

NO. 77751-9

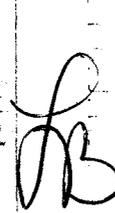
SUPREME COURT OF THE
STATE OF WASHINGTON

MATTHEW SETO, a single person,
Petitioner,

v.

AMERICAN ELEVATOR, INC., a Washington corporation,
Respondent.

FILED
JUN 15 2015
CLERK OF COURT
JULIA M. HARRIS



RESPONDENT'S SUPPLEMENTAL BRIEF

Jerret E. Sale, WSBA #14101
Deborah L. Carstens, WSBA #17494
Bullivant Houser Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930
Facsimile: 206.386.5130

Attorneys for Respondent, American Elevator

ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ISSUES PRESENTED FOR REVIEW	2
III. STATEMENT OF THE CASE	2
IV. ARGUMENT	5
A. Seto failed to timely file his request for a trial de novo.	5
B. Completion of service is not required to trigger the 20-day period set forth in MAR 7.1(a).	6
1. Neither MAR 6.2 nor MAR 1.3 requires completion of service.....	6
2. This Court’s decisions do not require completion of service.	9
3. Public policy considerations do not support Seto’s position.	14
C. Seto’s right to a jury trial has not been abridged.	16
D. American Elevator is entitled to recover its attorney fees and costs in the Supreme Court.....	19
V. CONCLUSION	20

TABLE OF AUTHORITIES

	Page
Cases	
<i>Alvarez v. Banach</i> , 153 Wn.2d 834, 109 P.3d 402 (2005).....	9-11, 13
<i>Boyd v. Kulczyk</i> , 115 Wn. App. 411, 63 P.3d 156 (2003)	20
<i>City of Kent v. Beigh</i> , 145 Wn.2d 33, 32 P.3d 258 (2001)	12
<i>Godfrey v. Hartford Cas. Ins. Co.</i> , 142 Wn.2d 885, 16 P.3d 617 (2001)	16
<i>Haywood v. Aranda</i> , 97 Wn. App. 741, 987 P.2d 121 (1999), <i>aff'd</i> , 143 Wn.2d 231, 19 P.3d 406 (2001)	17-19
<i>Hedlund v. Vitale</i> , 110 Wn. App. 183, 39 P.3d 358 (2002)	16
<i>Kim v. Pham</i> , 95 Wn. App. 439, 975 P.2d 544 (1999)	16-17
<i>Metz v. Sarandos</i> , 91 Wn. App. 357, 957 P.2d 795 (1998)	15
<i>Millay v. Cam</i> , 135 Wn.2d 193, 955 P.2d 791 (1988).....	12
<i>Roberts v. Johnson</i> , 137 Wn.2d 84, 969 P.2d 446 (1999)	9, 13
<i>Seto v. Am. Elevator, Inc.</i> , 129 Wn. App. 146, 118 P.3d 373 (2005) ..	4, 7, 11-12, 20
<i>State v. Greenwood</i> , 120 Wn.2d 585, 845 P.2d 971 (1993).....	13
<i>Wiley v. Rehak</i> , 143 Wn.2d 339, 20 P.3d 404 (2001)	19-20

Statutes

CR 5 7, 8
CR 5(b)(2)(A) 6, 8
CR 5(b)(2)(B) 8
CR 6(a)..... 7
CR 6(e)..... 7
CR 59 15
MAR 1.3 6, 7
MAR 1.3(b)(2) 7, 8
MAR 1.3(b)(3) 7
MAR 6.2 passim
MAR 7.1(a)..... passim
MAR 7.3 15, 19, 20
RAP 18.1 20

