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65357-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

FREDERICK AND KATHY KOHOUT,

Appellants,

v.

HOME CURB APPEAL, LLC, and
JOHN R. MULINSKI AND JANE DOE MULINSKI, and
HARDING & SONS, INC.

Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT
THE HONORABLE RICHARD EADIE

REPLY BRIEF OF APPELLANTS FREDERICK AND KATHY KOHOUT

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I. INTRODUCTION

Whether the Kohouts waived the right to arbitrate was not a question for the trial court to decide. The trial court's role is limited to deciding whether or not there is an enforceable agreement to arbitrate. The trial court improperly denied the Kohouts' first motion to compel arbitration ruling it was "fundamentally unfair to stay the actions against the subcontractors", and finding that the Mulinskis cannot be compelled to arbitrate. (CP 404-405). Additionally, the trial court improperly denied the Kohouts' second motion to compel arbitration on the basis of waiver. The issue of the enforceability of the arbitration clause in the contract between the Kohouts and HCA is not in dispute. The issue of whether the Kohouts waived the right to compel arbitration is an issue for the arbitrator, not the trial court.

The Kohouts filed a Notice of Appeal of the trial court's denial of their first motion to compel arbitration and the second motion to compel arbitration. The Court Commissioner has limited the scope of this appeal to only a review of the trial court's denial of the Kohouts' second motion to compel. The Kohouts fully intend to appeal the trial court's order denying the first motion to compel. Because the trial court committed an obvious error in denying both motions to compel, this court should reverse both decisions

because the trial court's only role is to decide whether or not there is an enforceable agreement to arbitrate, and the enforceability of the arbitration clause in the contract was never in dispute. Thus, the trial court committed obvious error in denying both motions to compel arbitration.

II. COUNTER-STATEMENT OF THE CASE

HCA misrepresents the facts of this case and falsely contends that the Kohouts engaged in over eighteen (18) months of litigation before seeking to compel arbitration. The fact is that the Kohouts served HCA and the Mulinskis with a demand for arbitration even before filing their lawsuit. The contract required that an arbitrator be appointed within five (5) days of the demand. However, HCA and the Mulinskis would not agree to arbitration and instead, claimed that the Kohouts' demand had to be forwarded to HCA's insurers for review, and that they were not prepared to agree to the Kohouts' proposed arbitrator. (CP 475-478; CP 480). Consequently, on September 27, 2008, the Kohouts filed a lawsuit against HCA, John and Shannon Mulinski, and HCA's bonding companies. (CP 482-492). The Complaint alleged causes of action against HCA and the Mulinskis for breach of contract, breach of warranty, unjust enrichment, fraud, intentional misrepresentation,

conversion, and violation of the Consumer Protection Act. (CP 482-492). The Complaint prayed that the matter be stayed and that the parties be compelled to arbitration pursuant to the contract.

After HCA's subcontractors filed two lien foreclosure actions against the Kohouts and HCA, the court consolidated all three lawsuits. (CP 32-33). Within ten (10) days of the court consolidating all three lawsuits, the Kohouts filed their first motion to compel arbitration and a stay of the proceedings. (CP 210-218). Contrary to HCA's contention, the Kohouts conducted absolutely no discovery prior to filing their first motion to compel and did nothing else inconsistent with their intent to submit their claims against HCA to arbitration. Furthermore, the parties never disputed the enforceability of the arbitration clause in the contract. Instead, HCA and the Mulinskis argued that the claims were not subject to arbitration, and that the Kohouts had waived the right to arbitration by filing a lawsuit. The trial court exceeded its authority and improperly denied the Kohouts' first motion to compel ruling it was fundamentally unfair to stay the actions against HCA's subcontractors, and that the Mulinskis were nonparties to the arbitration agreement. (CP 404-405).

The trial court refused to stay any of the claims between the parties. As a result, the Kohouts were forced to pursue their claims against HCA and the Mulinskis in superior court, and had to also defend against the two lien foreclosure actions. Over a year after the court denied the Kohouts' first motion to compel, HCA and the Mulinskis improperly noted a motion for summary judgment seeking dismissal of the Kohouts' claims for breach of warranty, fraud, intentional misrepresentation, conversion and violation of the Consumer Protection Act. (CP 746-766). The motion was renoted for hearing only ten (10) days before trial, in violation of the case schedule. Consequently, prior to the hearing on the motion, the Kohouts had to file a witness and exhibit list pursuant to the case schedule, and had to file objections to HCA's voluminous ER 904 documents. The Kohouts also filed a cross-motion for summary judgment on the same claims. On March 19, 2010 and April 6, 2010, the court dismissed all of the Kohouts' claims against the Mulinskis and HCA, with the exception of the Kohouts' claim for breach of contract. (CP 780-783; CP 425-428).

