

APPENDIX

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**THE SUPREME COURT STATE OF
WASHINGTON**

Henry Gossage,)	
Appellant,)	No. 101780-4
v.)	
Reality Homes, Inc., a	)	ORDER
Washington corporation;)	
Savings Account Number	)	Court of Appeals
7000328315; et al.,	)	No. 57120-0-II
Respondents.)	
_____)	

Department I of the Court, composed of Chief Justice Gonzalez and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis, considered at its June 6, 2023, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Clerk's motion to strike the Petitioner's reply to the answer to the petition for review is granted. The petition for review and the Petitioner's request for CR 11 sanctions are denied.

DATED at Olympia, Washington, this
7th day of June, 2023.

For the Court
Chief Justice Gonzalez

DELETED
JUNE 26, 2023
Motion for Reconsideration Denied
Supreme Court of Washington

**Filed: January 10, 2023
Washington State Court
of Appeals Division Two**

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON DIVISION II**

Henry Gossage,)	
Appellant,	)	No. 57120-0-II
v.)	
Reality Homes, Inc., a	)	UNPUBLISHED
Washington corporation;	)	OPINION
Savings Account Number)	
7000328315; et al.,)	
Respondents.)	
_____)	

GLASGOW, C.J.-Henry Gossage contracted with Reality Homes Inc. to build his home. Following construction, Gossage claimed there were numerous construction defects and filed a lawsuit against Reality for breach of contract and violation of the Consumer Protection Act, chapter 19.86 RCW. The dispute moved to arbitration pursuant to a binding arbitration provision in the construction contract. An arbitrator awarded Gossage partial damages, as well as statutory fees and costs.

Gossage filed a motion for a trial de novo, which Reality moved to strike based on language in the construction contract waiving each party's right to a trial de novo. The trial court granted Reality's

motion, struck Gossage's request for a trial de novo, and awarded Reality attorney fees and costs. Gossage appeals, and we affirm.

FACTS

Gossage and Reality, a home construction company, entered into a contract that included a disputes and arbitration clause. The clause provided, in relevant part, that any lawsuit must be filed in Pierce County Superior Court and "decided according to the Mandatory Arbitration Rules of Pierce County." Clerk's Papers (CP) at 34. The contract further provided that the arbitration award would be final, and the parties waived their rights to post arbitration trial de novo:

Each party hereby expressly waives a jury trial....The arbitrator's award shall be final and binding, [judgment] may be entered thereon in any court having jurisdiction, and both parties each waive their right to file any appeal for a trial de novo, thus assuring the cost- effective finality of any decision rendered. In the event a party fails to proceed with arbitration or fails to comply with the arbitrator's award, the other party is entitled to costs and expenses of suit, including a reasonable attorney's fee, for having to compel arbitration or defend or enforce the award.

Id.

Construction of the home was completed, and Gossage began living in the home in early 2018. Thereafter, Gossage began alleging numerous construction defects. Ultimately, in December 2019, Gossage filed a lawsuit in superior court against Reality. Gossage claimed that Reality was

responsible for numerous defects in the home and breached the construction contract. The parties stipulated that Gossage's claims were subject to arbitration pursuant to the contract. The arbitrator awarded Gossage \$10,500 plus \$1,365 in statutory costs and fees.

Gossage then filed a request for trial de novo. Reality moved to strike Gossage's request and sought attorney fees and costs. Reality argued that the arbitration award was final and binding under the contract and that Gossage had waived his right to a trial de novo. Reality sought an award for attorney fees and costs for enforcing the arbitration award.

Gossage responded to the motion to strike arguing that it was untimely, that the contract was unconscionable and obtained by fraud, and that Gossage should be awarded sanctions. The superior court granted Reality's motion and entered an order striking Gossage's request for a trial de novo and awarding Reality attorney fees and costs.

Gossage appeals.

ANALYSIS

I. TIMELINESS

As an initial matter, Gossage argues that Reality's motion to strike his request for a trial de novo was untimely. Gossage characterizes Reality's motion as an appeal or cross appeal of the arbitration award and argues it therefore should have been filed within 20 days of the award. Reality's motion to strike cannot reasonably be construed as an appeal or cross appeal of the arbitration award; it was a direct response to Gossage's request for a trial de novo. Gossage's argument that Reality's motion to strike was untimely fails.

II. ISSUES NOT ON APPEAL

Gossage also makes several arguments that are not properly before us on appeal. He alleges that "[Judge] Quinlan lacked judicial authority to supersede [Judge] Swartz and dismiss [Gossage's] right" to request a trial de novo. Br. of Appellant at 5. There is nothing in the record on appeal of any decision by Judge Swartz. Accordingly, we do not address this argument further. Gossage also attempts to argue the merits of his claims that Reality breached the Consumer Protection Act and breached the construction contract due to the alleged defects in the home. The merits of these claims are not properly before us. The trial court did not reach these claims before striking Gossage's request for a trial de novo. That decision—not the merits of Gossage's underlying dispute with Reality—is the subject of this appeal. We do not address these arguments further.

III. TRIAL DE NOVA

The primary issue on appeal is whether the trial court erred when it struck Gossage's request for a trial de novo based on the express language in the contract waiving the right to trial de novo. We hold that the trial court did not err.

Washington public policy favors binding arbitration. "[A]rbitration is a substitute for, rather than a mere prelude to, litigation." *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 892, 16 P.3d 617 (2001) (quoting *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 131-32, 426 P.2d 828 (1967)). "'Washington courts confer substantial finality on decisions of arbitrators rendered in accordance with the parties' contract and the arbitration statute." *Rimov v. Schultz*, 162 Wn. App.