Other Authorities

WASH. CONST. art. I, § 21 16

I. INTRODUCTION

Petitioner, Matthew Seto, seeks reversal of the court of appeals decision in this case. The court affirmed the denial of Seto's request for a trial de novo following mandatory arbitration. The request was denied because Seto did not file it within 20 days after the arbitration award was filed, as required by MAR 7.1(a). The arbitrator complied with the requirements of MAR 6.2 by filing the award, together with proof of service, on April 28. The fact that service was not "complete"—i.e., the award had been mailed to but not received by Seto—on that date, did not prevent the 20-day period for filing a request for a trial de novo from beginning to run. MAR 6.2, unlike MAR 7.1(a), requires only "proof of service," not "proof that a copy has been served." As the court of appeals correctly recognized, this distinction must be given effect, and the 20-day period to file a request for a trial de novo began to run when the arbitrator filed the award and proof of service on April 28. The court of appeals decision should be affirmed.

II. ISSUES PRESENTED FOR REVIEW

1. MAR 7.1(a) requires a request for a trial de novo to be filed and served within 20 days after an arbitration award and proof of service are filed with the clerk. Seto did not file his request for a trial de novo until 21 days after the arbitrator filed the award and proof of service with the superior court. Is Seto entitled to a trial de novo?

2. A party who does not comply with the procedural requirements and deadlines of the mandatory arbitration rules is deemed to waive the right to trial by jury. Seto did not file his request for a trial de novo within the time required under MAR 7.1(a). Did Seto waive his right to trial by jury?

III. STATEMENT OF THE CASE

Seto filed suit against respondent, American Elevator, Inc., in King County Superior Court. (CP 11-13) The case was subsequently transferred to mandatory arbitration. (CP 12) Following an arbitration hearing on April 27, 2004, the arbitrator entered an award in favor of

American Elevator. (CP 54-55) The arbitrator filed the award on April 28 together with a certificate of mailing. The certificate stated, "I certify under penalty of perjury under the laws of the State of Washington that I mailed on this date [April 28] a copy of the ARBITRATION AWARD, properly addressed and postage prepaid" to counsel. (CP 54-55, 56)

The arbitrator also forwarded copies of the award and the certificate of mailing to counsel by e-mail on April 28. (CP 14) The e-mail stated the arbitrator would file the award no later than April 29. (CP 24) Seto's attorney received the e-mail copy of the award on April 28 and received a copy in the mail on April 29. (CP 23-24)

Seto filed a request for a trial de novo on May 19. (CP 1-3) On May 21, the Arbitration Department issued a Notice of Waiver of Right to Trial De Novo stating that a trial date would not be set because Seto had not filed his request for a trial de novo within 20 days after the filing of the arbitration award. (CP 4) American Elevator then filed a motion to set aside Seto's request for a trial de novo. (CP

5-7) The court granted American Elevator's motion and entered judgment in favor of American Elevator. (CP 42-43, 44-46) Seto appealed from these rulings. (CP 47-53)

In an opinion filed August 22, 2005, the court of appeals affirmed the trial court's decision. The court explained:

The plain language of MAR 7.1 says that the 20-day period to file a request for trial de novo begins on the day the award is filed with the clerk. We conclude the arbitrator's MAR 6.2 obligation to file "proof of service" when filing the award does not extend the 20-day period by the time it takes to complete service. Because Seto filed his request for trial de novo 21 days after the award was filed, the trial court correctly entered judgment on the arbitration award.¹

Thereafter, Seto sought review of the court of appeals decision. On May 31, 2006, this Court granted Seto's petition for review.

¹ *Seto v. Am. Elevator, Inc.*, 129 Wn. App. 146, 152, 118 P.3d 373 (2005).

IV. ARGUMENT

A. Seto failed to timely file his request for a trial de novo.

MAR 7.1(a) sets forth the requirements for filing a request for a trial de novo following an arbitration award.

The rule provides:

Within 20 days after the arbitration award *is filed with the clerk*, any aggrieved party not having waived the right to appeal may serve and file with the clerk a written request for a trial de novo in the superior court along with proof that a copy has been served upon all other parties appearing in the case. The 20-day period within which to request a trial de novo may not be extended.²

It is undisputed the arbitrator in this case filed his award on April 28. It also is undisputed Seto did not file his request for a trial de novo until May 19, 21 days later. As the Arbitration Department, the trial court, and the court of appeals correctly recognized, Seto's failure to comply with the requirements of MAR 7.1(a) precludes a trial de novo in this case.

