forward, but that they elected to move their case forward despite knowledge of an arbitration clause, benefitted from using the tools of discovery, and cannot demonstrate any action or burden

from the active litigation except for that which they created. For example, Schusters complain of extensive written discovery – that they drafted.

3. Discovery Propounded by the Schusters and Mr. Lambert Do Not Establish Prejudice.

More directly, discovery expenses are not prejudicial when the party claiming prejudice did not take steps to limit the discovery known to be outside the arbitration clause. Shinto Shipping Co. v. Fibrex & Shipping Co., 572 F.2d 1328, 1330 (9th Cir. 1978). The Schusters are trying to claim prejudice from discovery which they propounded. They cannot use their own discovery – discovery which would have obviously been allowed in arbitration – to demonstrate harm.³

Discovery which includes non-arbitrable issues cannot establish prejudice. Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 697 (9th Cir. 1986). Depositions which include non-parties to litigation cannot establish prejudice. Shinto 572 F.2d at 1330. Thus, continued mention of depositions noted by Mr. Lambert and the Schusters, even if the depositions were attended by the Forsberg & Umlauf attorneys, who represented clients who both were and were not parties to the arbitration clause, is insufficient to establish prejudice.

³ Similarly, the Schusters excerpt quotes from Third Circuit cases indicating that time alone amounts to prejudice, but those cases, and their findings, relied in part on the initiation of motion work and discovery by the parties demanding arbitration. See Opposition Brief, p. 20, discussing Nino v. Jewelry Exchange, Inc. and progeny.

In reality, the Schusters have only benefitted from the alleged delay and the discovery propounded. Delay has given them time to fine-tune their case, amending their complaints and changing causes of action, time and again, once they finally comprehended that LaVida did not prescribe or adjust medications. It gave them time to add the DSHS citation (which the Schuster's sponsored) to their arsenal and to see how the DOH investigation they initiated against Mr. Lambert would play out.⁴ Regardless, they have provided no evidence of prejudice, and the trial court's finding of the same respectfully should be reversed.

C. The Schuster's Arguments Relating to Parties Bound by the Agreement Were Not Preserved for Appeal.

Finally, the Schusters attempt to re-litigate issues they did not properly appeal – which parties were included in the arbitration contract. If any attention is given to these arguments, they should be dismissed as quickly as they were in trial court.

⁴ Note that CP 893, the Schusters "evidence" of a citation, is a declaration by Gordon Schuster discussing a citation. Perhaps the actual citation was not included in the Clerk's Papers by the Schusters because it would demonstrate that the Schusters benefitted from the time elapsed in this matter, as they were able submit issues upon the advice of their expert to DSHS and DOH for review and investigation. CP 1043-45. The strength of Plaintiffs' evidence in this matter – despite the alleged \$70,000 in fees – continues to be lacking. For example, Gordon Schuster "opines" on causation in this matter because the Schusters' own expert opines that LaVida did not cause Ronald Schuster's demise. CP 893; 1043-47; 1259-1506.

1. **The Schusters Did Not Preserve the Issue of the Scope of the Arbitration Contract for Review, and Court Should Not Consider Arguments Relating to the Same.**

The Schusters' Notice of Cross-Appeal only addressed the Motion for Reconsideration filed by LaVida. The Notice of Cross-Appeal must designate the decision or part of a decision which the appealing parties desire to have reviewed. RAP 5.3(a)(3). While a court may expand the scope of review of a particular order to further justice, there is no indication it may consider orders not brought with the Notice of Appeal. RAP 5.3(h)(i). Proper parties to the arbitration agreement were not a subject of the Motion for Reconsideration, and as such, the issue should not be considered on appeal.

