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COURT OF APPEALS OF THE
STATE OF WASHINGTON
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NO. 66032-2-1

COURT OF APPEALS OF THE
STATE OF WASHINGTON

LIGHTWEIGHT STEEL FRAMING 2007 LTD.,
a Washington corporation

Appellant,

vs.

W.G. CLARK, CM, INC., a Washington corporation;
BRIX CONDOMINIUM, LLC, a Washington
limited liability company; et al.

Respondents.

**BRIEF OF APPELLANT
LIGHTWEIGHT STEEL FRAMING 2007 LTD.**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ASSIGNMENT OF ERROR.....	2
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT.....	7
I. THE TRIAL ERRED IN CONSIDERING WHETHER RESPONDENTS HAD COMPLIED WITH A CONDITION PRECEDENT TO ARBITRATION UNDER SECTION U.3 OF THE SUBCONTRACT WHEN THAT QUESTION IS A THRESHOLD ISSUE FOR THE ARBITRATOR.....	7
II. THE TRIAL COURT ERRED IN FINDING THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT ABOUT WHETHER RESPONDENT COMPLIED WITH SECTION U.3....	11
1. <u>There Are Genuine Issues Of Material Fact About Whether LSF Complied With Section U.3 Before It Filed The Lawsuit...</u>	11
2. <u>Respondents Waived Enforcement Of Section U.3 By Filing A Demand For Arbitration And Agreeing To Arbitration.....</u>	14
III. THE TRIAL ERRED IN FAILING TO GRANT APPELLANT'S MOTION TO COMPEL ARBITRATION.....	15
V. CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases	Pages
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14 (1986).....	12
<i>Chambers v. TRM Copy Centers Corp.</i> , 43 F.3d 29, 37 (2nd Cir. 1994).....	12
<i>Heights at Issaquah Ridge v. Burton Landscape Group, Inc.</i> , 148 Wn. App. 400, 405, 200 P.3d 254 (2009).....	8, 9, 15
<i>Kruse v. Hemp</i> , 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).....	7
<i>Townsend v. Quadrant Corp.</i> , 153 Wn. App. 870, 879-80, 224 P.3d 818 (2009).....	8
<i>Verbeek Props., LLC v. GreenCo Environmental, Inc.</i> , 159 Wn. App. 82, 87, 246 P.3d 205 (2010).....	15-16
<i>Yakima County Law Enforcement Officers Guild v. Yakima County</i> , 133 Wn. App. 281, 287-88, 135 P.3d 558 (2006).....	8
Statutory Provisions	
RCW 7.04A.030	7
RCW 7.04A.060.....	1, 7-8, 10, 16
RCW 7.04A.070.....	7, 15-16

I. INTRODUCTION

Appellant Lightweight Steel Framing 2007 Ltd. (“LSF”) respectfully requests that this Court reverse the Order for Summary Judgment and Alternative Motion to Stay (“Order”) entered by the Superior Court of Washington For King County on September 10, 2010, dismissing the underlying lawsuit (the “Lawsuit”). In addition, Appellant requests that this Court compel Respondents to mediate and arbitrate this dispute.

The trial court in this case erred in granting Respondents’ motion for summary judgment. Respondents’ summary judgment motion argued erroneously that Appellant had not complied with a contractual condition precedent to the filing of the Lawsuit and/or a condition precedent to arbitration. In granting Respondents’ summary judgment motion, the trial court erred in not applying Washington’s strong public policy in favor of arbitration, codified, for example, in RCW 7.04A.060(3), which provides that whether or not a condition precedent to arbitrability has been fulfilled is a question for an arbitrator to decide. In addition, the trial court failed to recognize the genuine issues of material fact raised by Appellant in response to Respondents’ summary judgment motion. The trial court failed to rule on Appellant’s motion to compel arbitration and left Appellant without a mechanism to enforce the dispute resolution provisions of the subcontract between the parties.

Respondents seek to needlessly delay or avoid the mediation and arbitration proceedings to which they previously agreed by litigating

technical arguments in bad faith and seeking to frustrate Appellant's attempts to compel arbitration. This type of behavior runs directly contrary to Washington's strong public policy in favor of arbitrating disputes and avoiding unnecessary litigation.