² MAR 7.1(a) (Emphasis added.)

B. Completion of service is not required to trigger the 20-day period set forth in MAR 7.1(a).

Seto contends he complied with MAR 7.1(a) because the 20-day period to file a request for a trial de novo did not begin to run until he received the copy of the award mailed to him by the arbitrator. Alternatively, Seto asserts the 20-day period did not begin to run until three days after the arbitrator mailed the award, in accordance with CR 5(b)(2)(A). Seto's arguments are not supported by the plain language of the arbitration rules or Washington case law and must be rejected.

1. Neither MAR 6.2 nor MAR 1.3 requires completion of service.

Seto cited both MAR 6.2 and MAR 1.3 in support of his assertion that he timely filed his request for a trial de novo. MAR 6.2 provides, "Within 14 days after the conclusion of the arbitration hearing, the arbitrator shall file the award with the clerk of the superior court, with proof of service of a copy on each party." The arbitrator complied with MAR 6.2 by filing both the arbitration award

and a certificate of mailing on April 28, one day after the arbitration hearing.

Contrary to Seto's assertion, MAR 6.2 does not require proof of receipt; it simply requires proof that the arbitration award was served. As the court of appeals cogently explained:

[T]he unambiguous language of MAR 6.2, which requires the arbitrator to file "proof of service" together with the award, is satisfied by proof that the award has been put in the mail. MAR 6.2 does not require the arbitrator to wait until service is complete before the arbitrator files "proof of service" and thereby starts the running of the MAR 7.1 20-day time period.³

The arbitrator also complied with the requirements of MAR 1.3. MAR 1.3(b)(2) provides, "After a case is assigned to an arbitrator, all pleadings and other papers shall be served in accordance with CR 5 and filed with the arbitrator." MAR 1.3(b)(3) states, "Time shall be computed in accordance with CR 6(a) and (e)." It is not clear that MAR 1.3(b)(2) applies here, as the rule apparently contemplates pleadings prepared by the parties, not the

³ *Seto*, 129 Wn. App. at 152.

arbitrator. Regardless, the arbitrator complied with the requirements of MAR 1.3(b)(2). CR 5, which is incorporated in the rule, provides for service by mail.⁴ The rule further provides, “The service shall be deemed complete upon the third day following the day upon which they are placed in the mail” The rule also sets forth the requirements for proof of service by mail.⁵

There is no dispute that (1) the arbitrator could mail the arbitration award to the parties’ counsel or (2) the certificate of mailing filed by the arbitrator complied with the requirements of CR 5. Moreover, contrary to Seto’s apparent assertion, the incorporation of CR 5 into the arbitration rules does not mean that service must be “complete” before the 20-day period to file a request for a trial de novo begins to run. As noted above, MAR 7.1(a)

⁴ CR 5(b)(2)(A) states, “If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid.”

⁵ CR 5(b)(2)(B) states, “Proof of service of all papers permitted to be mailed may be by . . . certificate of an attorney.” The rule then provides a format for a certificate of mailing, which is virtually identical to the certificate of mailing filed by the arbitrator in this case.

states such a request must be filed within 20 days “after the arbitration award is *filed* with the clerk.” If the 20-day period began to run when the award was *served*, Seto’s argument would be on point. However, it clearly does not, and there is no basis for extending the 20-day period an additional three days because the arbitrator served Seto by mail.

2. This Court’s decisions do not require completion of service.

In support of his position, Seto relies upon this Court’s decisions in *Alvarez v. Banach*⁶ and *Roberts v. Johnson*.⁷ These cases are readily distinguishable and do not mandate reversal of the court of appeals opinion. In *Alvarez*, the Court considered “whether a declaration of delivery without further proof that a request for a trial de novo has been served complies with the filing requirements” of MAR 7.1(a).⁸ The defendant had filed a

⁶ *Alvarez v. Banach*, 153 Wn.2d 834, 109 P.3d 402 (2005).