274, 279, 253 P.3d 462 (2011). Consistent with this policy, judicial review of an arbitration award is exceedingly limited. *Dahl v. Parquet & Colonial Hardwood Floor Co.*, 108 Wn. App. 403, 407, 30 P.3d 537 (2001).

Parties may agree to arbitrate to resolve their disputes, and arbitration by agreement is different from mandatory arbitration. Arbitration by agreement is governed by the Uniform Arbitration Act, chapter 7.04A RCW. That statute allows judicial review of an arbitration award only in limited circumstances, and the statute does not contain a right to trial de novo. RCW 7.04A.230, 240.

In contrast, mandatory arbitration applies to certain civil cases, and mandatory arbitration is subject to trial de novo in superior court. RCW 7.06.010, .020, .050. Mandatory Arbitration Rules (MARS) govern the procedures for mandatory arbitrations. MAR 1.2. In addition, parties engaging in arbitration by agreement may agree to the processes established in those rules. MAR 1.2, 8.1.

Here, the parties' contract provided that any dispute would be resolved through final and binding arbitration. The parties also stipulated that arbitration would be subject to the MARS. The contract expressly stated that "[t]he arbitrator's award shall be final and binding... and both parties each waive their right to file any appeal for a trial de novo, thus assuring cost-effective finality of any decision rendered." CP at 34.

Gossage argues that the waiver of the right to appeal by trial de novo was invalid under Washington law and that he is entitled to a trial de novo despite the contract language. Gossage relies on *Optimer International Inc. v. RP Bellevue, LLC*, 170 Wn.2d

768, 246 P.3d 785 (2011) and *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992).

In *Optimer*, the Washington Supreme Court explained that the parties could not waive or alter by agreement the limited judicial review available under former chapter 7.04 RCW (1943), the precursor to chapter 7.04A RCW. 170 Wn.2d at 772-73. But *Optimer* does not address entitlement to a more expanded judicial review in the form of trial de novo. *Id.* The *Optimer* court did not address trial de novo at all.

In *Barnett*, the parties entered into an agreement for private arbitration but subsequently sought full judicial review by recharacterizing the arbitration as a hearing before a referee. The Supreme Court rejected the parties' post hoc characterization of the proceeding, held it was an arbitration, and noted that former RCW 7.04.160 (1943) limited judicial review of arbitration decisions. *Barnett*, 119 Wn.2d at 160-61. The court held that the parties improperly attempted to expand the boundaries of review beyond that conferred in the former statute. *Id.* at 161. Like the *Optimer* court, the *Barnett* court allowed only the limited judicial review available under former chapter 7.04 RCW where the parties arbitrated by agreement. *Id.* at 163. Thus, neither *Optimer* nor *Barnett* is helpful here.

This case is most comparable to *Dahl*, 108 Wn. App. at 407. In *Dahl*, Division One of this court addressed a contract that limited judicial review rather than expanded or altered it. There the court held that parties could stipulate to binding arbitration under former chapter 7.04 RCW to be conducted under the procedures found in the MARS and still waive their right to trial de novo. 108 Wn. App. at 403. The

court emphasized that permitting parties to utilize the procedures of the MARS without automatically removing themselves from binding arbitration comports with the public policy that favors binding arbitration and the finality of disputes. *Id.* at 411.

The reasoning of *Dahl* applies here. The contract language is clear that the parties intended to subject their disputes to binding arbitration. It is equally clear that they intended to waive any right to trial de novo and considered an arbitrator's decision to be final and binding. This is no less true because the parties also agreed to otherwise use the MARS. As was the case in *Dahl*, this conclusion "comports with the public policy that favors binding arbitration, which is to provide a substitute not a prelude to litigation and to provide a means whereby parties can achieve finality in the resolution of their disputes and avoid court congestion as well as the delays, expense and vexation of ordinary litigation." *Id.* Moreover, the "strong public policy favoring finality of arbitration dictates that any ambiguity with respect to which statute the parties have invoked [former] chapter 7.04 or chapter 7.06 RCW-be resolved in favor of binding arbitration under [former] chapter 7.04 RCW." *Id.* at 412.

Accordingly, we hold that the trial court did not err by granting Reality's motion to strike Gossage's request for a trial de novo because the contract in this case was for No. 57120-0-II final and binding arbitration and the parties were not entitled to a trial de novo.

Gossage attempts to avoid the binding ramifications of the contract by arguing that the contract is unconscionable and unenforceable. It is unclear whether Gossage contends the contract is

procedurally or substantively unconscionable. "Procedural unconscionability applies to impropriety during the formation of the contract; substantive unconscionability applies to cases where a term in the contract is alleged to be one-sided or overly harsh." *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 54, 470 P.3d 486 (2020). Gossage's unconscionability argument seems to be primarily based on his belief that Reality breached the contract by defectively constructing the home. But Reality's performance is not before us on appeal.

ATTORNEY FEES AND COSTS

Gossage argues that we should award him CR 11 sanctions because Reality's motion to strike below was frivolous. We disagree.

Reality argues that it is entitled to attorney fees and costs pursuant to RAP 18.9(a) because Gossage's appeal is frivolous. **Although Gossage did not prevail, his appeal was not frivolous and Reality is not entitled to attorney fees on this basis.**

Reality also argues it is entitled to attorney fees and costs pursuant to RAP 18.1 and the terms of the contract. The parties' contract provides that either party is entitled to reasonable attorney fees and costs for enforcing an arbitration award. Accordingly, we award Reality reasonable attorney fees and costs for enforcing the arbitration award including appellate attorney fees and costs in an amount to be determined by a commissioner of this court.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for

public record in accordance with RCW 2.06.040, it is
so ordered.