II. ASSIGNMENT OF ERROR

Error No. 1

The trial court erred in considering whether Respondents had complied with a condition precedent to arbitration under Section U.3 of the Subcontract when that question is a threshold issue for the arbitrator.

Error No. 2

The trial court erred in finding that there were no genuine issues of material fact about whether Respondent complied with Section U.3 of the Subcontract between the Parties.

Error No. 3

The trial court erred in failing to grant Appellant's motion to compel arbitration.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1

Does a Court err when it considers a question of whether Appellant satisfied a condition precedent to arbitration (or an underlying lawsuit to enforce arbitration) when there is an agreement to arbitrate and Respondent initiated arbitration? (Assignment of Error 1.)

Issue No. 2

Does a Court err by dismissing on summary judgment an

underlying lawsuit filed to enforce arbitration on the basis of the non-moving party's alleged failure to satisfy a condition precedent to arbitration (or litigation), when there are genuine issues of material fact concerning the non-moving party's satisfaction of the condition precedent and/or the moving party waived its right to enforce the applicable provision? (Assignment of Error 2).

Issue No. 3

Does a Court err when it fails to grant a motion to compel arbitration where there is an agreement to arbitrate and one party is refusing to arbitrate, notwithstanding an alleged failure of one party to satisfy a condition precedent to arbitration (or litigation)? (Assignment of Error 3).

III. STATEMENT OF THE CASE

On or about May 2007, Appellant Lightweight Steel Framing 2007 Ltd. ("LSF") entered into a contract (the "Subcontract") with Respondent W.G. Clark, CM, Inc. ("W.G. Clark"), a Washington corporation, to provide steel framing and drywall services on a construction project (the "Project") known as Brix Condominiums, located on Capitol Hill in Seattle, Washington. CP 61 at ¶ 2; CP 17-49. W.G. Clark was the general contractor on the Project and Respondent Brix Condominium, LLC ("Brix"), a Washington limited liability company, was the developer and owner of the real property upon which the Project was located. *Id.*

Section U.3 of the Subcontract provided:

Subcontractor agrees not to file any claim in mediation, arbitration, or litigation, until thirty (30) days after having submitted its full claim in writing to Mike Ducey, president of W.G. Clark Construction Co. along with detailed cost documentation and all points of argument in Subcontractor's favor.

CP 38.

On or about July 10, 2008, LSF received a Notice of Assignment of Subcontract ("Notice") from Brix, notifying LSF that as of June 30, 2008, W.G. Clark was no longer "in charge of construction for the Brix Condominium Project and had assigned its subcontract with [LSF] dated May 29, 2007 to Brix Condominium, LLC." CP 65-66. The Notice indicated that the assignment was effective as of July 1, 2008, and that Brix had retained H.A. Andersen Co. ("Andersen") to serve as the new owner's representative / construction manager. *Id.* The Notice further stated: "[a]ccordingly, effective as of July 1, 2008, all references to "W.G. Clark" or "Member" in your subcontract shall be deemed to mean "Brix Condominium, LLC", the Services Addendum shall continue to serve as your Main Contract . . ." *Id.* The Notice went on to indicate that "all applications, lien releases and notices should be delivered" to Brix Condominium, LLC, Attn: Jim Donahue, with a copy to: H.A. Andersen Co., Attn: Martin Cloe, Senior Vice President. *Id.*

LSF continued to provide labor, materials, equipment and supplies to the Project until about July 29, 2008, when LSF was terminated by Brix. CP 62 at ¶ 6. Throughout its work on the Project,

LSF provided W.G. Clark with monthly invoices, on or before the 25th of each month, requesting progress payments for work performed on the Project. *Id.* LSF was paid for its progressive work on the project through approximately May 2008, until Brix terminated W.G. Clark. *Id.* After May 2008, Brix did not pay LSF for its work even though LSF continued to provide labor, materials, equipment and supplies to the Project until July 2008. *Id.*

From July 2008 through September 2008, Al Malcolm, the President of LSF, attended meetings with personnel from Brix and H.A. Andersen Co. to discuss the Project and LSF's outstanding invoices. CP 61 at ¶ 1; CP 62 at ¶ 7. Mr. Malcolm recalls attending meetings regarding the Project with Brix and Andersen personnel on or about July 10, 2008; July 18, 2008; July 29, 2008; and August 13, 2008. CP 62 at ¶ 7. He also exchanged numerous emails, phone calls, and written correspondence with management personnel from Brix and H.A. Andersen regarding our outstanding invoices. *Id.*