2. **All LaVida Entities Are Included.**

Even if the Court chooses to review arguments relating to the appropriate parties to the arbitration clause, the trial court's findings relating to the same should be affirmed. The Schusters argue that "at no point" is LaVida Communities, Inc. or "SRG" referenced in the agreement. This is incorrect. The upper left hand corner of pages 1-20 of the Agreement contain a logo which states "LaVida Communities; Senior Resource Group". CP 761-782. Page one of the agreement specifically explains that LSREF Golden Ops 12 (WA), LLC "entered into an agreement with LaVida Communities-Northwest..." CP 761. Ms. Trostad

signed the agreement on behalf of “LSREF Golden Ops 14 (WA), LLC, BY LaVida Communities-Northwest.” CP 782.

A contract is to be read as a whole, and in light of all of the circumstances in creating the same. Henry v. Lind, 76 Wn.2d 199, 201, 455 P.2d 927, 928 (1969). Here, LSREF and LaVida entities were expressly disclosed in the contract. LaVida and Senior Resource Group are identified on every page of the contract, excepting the table of contents and appendix pages. Most importantly, the arbitration clause contemplates that that:

all claims and disputes arising from or related to this Agreement or to [Ronald Schuster’s] residency, care, or services at the Community, **whether made against us or any other individual or entity**, shall be resolved by submission to neutral, binding arbitration...

CP 779.

To argue that the Agreement, which applies to all claims arising from Mr. Schuster’s stay at Blossom Creek, does not apply to entities disclosed on nearly every page of the agreement controverts the basic tenements of contract law. See also, Woodall v. Avalon Care Ctr.-Fed. Way, LLC, 155 Wn. App. 919, 929, 231 P.3d 1252, 1257 (2010) (non-signatories of an arbitration clause may enforce the same through agency principles). The Schusters agreed to this language. All LaVida entities are entitled to assert it.

3. All Plaintiffs Are Included.

The Schusters continue the pattern of selectively excerpting favorable language and omitting relevant information when quoting lines of the arbitration Agreement. According to them, the Agreement is “between LSREF Golden Ops 14 (WA), LLC, and Ronald Schuster...” They omit that immediately following Gordon Schuster’s name appears the following language:

This RESIDENCE AND CARE AGREEMENT (“Agreement”) is made and entered into this 15th day of April, 2009 (“Effective Date”) between LSREF Gold Ops 14(WA), LLC, (“we”, “us”, or “our”) and Ron Schuster (“you” or “Resident”) and Gordon Schuster (“Your Representative”, if you are unable to execute the Agreement on your own behalf”)...

CP 761 (emphasis added). Contracts are to be interpreted so that no term or word is rendered meaningless. Colorado Structures, Inc. v. Blue Mountain Plaza, LLC, 159 Wn. App. 654, 664, 246 P.3d 835, 840 (2011). Thus, the Agreement was made between Ronald and Gordon Schuster, and both Ronald Schuster’s estate **and** Gordon Schuster are bound by it. Gordon Schuster, the man who signed this Agreement, cannot now claim he is not bound by it.

Plaintiffs Pat Schuster and Diana Yeckel argue that under Woodall they are entitled to avoid the arbitration clause. Opposition Brief, p. 10, citing Woodall, 155 Wn. App. 919. They are not. This Division One case

relies heavily on Satomi, which identifies a myriad of ways in which non-signatory Plaintiffs can be bound by an arbitration agreement. Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 809-813, 225 P.3d 213 (2009). The list includes cases where, as here, the claims of a signatory decedent are asserted with the claims of the non-signatory plaintiffs. Satomi, 167 Wn.2d at 810. All of the Schusters, including Ms. Yeckel, are bound by the arbitration clause.

D. NAF's Poor Behavior Does Not Render This Arbitration Clause Unenforceable.

The Schusters base their argument that the invocation of the National Arbitration Forum ("NAF") as forum is integral to the arbitration agreement by relying on two flawed and closely-related principles – first, that the word "shall" is mandatory (here, it is not), and second, that no alternate method of choosing an arbitrator is provided. Their arguments fail because both premises are false.