Within three (3) days of the court issuing its March 19, 2010 order, the Kohouts filed a second motion to compel arbitration. (CP 429-431; CP 432-428; CP 442-451; CP 452-533). HCA argued that

the Kohouts had waived their right to arbitrate. Again, the trial court improperly denied the Kohouts' second motion to compel arbitration ruling that the Kohouts had waived their right to arbitrate.

III. ARGUMENT

A. THE TRIAL COURT LACKED AUTHORITY TO DECIDE ANY ISSUE OTHER THAN WHETHER OR NOT THERE IS AN ENFORCEABLE AGREEMENT TO ARBITRATE.

The party opposing arbitration bears the burden of showing the arbitration clause is inapplicable or unenforceable. *Otis Housing Ass'n v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009). Washington courts apply a strong presumption in favor of arbitration. *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 405, 20 P.3d 254 (2009). HCA does not even address the Kohouts' argument that the trial court had no authority to deny their first and second motion to compel arbitration when the contract between the parties contains an arbitration provision which requires arbitration of any dispute or claims between the parties relating to the contract. Here, the enforceability of the arbitration clause in the contract between the Kohouts and HCA was never in dispute.

The role of the trial court is limited to deciding whether or not there is an enforceable agreement to arbitrate. *Verbeek Properties,*

LLC, et al v. Greenco Environmental, Inc., No. 63772-0-I, -- Wn. App. --, -- P.3d --, 2010 Wash. App. LEXIS 2803, at page 7 (Dec. 20, 2010). Unless the court finds there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. RCW 7.04A.070(1); *Verbeek Properties, LLC, et al v. Greenco Environmental, Inc.*, No. 63772-0-I, -- Wn. App. --, -- P.3d --, 2010 Wash. App. LEXIS 2803, at page 7 (Dec. 20, 2010). Whether the Kohouts' claims are subject to arbitration and whether the Kohouts waived the right to arbitration by filing a lawsuit is an issue for the arbitrator, and not the trial court. *Verbeek Properties, LLC, et al v. Greenco Environmental, Inc.*, No. 63772-0-I, -- Wn. App. --, -- P.3d --, 2010 Wash. App. LEXIS 2803, at page 8 (Dec. 20, 2010). The trial court exceeded its authority by ruling on the Kohouts' first motion to compel that it was fundamentally unfair to stay the actions against the subcontractors, and that the Mulinskis, as nonparties to the arbitration, cannot be compelled to arbitrate. The Kohouts were entitled to arbitrate their claims against HCA and have the remaining claims against any nonparties to the arbitration agreement stayed. The issue of whether they complied with RCW 7.04A.090 was for the arbitrator, not the trial court.

The trial court also exceeded its authority in denying the Kohouts' second motion to compel arbitration. Even after the trial court dismissed all of the Kohouts' claims against the Mulinskis, and the only remaining claim left was for breach of contract against HCA, the trial court still denied the Kohouts' second motion to compel their breach of contract claim against the HCA on the basis of waiver. Again, the trial court exceeded its authority by ruling on the procedural issue. Whether the Kohouts waived their right to arbitrate the one remaining breach of contract claim against HCA is an issue for the arbitrator. Thus, this court should reverse the trial court's denial of the Kohouts' first and second motions to compel arbitration.

B. THE KOHOUTS DID NOT WAIVE THEIR RIGHT TO ARBITRATE AND TO APPEAL THE TRIAL COURT'S DENIAL OF THEIR SECOND MOTION TO COMPEL ARBITRATION.

The trial court denied the Kohouts' first motion to compel arbitration, ruling that it would be fundamentally unfair to stay the actions against the subcontractors pending the arbitration and that the Mulinskis are nonparties to the arbitration agreement. The trial court denied the Kohouts' second motion to compel arbitration, ruling that the Kohouts had waived the right to arbitrate. The

Uniform Arbitration Act limits the role of the court. *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 403, 200 P.3d 254 (2009). Under RCW 7.04A.090, the court shall order the parties to arbitrate unless the court finds that there is no enforceable agreement to arbitrate. The question of compliance with RCW 7.04A.090 must be left to the arbitrator. *Verbeek Properties, LLC, et al v. Greenco Environmental, Inc.*, No. 63772-0-I, -- Wn. App. --, -- P.3d --, 2010 Wash. App. LEXIS 2803, at page 7 (Dec. 20, 2010). The trial court had no authority to deny the Kohouts' second motion to compel arbitration based on waiver.