On February 9, 2009, Respondents sent a demand for arbitration to LSF. CP 10-12. On September, 23, 2009, LSF filed a complaint against Respondents initiating the underlying Lawsuit. LSF's claim consists of the unpaid amount of its invoices for the labor, materials, equipment and supplies LSF provided to the Project up to and including July 2008, plus interest, costs, and attorney's fees. CP 62 at ¶ 8. Al Malcolm provided Brix and H.A. Andersen's management personnel with this document, as well as other written cost

documentation detailing the amounts of LSF's claim, on several occasions between July 2008 and September 2008. CP 62 at ¶ 9; CP 68. In September 2008, Brix refused to pay LSF on its outstanding invoices and provided LSF with a detailed cost breakdown of Brix's purported claims against LSF, dated September 5, 2008. CP 62 at ¶ 10. Brix's purported claim incorporates and includes LSF's detailed cost breakdown. CP 62; CP 70-73.

The Parties agreed to mediate and arbitrate the dispute and to set dates. CP 74-76 at ¶¶ 2-6. The Parties agreed to mediate before Andrew Maron or Tom Brewer, and agreed to arbitrate before the Honorable Larry A. Jordan (retired), or another member of Judicial Dispute Resolution, LLC. *Id.*

On August 11, 2010, Respondents filed Defendants' Motion for Summary Judgment and Alternative Motion for Stay ("MSJ"). CP 1-51. Appellant filed Plaintiff's Response to Defendants' Motion For Summary Judgment and Alternative Motion for Stay and Plaintiff's Motion to Compel Arbitration. CP 52-83. Respondents filed Defendants' Reply for its Motion for Summary Judgment and Alternative Motion for Stay. CP 84-91. On September 9, 2010, the Court heard oral argument on Respondents' MSJ. CP 92; Narrative Report of Proceedings. On September 10, 2010, the trial court entered its Order for Summary Judgment and Alternative Motion to Stay ("Order"), granting Respondents' MSJ and dismissing the underlying

Lawsuit. CP 93-94. Appellant appealed from the trial court's Order. CP 95-100.

IV. ARGUMENT

This Court reviews summary judgment orders *de novo*, performing the same inquiry as the trial court. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). In granting Respondents' motion for summary judgment, and dismissing the Lawsuit, the trial court erred in three ways: (1) the trial court erred in considering whether Respondents had complied with a condition precedent to arbitration under section u.3 of the Subcontract when that question is a threshold issue for the arbitrator, pursuant to RCW 7.04A.060(3); (2) the trial court erred in finding that there were no genuine issues of material fact about whether Respondents complied with Section U.3 of the Subcontract, and finding that Respondents did not waive enforcement of the provision; (3) the trial court erred in failing to grant Appellant's motion to compel arbitration, pursuant to RCW 7.04A.070.

I. THE TRIAL ERRED IN CONSIDERING WHETHER RESPONDENTS HAD COMPLIED WITH A CONDITION PRECEDENT TO ARBITRATION UNDER SECTION U.3 OF THE SUBCONTRACT WHEN THAT QUESTION IS A THRESHOLD ISSUE FOR THE ARBITRATOR.

RCW Chapter 7.04A applies to the agreement to arbitrate in the Subcontract, which was entered into on May 29, 2007. RCW 7.04A.030 (2); *see* CP 17 (stating effective date of May 29, 2007). Under RCW 7.04A, whether a condition precedent to arbitrability has

been fulfilled is for an arbitrator to decide. RCW 7.04A.060(3); *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 879-80, 224 P.3d 818 (2009). RCW 7.04A.060(3) provides that “[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.” The trial court shall decide “whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” RCW 7.04A.060(2). The Parties do not dispute that there exists an agreement to arbitrate.

Questions about procedural prerequisites to arbitration are threshold questions for the arbitrator. *Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wn. App. 281, 287-88, 135 P.3d 558 (2006) (whether a time limit bars arbitration should be decided by the arbitrator as a threshold question); *Heights at Issaquah Ridge v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 405, 200 P.3d 254 (2009). This is because these types of procedural questions cannot ordinarily be answered without consideration of the merits of the dispute. *Id.* at 288. This case is a perfect example, as LSF provided Respondents with materials outlining its claim. To determine whether those materials satisfy the condition precedent to arbitrability in Section U.3, if that section even applies (which it doesn’t because Respondents filed the arbitration demand) requires some consideration of the merits of the dispute.