⁷ *Roberts v. Johnson*, 137 Wn.2d 84, 969 P.2d 446 (1999).

⁸ *Alvarez*, 153 Wn.2d at 836.

request for trial de novo together with a declaration of service signed by the defendant's attorney's secretary. The declaration stated the secretary had sent the request via legal messenger to be delivered the next day.⁹

The plaintiff filed a motion to strike the request for a trial de novo, arguing the declaration of delivery was insufficient to comply with MAR 7.1(a). The trial court granted the motion. The court of appeals reversed, concluding the declaration of delivery was sufficient, and proof of actual receipt need not be filed with the request for a trial de novo.¹⁰

The plaintiff then sought review by this Court. The Court reversed the court of appeals decision, concluding, "A declaration of delivery stating that a copy is 'to be delivered,' without more, does not satisfy" MAR 7.1(a)'s requirement of filing proof that a copy of the request for a trial de novo has been served.¹¹ In reaching this

⁹ *Id.*

¹⁰ *Id.* at 837.

¹¹ *Id.* at 840.

conclusion, the Court noted, “We employed the past tense when we promulgated [MAR 7.1(a)], which provides that the request for a trial de novo must be filed in superior court ‘along with proof that a copy *has been served* upon all other parties appearing in the case.’”¹²

As the *Alvarez* court pointed out, MAR 7.1(a) requires a party seeking a trial de novo to file proof that the request for a trial de novo has actually been served on the opposing party. In contrast, MAR 6.2, at issue here, only requires “proof of service.” Seto fails to appreciate the significance of this distinction, but the court of appeals in this case did not:

The unambiguous language of MAR 6.2 requires “proof of service.” Where the language in a court rule is unambiguous, “we give it its plain meaning.” . . . “Proof of service” is a term of art. It does not mean proof that the party has actually received service.

The drafters used the language “proof of service” in MAR 6.2 rather than using the MAR 7.1 language, “has been served.” If the drafters had intended MAR 6.2 to require actual service or proof that a copy of the award “has been

¹² *Id.* (quoting MAR 7.1(a)) (citations omitted).

served” as stated in MAR 7.1, they would have used the same language.¹³

The court of appeals went on to explain that its interpretation of MAR 6.2 was *supported* by the *Alvarez* decision:

In *Alvarez*, the Supreme Court held that by using the past tense in MAR 7.1 to require that the request for trial de novo must be filed “along with proof that a copy *has been served* upon all other parties appearing in the case,” the drafters intended that the opposing party had actually received service of the request for trial de novo. By contrast, the drafters did not use the past tense in MAR 6.2. We must therefore conclude that the drafters did not intend the opposing party to actually receive service of the request for trial de novo.¹⁴

MAR 6.2 and MAR 7.1(a) contain different language with respect to the service requirement, and it is well-established that when the legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed.¹⁵

¹³ *Seto*, 129 Wn. App. at 150.

¹⁴ *Id.* at 151.

¹⁵ See *City of Kent v. Beigh*, 145 Wn.2d 33, 45, 32 P.3d 258 (2001); *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1988). It also is well-established that principles of statutory

Accordingly, because *Alvarez* construed MAR 7.1(a), not MAR 6.2, it is readily distinguishable. Moreover, the principles of statutory construction relied upon in *Alvarez* support American Elevator's argument.¹⁶

Seto's reliance on the *Roberts* decision also is misplaced. In that case, the Court considered whether an arbitrator's failure to file proof of service as required by MAR 6.2 tolled the time period to file a request for a trial de novo. The Court concluded it did, stating, "The 20-day period begins to run only when both the award and proof of service thereof have been filed."¹⁷ Here, it is undisputed the arbitrator filed both the arbitration award and the proof of service on April 28.

construction are applied to construe court rules. *See, e.g., State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993).