Glasgow, CJ

Maxa, J.

Veljacic, J.

DELETED

June 13, 2023

Respondents' Fee

Request Supreme Court of Washington

**FILED
DEPT 6
IN OPEN COURT
FEBRUARY 18, 2022
PIERCE COUNTY, Clerk
By _____/s/_____
DEPUTY**

**IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON IN AND FOR THE
OF PIERCE COUNTY**

HENRY GOSSAGE,	) NO. 20-2-05978-7
An adult individual,)
Plaintiff,	) ORDER STRIKING
vs.	) PLAINTIFF'S REQUEST
	) FOR TRIAL DE NOVO
REALITY HOMES, INC.,	) AND AWARDING
a Washington corporation;	) DEFENDANT'S
SAVINGS ACCOUNT NO.	) ATTORNEY'S FEES
70003287315; ET AL.	) AND COSTS
)
Defendants.	) [CLERK'S ACTION
_____	) REQUIRED]

THIS MATTER came on for hearing
without oral argument on February 18, 2022 on

Defendants' Motion to Strike Plaintiffs Request for Trial de Nova [sic] and for Attorney's Fees and Costs. Pursuant to PCLR 7(a)(10), the Court, in its inherent discretion, considered the same without oral argument. The Court having considered the files and records contained herein, including but not limited to:

1. Defendants' Motion to Strike Plaintiffs Request for Trial de Nova and for Attorney's Fees and Costs;
2. Declaration of Grady R. Heins in Support of Defendants' Motion to Strike Plaintiffs Request for Trial de Nova and for Attorney's Fees and Costs;
3. Response to Defendants' Motion to Strike and for Attorney Fees and Costs;
4. Defendants' Reply in Support of Motion to Strike Plaintiffs Request for Trial de Nova and for Attorney's Fees and Costs; and
5. Supplemental Declaration of Grady R. Heins in Support of Defendants' Motion to Strike Plaintiffs Request for Trial de Nova and for Attorney's Fees and Costs;

And now being fully advised in the premises, now, therefore, it is hereby

ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Strike Plaintiff's Request for Trial de Nova and for Attorney's Fees and Costs is GRANTED. Plaintiffs request for trial de nova is hereby stricken. It is further

ORDERED, ADJUDGED AND DECREED, that Defendant is awarded reasonable attorney's fees in the amount of \$2,997.50 and upon

payment this case shall be closed.

DONE IN OPEN COURT this 18th day of
February, 2022.

_____/s/_____
JUDGE THOMAS QUINLAN

Presented by:
LEDGER SQUARE LAW, P.S.

By: _____
L. Clay Selby, WSBA #26049
Grady R. Heins, WSBA #54262
Attorneys for Defendants

DELETED
JANUARY 28, 2023
Defendants' Motion to Strike
Request for Trial de Nova

**SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY**

Michael E. Schwartz, JUDGE
Patricia Wood, Judicial Assistant
Department 03
(253) 798-7576
January 19, 2022

Leland Selby, Jr., Atty Henry Gossage, Pro Se
Grady Heins, Atty

RE: HENRY GOSSAGE vs. REALTY HOMES INC
Pierce County Cause No. 20-2-05978-7

Dear Counsel/Litigants:

I have stricken all previously set proceedings
and issued an Order Setting Case Schedule
reflecting a trial date of July 28, 2022,
pursuant to Pierce County Local Mandatory
Arbitration Rules 7.1(c).

**Enclosed please find said Order setting
Case Schedule.**

Sincerely,

_____/s/____

Patricia Wood
Judicial Assistant

E-Filed in County Clerk's Office
December 27, 2021 11:02AM
CONSTANCE R. WHITE COUNTY CLERK
NO. 20-2-05978-7

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

HENRY E. GOSSAGE) **20-2-05978-7**
 Plaintiff,)
) REQUEST FOR
V.) TRIAL DE NOVA
) SCCAR 7.1
REALITY HOMES, ET AL.,)
 Defendant(s).)
_____) **December 24, 2021**

TO: The clerk of the court and all parties:

Please take notice that HENRY GOSSAGE
requests a trial de novo from the Arbitrator Award
filed on DECEMBER 8, 2021.

Dated: December 24, 2021

_____/s/_____

Henry Gossage, Veteran Pro Se
469 Kloshe Ct SE
Ocean Shores, WA 98569

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 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 document Pre-Paid First-Class U.S. Mail on the following persons and in the manner listed below:

L. Clay Selby Grady R. Heins
LEDGER SQUARE LAW, P.S.
710 Market St.
Tacoma, WA 98402

_____/S/_____
Henry Gossage
Veteran, Pro se
469 Kloshe Ct SE
Ocean Shores, WA 98569

**SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE**

HENRY GOSSAGE,)	
an adult individual,	)	No. 20-2-05978-7
Plaintiff(s),)	
vs.	)	ARBITRATION
REALITY HOMES, ET AL.,	)	AWARD
Defendants(s)	)	(ARBA)
_____)	

**The issues in arbitration having been heard on
December 6, 2021. I make the following award:
For Plaintiff in the following amount:**

Roof repair:	\$2500.00
Caulking:	\$ 200.00
Vent repair:	\$ 100.00
Attic access:	\$ 100.00
Squeaky Floor	\$1,000.00
Entry Framing	\$2,000.00
French Doors	\$1,000.00
Contingency	\$ 600.00

TOTAL AWARD: \$10,500.00

Plaintiff is also awarded Statutory costs and fees.

Twenty days after the award has been filed with the clerk, if no party has sought a trial de novo under SCCAR 7.1, any party on notice to all parties may present to the Ex Parte Department a judgment on the arbitration award for entry as final judgment in this case.