Courts resolve the threshold legal question of arbitrability by analyzing the arbitration agreement. *Heights at Issaquah Ridge*, 148 Wn. App. at 403. “Washington has a strong public policy favoring arbitration of disputes.” *Id.* at 403-04.

In the underlying Lawsuit, it is clear from section U.2 of the Subcontract that the Parties agreed to arbitrate any disputes arising between them. CP 38. Brix sent an Arbitration Demand to LSF and the Parties agreed to arbitration. At this stage, unless the Court holds that the Subcontract is unenforceable due to the assignment by W.G. Clark to Brix, or some other ground that exists in law or equity, the Court’s inquiry should end and the Parties should be compelled to arbitrate. Any doubts should be resolved in favor of arbitration. *Issaquah Ridge*, 148 Wn. App. at 405.

Instead, in the instant case, Respondents delayed entering mediation and arbitration of the dispute to avoid a judgment against them for the unpaid amounts on LSF’s invoices. In an attempt to further delay resolution of the dispute, Respondents filed a summary judgment motion, arguing that Appellant had not complied with the condition precedent in Section U.3 of the Subcontract, which states that Subcontract (Appellant) “agrees not to file any claim in mediation, arbitration, or litigation until thirty (30) days after having submitted its full claim in writing to” Respondents. CP 38. That the provision states the claim should be submitted to Mike Ducey, president of W.G.

Clark is immaterial after the assignment of the Subcontract from W.G. Clark to Brix.

To further delay or avoid arbitration, Respondents attempt to make a meaningful distinction between a condition precedent to filing an underlying litigation that seeks to enforce arbitration and a condition precedent to arbitration in this case. The Parties agreed to arbitrate. Appellant filed the Lawsuit so that it would have a mechanism to compel Respondents to arbitrate. Respondents filed the initial demand for arbitration, not Appellant. CP 12. As such, the second paragraph of Section U.3 of the Subcontract does not apply, as the Subcontractor (Appellant) has not filed a claim in arbitration – Respondent filed the demand for arbitration. Section U.3 should not be interpreted to permit Respondents to frustrate the only legal mechanism available to Appellant to compel the mediation and arbitration that the Parties agreed to by dismissing the underlying lawsuit. This is contrary to Washington's strong public policy in favor of arbitration of disputes, and results in the extensive and unnecessary litigation that RCW 7.04A.060(3) was designed to avoid. If Respondents refuse to arbitrate, despite their prior agreement to do so, Appellant is left with no mechanism to compel arbitration. Respondents could assert endlessly that whatever materials Appellant provides to Respondents in an attempt to comply with Section U.3 were inadequate. Appellant would be unable to seek relief in Court by filing a lawsuit to compel arbitration if Respondents could simply

dismiss any such action by pointing to Section U.3 and asserting a meaningless distinction between a condition precedent to arbitration and a condition precedent to “litigation” designed to compel arbitration.

The trial court’s dismissal of Appellant’s lawsuit and motion to compel arbitration, as Respondents demanded, goes against Washington’s strong public policy in favor of arbitration of disputes. Appellant provided Respondents with a statement of claim years ago, and Respondents now seek to rest on technical contract interpretations to frustrate Appellant’s attempt to enforce arbitration.

II. THE TRIAL COURT ERRED IN FINDING THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT ABOUT WHETHER RESPONDENT COMPLIED WITH SECTION U.3

Even if Appellant’s compliance with Section U.3 of the Subcontract was properly considered by the trial court, the Court erred in granting Respondents’ motion for summary judgment because: (1) LSF raised genuine issues of material fact about whether LSF complied with section U.3 of the Subcontract before it filed the Lawsuit; (2) Respondents waived their right to enforce Section U.3 of the Subcontract by agreeing to mediation and arbitration.

1. There Are Genuine Issues Of Material Fact About Whether LSF Complied With Section U.3 Before It Filed The Lawsuit

Between July 2008 and September 2008, LSF provided detailed claim documentation to Brix and Andersen. CP 61-73 (Declaration of Al Malcolm and Exhibits). In doing so, LSF complied with the

condition precedent to litigation or arbitration in Section U.3 (if it applies); or, at least, through the Declaration of Al Malcolm, LSF raised genuine issues of material fact about whether it complied, sufficient to preclude summary judgment.