¹⁶ *Alvarez*, 153 Wn.2d at 840.

¹⁷ *Roberts*, 137 Wn.2d at 92.

3. Public policy considerations do not support Seto's position.

Seto contends his interpretation of MAR 6.2 “will reduce congestion in the courts.”¹⁸ He does not explain, however, why allowing untimely requests for a trial de novo will achieve this goal. As explained above, the language of MAR 6.2 and MAR 7.1(a) is clear. MAR 6.2 requires the arbitrator to file the arbitration award and proof of service with the court, and MAR 7.1(a) requires that a request for a trial de novo be filed within 20 days after an arbitration award is filed. It is undisputed the arbitrator filed the arbitration award on April 28, together with proof of service, and that Seto did not file his request for a trial de novo until 21 days later. The trial court quickly denied Seto's untimely request, thus allowing judicial resources to be utilized by those parties who comply with the plain and unambiguous language of the arbitration rules.

¹⁸ Petition for Discretionary Review at 10.

Seto contends, and the dissent agreed, that it is unfair to grant a party who is personally served more time to file a request for a trial de novo than a party who is served by mail. However, the plain and unambiguous language of MAR 6.2 must be enforced as written, whether “fair” or not.¹⁹

It also should be noted that the arbitration rules evidence an intent to discourage parties from seeking a trial de novo. For example, MAR 7.3 states, “The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party’s position in the trial de novo.” The Washington courts have

¹⁹ See, .e.g., *Metz v. Sarandos*, 91 Wn. App. 357, 360, 957 P.2d 795 (1998) (10-day service and filing requirement for motion for reconsideration under CR 59 begins to run when order is filed, even if parties do not receive a copy of the order that same day). It also should be noted that Seto received a copy of the award by e-mail April 28 and that the arbitrator informed the parties he would file the award “no later than” April 29. Seto does not explain why he apparently assumed this meant the award would be filed April 29, when it was equally possible filing would occur April 28.

recognized that this provision is intended to “discourage meritless appeals.”²⁰

In this case, the purposes of the arbitration rules are best served by adhering to the plain and unambiguous language of MAR 7.1(a) requiring a request for a trial de novo to be filed within 20 days after filing of an arbitration award.

C. Seto’s right to a jury trial has not been abridged.

Seto argued, for the first time in his petition for review, that the denial of his request for a trial de novo abridged his constitutional right to a trial by jury. Although the right to trial by jury is “inviolable,”²¹ it can be waived.²² In *Kim v. Pham*,²³ the court rejected an argument similar to that made by Seto here. In *Kim*, the defendant filed a request for a trial de novo following mandatory

²⁰ *Hedlund v. Vitale*, 110 Wn. App. 183, 187, 39 P.3d 358 (2002).

²¹ WASH. CONST. art. I, § 21.

²² *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 898, 16 P.3d 617 (2001).

²³ *Kim v. Pham*, 95 Wn. App. 439, 975 P.2d 544 (1999).

arbitration. However, she failed to file a written proof of service of the request within 20 days, as required by MAR 7.1(a). The plaintiff moved to strike the defendant's request for a trial de novo, and the trial court granted that request.²⁴

On appeal, the defendant argued the trial court's denial of her request for a trial de novo violated her constitutional and statutory rights to trial by jury. The court rejected this assertion, explaining that the right to a jury trial can be waived by a party's failure to comply with MAR procedural requirements and deadlines.²⁵ Because the defendant failed to comply with the requirements of MAR 7.1(a), she was not entitled to a trial de novo.²⁶

In support of his claim that he was improperly denied his right to a jury trial, Seto cited *Haywood v. Aranda*.²⁷ In that case, the defendant filed a request for a trial de novo

²⁴ *Kim*, 95 Wn. App. at 441.

²⁵ *Id.* at 445.