Was any part of this award based on the failure of a party to participate at the hearing?

Yes **NO XX** (MAR 5.4)

If yes, please identify the party and explain.

Dated: 12/08/2021

_____/s/____

Gregory J. Wall
WSBA 8604
ARBITRATOR

CERTIFICATE OF SERVICE

On this Day, the undersigned sent to the Attorneys of Record for Plaintiffs, Defendants a copy of this document by LINX filing and service. I certify under penalty of perjury under the of the State of Washington that the Foregoing is true and correct

12/8/21
Date

Port Orchard, WA
Place

_____/s/____
Signed

LAW OFFICE OF
GREGORY J. WALL, PLLC
P.O. Box 1594, Port Orchard. WA 98366
Phone:(360) 876-1214
gregwall@gjwlaw.com

December 8, 2021

Jeremey Dobbins
Attorney at Law
Scuderi Law Offices, PS
924 Capitol Way South
Olympia, WA 98501

L. Clay Selby
Attorney at Law
Ledger Square Law, PS
710 Market Street
Tacoma, WA 98402

Re: Gossage v. Reality Homes, et al
Pierce County Cause No. 20-2-05978-7

Dear Counsel:

This letter will explain my Arbitration Award
in this matter. I hope it is helpful.

I found no violation of the Consumer Protection
Act, RCW 19.86.010, et seq. concluded that all
parties were acting in good faith during the
process of the construction of the house and
subsequent discussions about the Plaintiffs claims.

I also found that Mr. Gossage's claims were not barred by the contract. All of his claims fall within the 2-10 Warranty provided or were clearly construction defects.

Each of Plaintiffs claims are discussed below:

1. The concrete work, interior and exterior painting, installing moldings and other trim, including caulking, were the responsibility of Mr. Gossage. It was clear from his testimony that he was aware of this. No damages are awarded.
2. While the project took somewhat longer than the parties anticipated, for a variety of reasons, there was no evidence of damages arising from the length of construction.
3. The roof is obviously not built correctly, resulting in a dip, but the evidence shows that this can be corrected without necessitating the removal of the shingles, from inside the attic. I have awarded \$2,500.00 in damages for this repair.
4. Caulking in the bathrooms is the contractor's responsibility. While there are some issues regarding failure to mitigate damages, I am awarding damages for reasonable cost of completing this in the amount of \$200.00.
5. The claims that the roof vents and gutters were improperly installed were not proven. No damages are awarded for this claim.
6. The claims regarding the presence of mold

were not proven. There was no evidence of testing the house for the presence of mold in the air. No damages are awarded on these claims.

7. Improper installation of the bathroom vent would have been covered by warranty and I have awarded damages of \$100.00.
8. The attic access was improperly constructed. damages of \$100.00 have awarded.
9. The claim regarding Change Order #1, the circuit breakers, was not proven. No damages are awarded.
10. The hot water tank was installed according to the contract. The hot water heater is compliance with the plans and specifications. No damages are awarded.
11. The siding and the interior walls are not perfectly straight, but I found that they are within the accepted construction standards. No damages are awarded for this claim.
12. The claim regarding the sliding door in the master bedroom was not proven. No damages are awarded for this claim.
13. The laundry room doors and the light switches in that room are installed in compliance with the drawings and specifications. No damages are awarded for this claim.
14. The vent for the microwave oven, while not perfect, is functional and in compliance with the plans and specifications. No damages are awarded for this claim.

15. The claim that the countertops were not level was not proven. No damages are awarded for this claim.
16. The claims that the floors were squeaky in the master bath and bedroom have validity. This was reported on the final walk through and not repaired, even though a repair is fairly simple. I have awarded \$1,000.00 for this claim.
17. The improper framing of the front entry was admitted by Defendants. I have awarded \$2,000.00 for this repair.
18. The French Doors have obvious problems, as shown by the rusty hinges and the evidence of serious water intrusion. I found Mr. Gossage to be credible in his testimony that the doors were suggested by Defendant's sales representative. I think this negates the sales document warning against the doors. I have awarded \$4000.00 for the repair or replacement of the damage.
19. Plaintiff's expert, Mr. Babbit, discussed the expected markups of a contractor for profit and for contingency expenses. The evidence was clear that Reality Homes offered to repair many of these construction defects and Plaintiff refused to allow them to do so, even though the Warranty required this. I have awarded damages for the repairs, but the contractor expenses could have been avoided had Reality been allowed to do the repairs. This is a failure to mitigate damages. I am not awarding additional damages for the contractor profit and overhead, with the

exception of the French Doors. Reality did not offer to repair them. I am awarding \$600.00 as a contingency for corrections for the French door repair.

Since Plaintiff substantially prevailed,
I am awarding statutory costs and fees. I want to thank all counsel for putting on a professional case in a fairly complex matter.

Very truly yours,

LAW OFFICE OF GREGORY J. WALL,
PLLC

_____/s/____

GREGORY J. WALL

**E-FILED IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON
JANUARY 27, 2021 12:10PM
KEVIN STOCK COUNTY CLERK
NO: 20-2-05978-7**

**IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON
FOR PIERCE COUNTY**

HENRY GOSSAGE,) CAUSE NO. 20-2-05978-7
Plaintiff,)
and) STATEMENT OF
) ARBITRABILITY
Reality Homes, Inc.,)
Defendants.)
_____)

CASE CATEGORY:

NAME: L. Clay Selby & Grady R. Heins

ADDRESS: Ledger Square Law, 710Market St.,
Tacoma, WA 98402

CERTIFICATE OF ARBITRABILITY

☐ This case is subject to arbitration because the sole relief sought is a money judgment and involves no claim in excess of One Hundred Thousand Dollars

(\$100,000), exclusive of attorney fees, interest and costs.