Otis Housing Ass'n v. Ha, 165 Wn.2d 582, 201 P.3d 309 (2009) does not compel a different conclusion. HCA argues that when the Kohouts filed a complaint against HCA's bonding companies, and filed a motion to consolidate the two lien foreclosure actions, that they waived the right to arbitrate their claims against HCA. This case is not like *Otis Housing Ass'n*, where waiver was found because the issue the appellant presented at the show cause hearing in an unlawful detainer action was the same issue the appellants wished to arbitrate. Here, the Kohouts filed a motion to consolidate the two lien foreclosure lawsuits, and

asked the court to stay these actions and its claims against HCA's bonding companies, pending arbitration of their claims against HCA. This action was not inconsistent with demanding arbitration of their claims against HCA and the Mulinskis. In ruling on the motion to consolidate, the trial court did not address any facts or arguments pertaining to the Kohouts' claims which they sought to arbitrate.

Furthermore, after the trial court denied the Kohouts' first motion to compel arbitration and refused to stay any of the proceedings against the other parties, the Kohouts were forced to litigate their claims in superior court. HCA has not presented any authority which supports its argument that the Kohouts waived the right to appeal because, after the court denied their first motion to compel arbitration, they were forced to engage in discovery and further litigate the claims, and then file an appeal of the trial court's denial of its second motion to compel arbitration. HCA cites *Steele v. Lundgren*, 85 Wn. App. 845, 935 P.2d 671 (1997) and *Otis Housing Ass'n v. Ha*, 165 Wn. App. 2d 582, 201 P.3d 309 (2009), which are not on point. Neither *Otis Housing Ass'n* nor *Steele* address the issue of whether a party waives a right to appeal after the trial court denies its first motion to compel, and it engages in

discovery and further litigates the claims, and then files a second motion to compel arbitration and appeals the trial court's denial of its second motion to compel arbitration. Unlike in *Otis Housing Ass'n*, the Kohouts filed a motion to arbitrate their claims against HCA and the Mulinskis prior to any discovery or litigation of the claims. The trial court improperly denied the motion to compel arbitration, and the Kohouts were forced to litigate their claims against HCA and the Mulinskis in superior court. The fact that the Kohouts were forced to litigate their claims in superior court was not inconsistent with demanding arbitration on their claims against HCA.

In fact, once the trial court dismissed all of the Kohouts' claims against the Mulinskis and HCA, and the only remaining claim left was the Kohouts' breach of contract claim against HCA, the Kohouts immediately filed a second motion to compel arbitration. The trial court denied the motion ruling that the Kohouts had waived the right to arbitrate. Again, the trial court's only authority was to decide whether or not there is an enforceable agreement to arbitrate. RCW 7.04A.070(1); *Verbeek Properties, LLC, et al v. Greenco Environmental, Inc.*, No. 63772-0-I, -- Wn. App. --, -- P.3d --, 2010 Wash. App. LEXIS 2803, at page 7 (Dec.

20, 2010). The trial court erred by concluding that the Kohouts had waived the right to arbitrate when they were forced to engage in discovery and further litigate their claims after the trial court improperly denied their first motion to compel arbitration.

HCA has failed to cite any authority which holds that arbitration is waived by filing a complaint. Under RCW 7.04A.070, the act sets forth procedures for initiating a complaint and motion to compel arbitration in court. The Kohouts filing a complaint and a motion to compel arbitration is consistent with the procedures under the Act. Furthermore, HCA does not dispute that Washington's Contractors' Registration statute required that they file suit against HCA and its bonding companies in superior court. HCA now contends that the Kohouts waived their right to arbitrate their claims against HCA by filing suit against the Mulinskis, which they argue are nonparties to the arbitration clause. The presence of non-arbitratable claims, or the presence of parties who are not signators to the agreement to arbitrate, cannot constitute a waiver of those disputes that are arbitrable. HCA has not presented any authority in support of their argument that the Kohouts waived their right to arbitrate their claims merely by asserting claims against HCA's bonding company and the Mulinskis, who defrauded the Kohouts