As already argued in the opening brief, under Reddam, which the Schusters and the trial court agree is guiding in this case, the use of "shall" is permissive. Reddam v. KPMG, LLP, 457 F.3d 1054, 1060 (9th Cir. 2006) (abrogated on other grounds). Instead, as demonstrated by the cases collected in Reddam, the use of "shall," coupled with the exclusion of all

other possible arbitration forums, renders the forum selected integral to the agreement. See Opening Brief, pp. 22-23.

Here, contrary to the Schusters' second flawed premise, the arbitration clause provided an alternate method of forum selection – the Federal Arbitration Act (“FAA”). 9 U.S.C. § 5 provides:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or **if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein;** and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Emphasis added.

The Schusters do not contest that the FAA was expressly integrated into the arbitration clause – they cannot because the plain language of the clause states that the arbitration “shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration Act.” CP 779. Moreover, the FAA is referenced before the NAF – indicating the FAA (and not NAP provisions) is the guiding framework of the arbitration clause.

But most importantly, the arbitration contract is clear in its commands: the arbitration is governed by the FAA. Pursuant to the FAA, the arbitrator will be whomever the parties appointed within the contract, unless that arbitrator is unavailable, and then the parties shall seek appointment of one through the trial court. CP 779; 9 U.S.C. § 5. Here, NAF was appointed by the contract. NAF is unavailable. Therefore, the trial court should select an arbitrator. One need not look beyond the FAA and the four corners of the document to find the simple resolution of this issue.

Nonetheless, the Schusters insist upon a national tour of legal treatment of this issue. Applying non-Washington state-based contract principles interpreting contracts with different wording can hardly be helpful in the face of the clear resolution of this contract's terms.

The Schusters, however, ignore persuasive law supporting LaVida's position. Green v. U.S. Cash Advance Illinois, LLC, 724 F.3d 787, 789 (7th Cir. 2013) (reference to NAF Code of Procedure indicated that NAF was not exclusive arbitrator, as reference to the Procedure of NAF would be rendered pure surplusage; fact that NAF Procedure required it be enforced solely by NAF did not render the procedure unavailable to other arbitration forums so long as patent and copyright laws were not violated); Khan v. Dell Inc., 669 F.3d 350, 356 (3d Cir.

2012) (language “SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM” was ambiguous and therefore must be resolved in favor of arbitration, which is the presumed outcome); Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1222 (11th Cir. 2000) (language that arbitration “shall” be done by NAF was not integral to the agreement and allowed for Section 5 of the FAA to fill in); Meskill v. GGNSC Stillwater Greeley LLC, 862 F. Supp. 2d 966, 973-77 (D. Minn. 2012); Levy v. Cain, Watters & Assocs., P.L.L.C., No. 2:09-cv-723, 2010 WL 271300, at *6 (S.D. Ohio Jan. 15, 2010); Adler v. Dell Inc., No. 08-cv-13170, 2009 WL 4580739, at *3 (E.D. Mich. Dec. 3, 2009); Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 742 F. Supp. 1359, 1362-65 (N.D.Ill. 1990); Wright v. GGNSC Holdings LLC, 808 N.W.2d 114 (S.D. 2011).

The trial court correctly ruled on reconsideration that the NAF provision was not integral to the arbitration agreement. This finding should be affirmed on appeal.

III. CONCLUSION

LaVida respectfully requests that this Court reverse the findings of the trial court regarding arbitration waiver and remand this matter to the trial court with instructions to select an arbitrator pursuant to the FAA.

LaVida also respectfully requests the Court affirm the trial court's ruling that the NAF provision is not an integral portion of the agreed-upon arbitration clause.

DATED this 11th day of September, 2015.

FORSBERG & UMLAUF, P.S.

A handwritten signature in black ink, appearing to read 'J. Meade', written over a horizontal line.

By:

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Attorneys for Appellants
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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing LA VIDA APPELLANTS/CROSS-RESPONDENTS' REPLY BRIEF on the following individuals in the manner indicated:

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SIGNED this 11th day of September, 2015, at Tacoma, Washington.



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