☐ This case is not subject to arbitration because:

☐ Plaintiff's claim exceeds One Hundred Thousand Dollars (\$100,000).

☐ Plaintiff seeks relief other than a money judgment.

☐ Defendant's counter or cross claim exceeds One Hundred Thousand Dollars (\$100,000)

☐ Defendant's counter or cross claim seeks relief other than a money judgment.

X☐**X** The undersigned contends that its claim exceeds One Hundred Thousand Dollars (\$100,000), but hereby waives any claim in excess of One Hundred Thousand Dollars (\$100,000) for the purpose of arbitration. (waiver in contract)

CERTIFICATE OF READINESS

The undersigned attorney **certifies** that:

1. All parties have been joined and served;
2. All parties have received a copy of the Case Schedule;
3. All answers and other mandatory pleadings have been filed and served; and
4. No additional claims or defenses will be raised.

Signed _____/s/_____ Date: 01/27/2021
Jeremey Dobbins WSBAR: 47709

ARBITRATION AWARD

NOTE: In cases where an Arbitration Award is filed and there is no timely request for trial *de novo*, either a judgment on arbitration award or an order dismissing all claims against all parties must be entered within 90 days of the filing of the Arbitration Award. Failure to do so shall result in the case being dismissed by the court.

FILED
DEC-5 2019
GRAYS HARBOR COUNTY, WA
KYM FOSTER, COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON IN AND FOR THE
OF PIERCE COUNTY

HENRY GOSSAGE,	) NO. 20-2-05978-7
An adult individual,)
Plaintiff,	) AMENDED COMPLAIN
vs.	) COMPLAINT
)
REALITY HOMES, INC.,)
a Washington corporation;)
SAVINGS ACCOUNT NO.)
70003287315; ET AL.)
)
Defendants.)
_____)

COMES NOW Plaintiff Henry Gossage, through his attorneys of record at Cushman Law Offices, P.S., states and alleges as follows:

1.1 Plaintiff Henry Gossage is a resident of Grays Harbor County, Washington. Plaintiffs have met all prerequisites to bring this action. This arises from the purchase and development of real property located at 469 SE Kloshe Court, Ocean Shores, WA 98569 (the Home).

1.2 Defendant Reality Homes, Inc., (RHI or Reality) is a Washington corporation and licensed contractor (Contractor's Registration No. REALIHI984CN) and doing business in Grays Harbor County, WA.

1.3 Rather than a bond, Reality maintains funds in a registered savings account with the Washington Department Labor and Industries under account number 70000328315.

1.4 Defendant Thomas Fancher is an adult individual and governing member of Reality. "Jane Doe" Fancher is named in the event Mr. Fancher was married during times relevant to this matter. It is alleged that the activities of Mr. Fancher benefitted any marital community between them. Mr. Fancher does business in Grays Harbor County, WA.

1.5 Defendant Jamie Hankel is an adult individual and member of Reality. "Jane Doe" Hankel is named in the event Mr. Hankel was married during times relevant to this matter. It is alleged that the activities of Mr. Hankel benefitted any marital community between them. Mr. Hankel

1.6 Defendant Lowell Hankel, Jr. is an adult individual and member of Reality. "Jane Doe" Hankel, Jr. is named in the event Lowell Hankel, Jr. was married during times relevant to this matter. It is alleged that activities of Lowell Hankel, Jr. benefitted any marital community between them. Mr. Hankel, Jr. does business in Grays Harbor County, WA.

1.7 The acts giving rise to this lawsuit all occurred in Ocean Shores, Grays Harbor County, Washington.

1.8 Jurisdiction and venue are proper in Grays Harbor County Superior.

1.9 Plaintiff Gossage and Defendant Reality entered into an agreement for the development of real property and construction of a residential home locate at 469 SE Kloshe Court, Ocean Shores, WA 98569. Defendants provided plans and specifications for the construction of the Home, and Defendants drafted the contract.

1.10 The foundation was poured in August 2016 and work was supposed to be completed by December 2017. However, substantial completion did not allegedly occur until October 2018, without legal excuse.

1.11 During the course of construction, Plaintiff raised many of the matters now at issue with the contractor, but Plaintiff was ignored.

1.12 As the project was nearing completion, Plaintiff Gossage also discovered additional construction defects with the Home.

1.13 On August 13, 2018, Mr. Gossage sent notice pursuant to Chapter 64:50 RCW to the Defendants to formally raise these issues for repair. The issues complained of in this Complaint include those issues complained of in August 13, 2018, and additional defects discovered thereafter.

1.14 On October 16, 2019, Mr. Gossage met with representatives of the Defendants at the Property to discuss the noted defects with the Home.

1.15 On November 9, 2018, Defendants responded via letter to Plaintiff. Defendants were mostly dismissive of claims and issues raised by Mr. Gossage, although they agreed to address some matters regarding the framing, a dip in the roof, attic ventilation, and remedying a squeaky floor. A copy of Reality's response is attached and identified as Exhibit.

1.16 The defects complained of herein, some of which are the result of defective completed operations by subcontractors, have caused property damage and loss of use. It is anticipated the Home will require extensive repairs, and the proposed corrections by Defendant Reality are inadequate. Defendants deviated substantially from the plans and specifications they represented they would build to and otherwise did not comply with Plaintiff's desires and specifications. Defendants failed to follow building code in constructing the Home. This breach of contract damaged Plaintiff in excess of \$ 100,000.

1.17 The actions of the Defendants were unfair and deceptive and subject repetition. Plaintiffs have been damaged and seek recovery pursuant to Chapter 19.86 RCW.