out of over Two Hundred Thousand Dollars which they paid under the contract. The Kohouts are not attempting to bring the bond companies into arbitration. The Kohouts' assertion of the right to obtain a judgment against the bonds, if they are successful in obtaining an arbitration award for money damage, is a peripheral matter solely dependent on the outcome of the arbitration. *See Verbeek Properties, LLC, et al v. Greenco Environmental, Inc.*, No. 63772-0-I, -- Wn. App. --, -- P.3d --, 2010 Wash. App. LEXIS 2803, at page 12 (Dec. 20, 2010) (holding that a party does not waive arbitration by asserting a right to obtain a judgment against the bond, if successful in obtaining an arbitration award, which is a peripheral matter solely dependent on the outcome of the arbitration). The mere fact that the Kohouts asserted claims against the Mulinskis and the bonding companies can not constitute a waiver of their right to arbitrate their claims against HCA.

Lastly, HCA attempts to argue that it has been prejudiced by more than two years of litigation, and that the Kohouts' delay in filing their second motion to compel arbitration justifies a waiver. Neither *Steele* nor *Kinsey* support this argument. Had the trial court not denied the Kohouts' first motion to compel arbitration, they would not have had to incur thousands of dollars litigating their

claims which should have been arbitrated. If any party has been prejudiced in this case, it is the Kohouts. The Kohouts were denied their contractual right to arbitrate their claims against HCA, and have been forced to litigate their claims in superior court, which HCA admits is neither expeditious nor cost-effective. Only ten (10) days before trial, the trial court dismisses all of their claims against all parties, and left them with only a breach of contract claim against a dissolved LLC with no assets. The trial court then denied their second motion to compel arbitration of the one remaining breach of contract claim against HCA. The Kohouts have been forced to spend thousands of dollars appealing the trial court's erroneous rulings. The trial court should have stayed any non-arbitrable claims, and allowed the Kohouts to arbitrate their claims against HCA and the Mulinskis. The trial court erred in denying the Kohouts' motions to compel arbitration. HCA has not met its burden of showing conduct by the Kohouts inconsistent with the intent to arbitrate.

IV. CONCLUSION

The trial court erred in denying the Kohouts' first motion to compel arbitration. The trial court's only role is to decide whether or not there is an enforceable agreement to arbitrate. The

enforceability of the arbitration clause in the contract between the Kohouts and HCA was not in dispute. The trial court had no authority to deny the Kohouts' first motion to compel arbitration. The trial court also erred in denying the Kohouts' second motion to compel arbitration based on waiver. Whether the Kohouts waived the right to arbitrate is for the arbitrator to decide. Furthermore, none of the Kohouts' actions in filing suit against the bonding companies and the Mulinskis, and filing a motion to consolidate the two lien foreclosure actions, constitutes a waiver of arbitration. The fact that the Kohouts were forced to litigate their claims in superior court after the trial court denied their first motion to compel arbitration, does not show conduct by the Kohouts inconsistent with the intent to arbitrate.

This court should reverse the trial court's orders denying the Kohouts' first motion to compel arbitration and their second motion to compel arbitration.

DATED this 22nd day of December, 2010.

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ORIGINAL

65357-1-I

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FREDERICK AND KATHY KOHOUT,

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CERTIFICATE OF SERVICE OF REPLY BRIEF OF APPELLANTS FREDERICK AND KATHY KOHOUT

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I, Diana T. Woodruff, do hereby certify under penalty of perjury under the laws of the State of Washington as follows:

1. I am a citizen of the United States, over the age of 18 years and am not a party to the within cause;

2. I am employed by the law firm of Oles Morrison Rinker & Baker, LLP. My business and mailing address is 701 Pike Street, Suite 701 Pike Street, Suite 1700, Seattle, Washington 98101-3930.

3. On December 22, 2010 I caused to be delivered via Legal Messenger Services, Inc. a copy of the following document(s) on the following parties:

1. Reply Brief of Appellants Frederick and Kathy Frederick; and
2. Certificate of Service.

Directed to the following entities/individuals:

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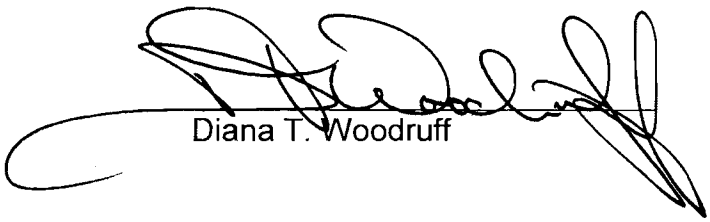

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