Respondents failed to meet their burden to show that there were no genuine issues of material fact about whether Appellant complied with Section U.3. In making that determination, the Court is required to resolve all ambiguities and draw all factual inferences in favor of the nonmoving party (Appellant). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14 (1986). “If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper.” *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2nd Cir. 1994).

In their motion for summary judgment, Respondents filed the Declaration of Mike Ducey, President of Respondent W.G. Clark, which stated that Mr. Ducey believed that W.G. Clark did not comply with s. U.3. CP 16 at ¶ 4. However, whether or not W.G. Clark received LSF’s claim is irrelevant to the issue relating to s. U.3, as LSF’s claims were sent by LSF to Brix and Andersen personnel because Brix terminated W.G. Clark and took an assignment of W.G. Clark’s contractual obligations. CP 62 at ¶¶ 7-10; CP 68.

Section U.3 of the Subcontract was amended by an assignment of contract by W.G. Clark to Brix, effective July 1, 2008. CP 65-66. The

notice (“Notice”) to LSF regarding the assignment stated that “[a]ccordingly, effective as of July 1, 2008, all references to “W.G. Clark” or “Member” in the Subcontract shall be deemed to mean “Brix Condominium, LLC”, the Services Addendum shall continue to serve as your Main Contract . . .” *Id.* The Notice went on to indicate that “all applications, lien releases and notices should be delivered” to Brix Condominium, LLC, Attn: Jim Donahue, with a copy to: H.A. Andersen Co., Attn: Martin Cloe, Senior Vice President. *Id.* Thus, on July 1, 2008, pursuant to the assignment, the notice to Mike Ducey at W.G. Clark required under section U.3 of the Subcontract was required to be sent to Brix and Andersen instead. *Id.*

Respondents provided no declaration from Brix or Andersen – the relevant parties after the assignment – stating that Brix did not receive LSF’s claim information. Rather, Respondents simply relied on the Declaration of Matt Adamson – counsel for Brix – who made the bald, conclusory assertion that based on his review of the file: “LSF has never complied with section U3 of its subcontract in any submittal to Brix Condominium, LLC.” CP 8 at ¶ 2. However, Mr. Adamson, as Respondents’ counsel, does not (and cannot) have personal knowledge of whether or not anyone at Brix or Andersen received a statement of LSF’s claim, or the contents of that statement, and any such knowledge would necessarily be based on inadmissible hearsay. Moreover, that conclusory assertion by Mr. Adamson is a simply a legal conclusion on a matter that is properly decided by the

arbitrator (or at least the Court), and is not a statement of fact to preclude summary judgment.

For these reasons, Appellant moved to strike the conclusory legal conclusion made by Mr. Adamson in paragraph 2 his declaration. That statement cannot satisfy Respondents' threshold requirement to demonstrate that there are no genuine issues of material fact regarding LSF's compliance with section U.3. Further, the Declaration of Al Malcolm, the President of LSF, which declaration is based on his personal knowledge, directly contradicts Mr. Adamson's conclusory hearsay statements, and demonstrates that Mr. Adamson's statement is false. Mr. Malcolm declares that he provided Brix and H.A. Anderson management personnel with a breakdown of LSF's claim. CP 62-63 at ¶¶ 7-10. This evidence raises a genuine material issue of material fact that should have precluded summary judgment and dismissal of the Lawsuit. For reasons unknown, the trial court nevertheless granted summary judgment, apparently erroneously overlooking Mr. Al Malcolm's declaration, and relying on a conclusory legal conclusion made by Respondents' counsel.

2. Respondents Waived Enforcement Of Section U.3 By Filing A Demand For Arbitration And Agreeing To Arbitration

Respondents waived enforcement of s. U.3 (if it is properly considered by the trial court) by filing a Demand for Arbitration and agreeing to mediate and arbitrate the dispute. The Parties don't dispute that Respondents filed a Demand for Arbitration, *see* CP 12, and that the

Parties agreed to mediate and arbitrate the dispute. *See, e.g.*, CP 77-83. The issue of whether this constituted a waiver of Respondents' right to enforce section U.3 of the Subcontract was raised by Appellant tangentially in its response to Respondents' MSJ, and at oral argument. *See* CP 58, ln. 25 – CP 59, ln. 3; *see also*, Narrative of Proceedings.