PRAYER FOR RELIEF

Plaintiff Henry Gossage prays for the following relief:

2.1 For a judgment for all available damages against Defendant Reality Homes, Inc., in an amount to be proven at trial but known to exceed \$100,000.00, including loss of use, repair costs, related property damage, and stigma damages;

2.2 For Judgment against Reality's savings account pursuant to Chapter 18.27 RCW and up to the available penal sum(s).

2.3 For a judgment for consumer protection act damages against Defendants Reality Homes, Inc., Thomas Fancher, and Jamie Hankel, and Lowell Hankel, Jr., including but not limited to

2.4 For recovery of reasonable attorney's fees, litigation expenses, costs and interest as permitted by contract, statute, and/or other bases, including Chapters 18.27 and 19.86 RCW; their respective marital estates, pursuant to Chapter 19.86 RCW and as proven at trial;

2.5 For such other relief as the Court deems just and equitable in the premises.

DATED this 26th day of November 2019.

CUSHMAN LAW OFFICES, P.S.

_____/s/_____

Jon Cushman

Jerermy Dobbins

Attorney for the Plaintiff

CONSTITUTION AND STATUTES

U.S. Const., amend. XIV, § 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington State Statutes

1. Revise Code of Washington (RCW)

a. Arbitration of Civil Actions

RCW 7.06.050 Decision and award—Appeals—Trial—Judgment. (1) Following a hearing as prescribed by court rule, the arbitrator shall file his or her decision and award with the clerk of the superior court, together with proof of service thereof on the parties. **Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact.** The notice must be signed by the party. Such trial de novo shall thereupon be held, including a right to jury, if demanded.

RCW 7.06.070 Right to trial by jury. No provision of this chapter may be construed to abridge the right to trial by jury.

RCW 7.06.080 Application date for request under RCW 7.06.050 and 7.06.060. RCW 7.06.050 and 7.06.060 apply to all requests for a trial de novo filed

pursuant to and in appeal of an arbitrator's decision and filed on or after **June 13, 2002**.

b. Uniform Arbitration Act

RCW 7.04A.030 When chapter applies.

(2) On or after July 1, 2006, this chapter governs agreements to arbitrate even if the arbitration agreement was entered into before January 1, 2006.

(3) This chapter does not apply to any arbitration governed by chapter 7.06 RCW.

RCW 7.04A.040 Effect of agreement to arbitrate—Nonwaivable provisions.

(1) Except as otherwise provided in subsections (2) and (3) of this section, the parties to an agreement to arbitrate or to an arbitration proceeding may waive or **vary the requirements of this chapter to the extent permitted by law.**

(2) **Before a controversy arises that is subject to an agreement to arbitrate,**

(3) The parties to an agreement to arbitrate may not waive or vary the requirements of this section.

RCW 7.04A.280 Appeals.

(1) An appeal may be taken from:

(a) An order denying a motion to compel arbitration;

(b) An order granting a motion to stay arbitration;

(c) An order confirming or denying confirmation of an award;

(d) An order modifying or correcting an award; (e) An order vacating an award without directing a rehearing; or

(f) A final judgment entered under this chapter.

(2) An appeal under this section must be taken as

2. Washington Mandatory Arbitration Rules

MAR 6.3 Judgment. If within the **20-day period** specified in rule 7.1(a) no party has properly sought a trial de novo....

MAR 7.1 Request for Trial De Nova. Any aggrieved party not having waived the right to appeal may request a trial de novo in the superior court. Any request for a trial de novo must be filed with the clerk and served, in accordance with CR 5, upon all other parties appearing in the case **within 20 days**.

3. Pierce County Mandatory Rules of Arbitration

PCLSCCAR 1 - Purpose. The purpose of mandatory arbitration of civil actions under **RCW 7.06**, as implemented by the Mandatory Superior Court Civil Arbitration Rules, is to provide a simplified and economical procedure for obtaining the prompt and equitable resolution of disputes involving claims of \$100,000.00 or less.

1.2 Matters Subject to Arbitration. The limit for claims subject to mandatory arbitration is \$100,000.00.

7.1 Request for Trial de Novo – Time for Appeal. the **20 day period** for appeal shall not commence until the arbitrator has either filed and served the amended award, or the written denial thereof.

Contract Section P-Dispute Arbitration

The parties will make a good faith effort to first resolve any disputes without resorting to litigation. If a dispute cannot be resolved between the two parties, then any suit, other than the one to enforce the lien must be filed in Pierce County Superior Court, and decided according to the **Mandatory Arbitration Rules of that County**. Any action to enforce a lien shall be filed in the county in which the property is located and shall be decided according to the Mandatory Arbitration rules of that county. Each party expressly waives a jury trial, **waives** the Mandatory Arbitration dollar limits that maybe in effect at the time of suit, and **waives** all claims that could be asserted by a representative, private attorney general, member of a class or in any other representative capacity. The arbitrator shall have the authority to determine the amount, validity and enforceability of a lien as well as the claim for damages. The arbitrator's award shall be final and binding, judgment maybe entered thereon in any court having jurisdiction, and **both parties waive their right to file any appeal for a trial de nova**, thus assuring cost-effective finality of any decision rendered. In the event a party fails to proceed with arbitration or fails to comply with the arbitrator's award, the other party fails to proceed with arbitration or fails to comply with the arbitrator's award, the other party is entitled to costs and expenses of suit, including reasonable attorney's fee for having to compel arbitration or defend or enforce the award.

**WASHINGTON STATE SUPREME COURT
DECISIONS**

Optimer International, Inc. v. RP Bellevue, LLC

170 Wn. 2d 768 (Wash. 2011)

No. 83807-1.