²⁶ *Id.*

²⁷ *Haywood v. Aranda*, 97 Wn. App. 741, 987 P.2d 121 (1999), *aff'd*, 143 Wn.2d 231, 19 P.3d 406 (2001).

following mandatory arbitration proceedings. He failed to file proof of service of the request as required by MAR 7.1(a). However, the plaintiff did not object, and the case proceeded to a jury trial. After the jury awarded the plaintiff a lower amount than she received in arbitration, she moved to vacate the award on the ground that the defendant failed to file proof of service of the request for a trial de novo.²⁸

The trial court rejected the plaintiff's argument, concluding she waived her right to assert noncompliance with MAR 7.1(a), and the court of appeals agreed.²⁹ The appellate court also concluded the doctrines of laches and estoppel applied to preclude plaintiff's challenge to the jury verdict.³⁰

However, the court *rejected* the defendant's argument that his right to a jury trial necessitated the denial of the plaintiff's motion to vacate. The court explained, "[A]

²⁸ *Haywood*, 97 Wn. App. at 742.

²⁹ *Id.* at 743, 744.

³⁰ *Id.* at 748.

waiver of the right to a jury trial can occur when a party fails to comply with MAR 7.1(a) procedural requirements and deadlines.”³¹

In this case, Seto did not comply with the requirement in MAR 7.1(a) that a request for trial de novo be filed and served within 20 days after the arbitration award is filed with the clerk. It is undisputed the award was filed April 28, 2004. It also is undisputed Seto did not file his request for a trial de novo until May 19, 21 days later. Because Seto failed to timely file his request for a trial de novo, he waived his right to a trial by jury.

D. American Elevator is entitled to recover its attorney fees and costs in the Supreme Court.

MAR 7.3 authorizes an award of attorney fees and costs when a party who appeals from an arbitration award fails to improve his position in a trial de novo. In *Wiley v. Rehak*,³² this Court explained that this rule applies when a party requests a trial de novo but does not improve his

³¹ *Id.* at 749 (citing *Kim*, 95 Wn. App. at 445).

³² *Wiley v. Rehak*, 143 Wn.2d 339, 20 P.3d 404 (2001).

position because he fails to comply with the requirements for proceeding to a trial de novo such as those contained in MAR 7.1(a).³³

Here, as explained above, Seto is not entitled to a trial de novo because he did not comply with the 20-day time requirement set forth in MAR 7.1(a). Accordingly, he has not improved his position. The court of appeals awarded American Elevator attorney fees on appeal pursuant to MAR 7.3 and RAP 18.1.³⁴ American Elevator is also entitled to recover attorney fees incurred in this Court in accordance with these rules.

V. CONCLUSION

For the reasons set forth above, American Elevator respectfully requests that the court of appeals decision be AFFIRMED.

³³ *Wiley*, 143 Wn.2d at 348; *see also Boyd v. Kulczyk*, 115 Wn. App. 411, 417, 63 P.3d 156 (2003).

³⁴ *Seto*, 129 Wn. App. at 153.

DATED June 30, 2006.

BULLIVANT HOUSER BAILEY PC

By 

Jerret E. Sale, WSBA #14101
Deborah L. Carstens, WSBA #17494

Attorneys for Respondent, American
Elevator

CERTIFICATE OF SERVICE

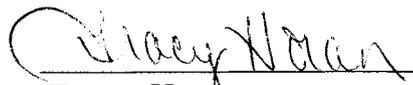
The undersigned certifies that on this 30th day of
June, 2006, I caused to be served Respondent's

Supplemental Brief to:

Tucker F. Blair
Scott A. Sayre
Blair & Meeker LLP
2505 2nd Ave., Ste. 500
Seattle, WA 98121-1452

via hand delivery.
 via first class mail.
 via facsimile.

I declare under penalty of perjury under the laws of
the State of Washington this 30th day of June, 2006, at
Seattle, Washington.



Tracy Horan

3497406.1