The trial court held that Respondents had not waived enforcement of s. U.3 because they stated that they were reserving that right in an email. *See, e.g.*, CP 14. That a party makes such a reservation, though, is not determinative of whether or not it waived such a right. "Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Issaquah Ridge*, 148 Wn. App. At 407. "Waiver is a voluntary of and intentional relinquishment of a known right." *Verbeek Props., LLC v. GreenCo Environmental, Inc.*, 159 Wn. App. 82, 87, 246 P.3d 205 (2010). Respondents' filing of the Demand for Arbitration, and subsequent agreement to arbitrate, constitutes conduct that inconsistent with Respondents' later assertion that it seeks to enforce a clause that explicitly applies only in a circumstance where Appellant files a claim in arbitration or litigation.

III. THE TRIAL ERRED IN FAILING TO GRANT APPELLANT'S MOTION TO COMPEL ARBITRATION

In response to Respondents' motion for summary judgment, Appellant moved the Court for an order compelling arbitration, pursuant to RCW 7.04A.070. Respondents also moved the trial court (in the

alternative) to stay the Lawsuit and compel the Parties to arbitrate. The trial court did not compel the Parties to arbitrate; rather, it dismissed the Lawsuit. RCW 7.04A.070(1) provides that:

On a motion of a person showing an agreement and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

RCW 7.04A.070(1). The Parties don't dispute that there is a clear agreement to arbitrate. This matter should have been summarily decided by the trial court and the Parties ordered to arbitrate, staying the underlying Lawsuit. The question of compliance with procedures to initiate arbitration should have been left for the arbitrator. *Verbeek*, 159 Wn. App. at 87.

Respondents are simply engaging in procedural games designed to frustrate and delay the mediation and arbitration process, and this behavior is directly contrary to the strong public policy in Washington codified in RCW 7.04A.060(3) and RCW 7.04A070(1). This Court should reverse the trial court and compel the Parties to arbitrate in accordance with their agreement to do so.

Should the court reverse the trial court, Appellant should be awarded its costs and attorney's fees.

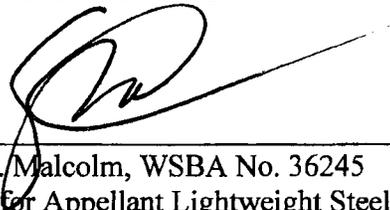
V. CONCLUSION

Respondents seek to needlessly delay or avoid the mediation and arbitration proceedings to which they previously agreed by litigating technical arguments in bad faith and seeking to frustrate Appellant's attempts to compel arbitration. This type of behavior runs directly contrary to Washington's strong public policy in favor of arbitrating disputes and avoiding unnecessary litigation.

For the above reasons, this Court should reverse the Order entered by the Superior Court of Washington For King County on September 10, 2010, compel the Parties to arbitrate this dispute, and award Appellant its costs and attorney's fees.

RESPECTFULLY SUBMITTED this 25th day of March, 2011.

VALDEZ MALCOLM PLLC

By 
Sean B. Malcolm, WSBA No. 36245
Attorneys for Appellant Lightweight Steel Framing
2007 Ltd.

Certificate of Service

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 28th day of March, 2011:

Fax and Hand Delivery via ABC Legal Messenger:

Counsel for For Respondents W.G. Clark, et al.

Matt Adamson, Esq.
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999 Third Avenue, Suite 1900
Seattle, WA 98104-4001
FAX: (206) 292-1995

I declare that I am employed in the office of Valdez Malcolm PLLC, and I am over the age of eighteen years.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Sean B. Malcolm

Certificate of Service

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 28th day of March, 2011:

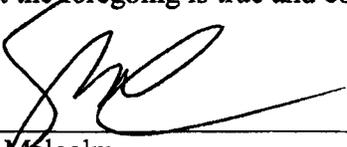
Fax and Hand Delivery via ABC Legal Messenger:

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Matt Adamson, Esq.
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Seattle, WA 98104-4001
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I declare that I am employed in the office of Valdez Malcolm PLLC, and I am over the age of eighteen years.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Sean B. Malcolm

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