Argued November 18, 2010.

Decided January 13, 2011.

Appeal from the Superior Court for King County, No. 08-2-40736-5, Paris K. Kallas, J.

Craig S. Sternberg and Aaron S. Okrent (of Sternberg Thomson Okrent Scher PLLC), for petitioner.

Paul E. Brain (of Brain Law Firm PLLC), for respondent.

OWENS, J.

¶1 — This case centers on an arbitration agreement contained in a lease between a landlord, RP Bellevue LLC and its commercial tenant, Optimer International Inc. Pursuant to that lease, Optimer sought to arbitrate a dispute with RP Bellevue. Dissatisfied with the result of that arbitration, RP Bellevue sought review of the arbitration award in superior court. The superior court dismissed the case based on its determination that the parties had validly waived any judicial review of the arbitration award. We hold that the lease does not validly waive the judicial review of an arbitration award provided for by statute.

FACTS

¶2 Optimer operates three retail establishments on the second floor of the Bellevue Galleria, which is

currently owned by RP Bellevue. On September 25, 1997, Optimer entered into a lease with RP Bellevue's predecessor in interest. That lease provides that disputes arising between the parties are to "be resolved by single-arbitrator arbitration" and that "[t]he decision of the Arbitrator shall be final and non-appealable and enforceable in any court of competent jurisdiction." Clerk's Papers (CP) at 78-79. At that time, arbitration in Washington was governed by the Washington arbitration act (WAA), former ch. 7.04 RCW, *repealed by* LAWS OF 2005, ch. 433, § 50. In 2005, the legislature repealed the WAA and adopted the revised uniform arbitration act (RUAA), LAWS OF 2005, ch. 433 (codified as ch. 7.04A RCW).

¶3 On April 30, 2008, Optimer submitted a demand for arbitration, alleging that RP Bellevue had violated the lease. The arbitrator ultimately found that RP Bellevue had violated certain lease provisions and awarded Optimer nominal damages as well as attorney fees and costs. RP Bellevue sought review of the arbitration award in King County Superior Court, alleging that the arbitrator had exceeded his authority. The WAA permitted limited judicial review of arbitration awards in former RCW 7.04.150 (1982), .160-.170 (1943). The superior court denied RP Bellevue's motion to vacate or modify the award, finding that under *Harvey v. University of Washington*, 118 Wn. App. 315 (2003), the parties may waive the right to appeal; and that the provisions of Paragraph 28.11 of the Lease that the arbitrator's decision is "final and nonappealable and enforceable" constitute a

voluntary and knowing waiver of judicial review under RCW 7.04A.010 et seq. and therefore there is no right to appeal.

CP at 291. RP Bellevue appealed the superior court's decision to the Court of Appeals.

¶4 At the Court of Appeals, RP Bellevue argued that parties cannot waive the limited right of review of arbitration awards in superior court, citing to *Godfrey v. Hartford Casualty Insurance Co.*, 142 Wn.2d 885 (2001), and *Barnett v. Hicks*, 119 Wn.2d 151 (1992). *Godfrey* and *Barnett* were both decided prior to this state's 2005 adoption of the RUAA. At oral argument, the Court of Appeals raised, for the first time, the question of whether the RUAA prohibits parties from waiving the limited review provided for in the act. *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 151 Wn. App. 954, 960-61 (2009). The Court of Appeals also asked whether such a prohibition would violate the contract clause of the Washington Constitution. *Id.* at 961; *see also* WASH. CONST., art. I, § 23. After the parties submitted supplemental briefing, the Court of Appeals held that the RUAA applied to the contract and prohibited waiver of judicial review and that this was constitutional. *Optimer*, 151 Wn. App. at 963-64, 971. The Court of Appeals also denied both parties' requests for attorney fees and costs on appeal as premature. *Id.* at 971-72.

ISSUES

¶5 1. Does the lease validly waive judicial review of an arbitration award?

¶6 2. Should either party be awarded attorney fees and costs?

ANALYSIS

A. Standard of Review

¶7 Interpretation of constitutional provisions, statutes, and court rules is a question of law, which this court reviews de novo. *Burt v. Dep't of Corr.*, 168 Wn.2d 828, 832 (2010) (rules); *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523 (2009) (constitutional provisions); *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456 (2009) (statutes). *B. The Parties' Lease Does Not Validly Waive Judicial Review*

¶8 Optimer asserts that its lease waives any judicial review of an arbitration award. **We need not definitively interpret the contract to determine that such a reading is untenable. We also do not need to apply the RUAA, which would necessitate analysis under the contract clause of the Washington Constitution.** *Cf. State v. Speaks*, 119 Wn.2d 204, 207 (1992) ("If it is not necessary to reach a constitutional question, it is well established policy that we should decline to do so."). Instead, we can resolve this case solely by reference to the law in effect at the time the lease was drafted and what the lease could not have meant.

¶9 At the time the lease at issue here was drafted and took effect, arbitration was governed by the WAA. The WAA allowed for limited judicial review in the superior court to confirm, vacate, modify, or correct arbitration awards based upon statutorily enumerated grounds. Former RCW 7.04.150-. 170. **Parties were prohibited from altering these boundaries of review.** *See Godfrey*, 142 Wn.2d at

896 ("[A]ny efforts to alter the fundamental provisions of the Act by agreement are inoperative."); *Barnett*, 119 Wn.2d at 161 ("**Litigants cannot . . . create their own boundaries of review**")¹. This is because arbitration in Washington is solely a creature of statute; common law arbitration does not exist. *See, e.g., Godfrey*, 142 Wn.2d at 893 ("arbitration in Washington is exclusively statutory"); *Dickie Mfg. Co. v. Sound Constr. Engg Co.*, 92 Wash. 316, 318, 159 P. 129 (1916) ("common-law arbitration does not exist in this state").

¹ The RUAA makes this prohibition on waiver or variation of judicial review explicit. RCW 7.04A.040(3).

¶10 While both *Barnett* and *Godfrey* involved agreements purporting to expand the availability of judicial review of arbitration awards, *Godfrey*, 142 Wn.2d at 890; *Barnett*, 119 Wn.2d at 160, the reasoning in both cases applies equally to expansions or contractions of such judicial review. As the Court of Appeals below astutely noted, *Godfrey* disapproved *Keith Adams Associates v. Edwards*, 3 Wn. App. 623 (1970), to the extent it "purport [ed] to permit the parties to an arbitration agreement to fundamentally alter the provisions of [the WAA] by agreement." *Godfrey*, 142 Wn.2d at 897 n. 8. One of the fundamental alterations at issue in *Keith Adams* was waiver of the right to seek vacation, modification, or correction of an arbitration award in the superior court. *Keith Adams*, 3 Wn. App. at 628. The *Keith Adams* court's approval of this waiver of judicial review was disapproved by the *Godfrey*

decision. This makes plain that, under the WAA, parties were not free to either enlarge or diminish judicial review of arbitration awards established by statute. Rather, parties entering into arbitration agreements agreed to arbitrate subject to the statutory review provisions.

¶11 **Because the WAA prohibited waiver of the judicial review established by statute**, we need not definitively interpret the contractual language providing that arbitration awards are "final and non-appealable and enforceable." CP at 79. It is enough to say that, under the WAA, that language could not have been given the legal effect Optimer urges. The provision must either have some other meaning, *cf. Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 653 (1993) ("[C]ontracting parties are generally deemed to have relied on existing state law pertaining to interpretation and enforcement."), or it was void at its inception. What the language does not do is prohibit the judicial review provided for in the governing arbitration act. As a result, the superior court erred in dismissing RP Bellevue's motion to vacate the arbitration award.

¶12 Finally, we must briefly address the superior court's reliance on *Harvey*, 118 Wn. App. 315. Sixteen months after filing suit, the parties in *Harvey* entered into an agreement providing for a private trial and waiving any appeal from the arbitrator's decision. *Id.* at 316-17. The Court of Appeals approved of this waiver, finding that "[t]here is nothing in Washington law prohibiting a party from waiving the right to appeal an arbitration award," specifically including the WAA. *Id.* at 320-21. It attempted to distinguish *Godfrey* and *Barnett*

on the basis that the parties in those cases had sought to expand judicial review of arbitration awards while the parties in *Harvey* sought to further limit judicial review. *Id.* As discussed above, however, this distinction is untenable. *Harvey* is therefore disapproved insofar as it suggests that parties may waive judicial review of arbitration awards under the WAA.

C. Neither Party Is Entitled to Attorney Fees or Expenses

¶13 Both RP Bellevue and Optimer have requested an award of attorney fees and expenses. There are two possible bases for such an award. First, RCW 7.04A.250(3) permits an award of attorney fees and expenses to a prevailing party in contested judicial proceedings to confirm, vacate, modify, or correct an arbitration award. Second, the lease between the parties provides for an award of reasonable attorney fees, costs, and expenses to "[t]he prevailing party in the proceeding." CP at 79.

¶14 Resolution of the issues before this court will not determine which party is the "prevailing party." The lease refers to the prevailing party in the overall arbitration proceedings; the statute refers, in this case, to the party that prevails on a motion to vacate. Neither will be determined until the superior court rules on RP Bellevue's motion to vacate the arbitration award. We therefore deny both parties' requests for attorney fees and costs as premature.

CONCLUSION

¶15 **The lease between Optimer and RP Bellevue does not validly waive judicial review of an arbitration award.** Accordingly, we affirm the judgment of the Court of Appeals and remand

the matter to the superior court for further proceedings consistent with this opinion.

MADSEN, C.J.; C. JOHNSON, ALEXANDER, CHAMBERS, FAIRHURST, J.M. JOHNSON, and STEPHENS, JJ.; and SANDERS, J. P.

Bearden v. McGill

190 Wash. 2d 444 (2018)

OWENS, J. — Mandatory arbitration provides an efficient and inexpensive procedure to resolve low dollar amount disputes. Parties to mandatory arbitration may request a trial de novo after the arbitration award is issued.

After an arbitrator files a decision in mandatory arbitration, **either party may request a trial de novo**. RCW 7.06.050(1).

Nelson v. Erickson

92489-9 (Wash. 2016)

OWENS, J. — In many civil cases, arbitration is mandatory. After arbitration, either party can request a full trial, but if they do not improve their position from arbitration, they have to pay the opposing party's attorney fees. In this case, Michael Erickson **requested a trial after arbitration**, and the issue before us is whether he improved his position at trial.

Williams v. Tilaye

174 Wash. 2d 57, (2012)

¶ 2 Here, after receiving no award in mandatory arbitration, plaintiffs Patrick Williams and Andrea Harris **requested a trial de novo.**

¶ 7 The mandatory arbitration scheme is another exception to the general rule that each party bears its own attorney fees; it also provides for reasonable attorney fees under certain circumstances.

Mandatory arbitration was established by the legislature in 1979.^[2] LAWS of 1979, ch. 103, § § 1-10. **Mandatory arbitration is authorized by the legislature at the option of each county and applies to claims where the claimant limits the amount claimed to \$50,000 or less.**^[3] After the arbitrator files a decision, **either party may request a "trial de novo."** RCW 7.06.050(1).