IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SWINERTON BUILDERS NORTHWEST, INC., a Delaware corporation, Appellant, v. KITSAP COUNTY, a Washington municipal corporation, Respondent.	No. 40924-1-II Consolidated with No. 41780-4-II UNPUBLISHED OPINION

Van Deren, J. — Kitsap County contracted with Swinerton Builders Northwest, Inc. to construct a county administration building. At issue in these consolidated appeals is whether the trial court erred in granting summary judgment to Kitsap County in Swinerton's breach of contract claim against the County and whether the trial court earlier erred in denying Swinerton's motion to compel arbitration in that lawsuit. We hold that summary judgment was properly granted to the County because the parties' stipulation and dismissal order bars Swinerton's breach of contract claims. We also resolve the arbitration matter on alternative threshold issues: No arbitration agreement existed between the parties and the claims that Swinerton seeks to arbitrate are barred by the parties' prior stipulation. We affirm the trial court decisions in each of the consolidated cases.

FACTS

This is the second lawsuit involving Swinerton and Kitsap County arising out of a single construction project. *See M.B. Diddy Const., Inc. v. Swinerton Builders, Northwest*, et al., 152 Wn. App. 1044, 2009 WL 3337249, at *1 (2009), *review denied*, 168 Wn.2d 1033 (2010). In the first suit,[1] subcontractor Diddy Construction sued general contractor Swinerton and Kitsap County for breach of contract regarding earthwork services that Diddy performed on a building project. *Diddy*, 2009 WL 3337249, at *1. The parties settled their dispute and the case was dismissed with prejudice after the parties (including Kitsap County) signed a broad written stipulation and order of dismissal prepared by Swinerton's and Diddy's attorneys. *Diddy*, 2009 WL 3337249, at *1. The stipulation stated in relevant part:

> COMES NOW, Plaintiff M.B. Diddy Construction, Inc. and Defendants Swinerton Builders Northwest . . . and Kitsap County Administration, by and through their undersigned attorneys of record, and stipulate that all claims asserted herein, or which could have been asserted herein, by and between them, shall be dismissed with prejudice, without admission of liability, and without costs to any party.
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> The parties to this action hereby release and discharge each other, their employees, officers, agents, successors, assigns, and sureties from any [and] all claims, demands, causes of action and liabilities . . . , known or unknown, asserted or unasserted . . . arising from the Project in any manner.

Diddy, 2009 WL 3337249, at *1. The dismissal order was similarly broad and stated, "[A]ll claims asserted herein, or which could have been asserted herein, by and between Plaintiff M.B. Diddy Construction, Inc. and Defendants Swinerton Builders Northwest . . . and Kitsap County Administration, are hereby dismissed with prejudice, and without costs to any party." *Diddy*, 2009 WL 3337249, at *1.

[1] Background facts are from the prior appeal involving these parties and resolved in a Division I unpublished opinion at *Diddy*, 2009 WL 3337249.

A superior court judge entered the stipulation and signed an order of dismissal on January 15, 2008. *Diddy*, 2009 WL 3337249, at *1. The following day, Swinerton served Kitsap County with a new complaint for breach of contract regarding the ongoing construction of the county administration building. *Diddy*, 2009 WL 3337249, at *1. In response to this second lawsuit, the County notified Swinerton of its intent to move for summary judgment based on the January 15, 2008 stipulation and order of dismissal. *Diddy*, 2009 WL 3337249, at *1. Swinerton and Diddy filed a joint motion asking the trial court to vacate the stipulation and order of dismissal, arguing that the language releasing claims against Kitsap County constituted a mistake under CR 60(b)(1). *Diddy*, 2009 WL 3337249, at *1. The trial judge granted their motion and vacated the stipulation and order of dismissal. *Diddy*, 2009 WL 3337249, at *1.

The County then appealed, arguing that under Washington law "'poorly drafted language'" or other errors by an attorney do not constitute sufficient grounds to vacate a judgment under CR 60(b)(1).[2] *Diddy*, 2009 WL 3337249, at *2. Division One of this court ultimately agreed with the County and reversed, holding that the trial court abused its discretion in vacating the stipulation and order of dismissal. *Diddy*, 2009 WL 3337249, at *4. Our Supreme Court denied Diddy and Swinerton's petition for review. *Diddy*, 168 Wn.2d 1033 (2010). Thereafter, on June 17, 2010, the trial court entered an order reinstating the stipulation and order of dismissal.

Meanwhile, on June 16, 2010, Swinerton filed a motion to lift the stay in its breach of contract case and a motion to compel arbitration with the County on that claim. The County filed

[2] Swinerton's breach of contract suit (i.e., the second lawsuit), Kitsap County Cause No. 08-2-00045-3, was stayed during the County's appeal of the trial court's order vacating the stipulation in Kitsap County Cause No. 06-2-01941-7.

a motion for summary judgment in the breach of contract suit on June 18, 2010. It argued both in its summary judgment motion and in its response to Swinerton's motion to compel arbitration that Swinerton had waived all claims against the County through the stipulation and dismissal in the prior Diddy-Swinerton-County suit and, thus, there was no basis on which Swinerton could pursue its breach of contract claims (either through arbitration or through the trial court).

Swinerton's motion to compel arbitration was decided six months before the County's summary judgment motion. At the July 2, 2010, hearing on Swinerton's motion to compel arbitration, the County responded, "[W]e do deny that there is an arbitration [agreement]." Report of Proceedings (RP) (No. 40924-1-II) at 5. The County primarily argued that Swinerton's motion to compel arbitration was without merit because Swinerton had entered into a written stipulation and order of dismissal that was dispositive of Swinerton's motion and precluded the filing of the second suit claiming breach of contract. The County's attorney also said, "I can and am ready to address the arbitration provisions if the Court believes that is necessary, but I don't believe it appropriate to waste County expenses to respond to something that was a frivolous motion, and I can address the arbitration clause if the Court would like me to do that." RP (No. 40924-1-II) at 8.

The trial court heard from Swinerton's attorney regarding the County's argument that neither the motion to compel arbitration nor the breach of contract claim was meritorious because of the stipulation and order of dismissal in the earlier lawsuit. Swinerton's attorney responded that the stipulation and order of dismissal on which the County relied was ambiguous and because "there is an arbitration agreement between the parties," questions arising out of such ambiguity "should be addressed by an arbitrator and not by the Court." RP (No. 40924-1-II) at 13, 12.

In ruling, the trial court did not address the existence of an arbitration agreement. Instead, it denied Swinerton's motion to compel arbitration based on the stipulation and order of dismissal of the prior lawsuit, stating, "In reading the language of the stipulation, the order quite clearly states that any and all claims between M.B. Diddy, Swinerton Builders, and Kitsap County [are] released and dismissed with prejudice. I think that language is very clear, and on that basis I am denying [Swinerton's] motion." RP (No. 40924-1-II) at 14.

Swinerton immediately appealed the trial court's denial of its motion to compel arbitration (No. 40924-1-II) and this notice of appeal stayed matters in the trial court, including the County's summary judgment motion. We ultimately granted the County's motion to allow trial court action on its motion for summary judgment. *See* Order Granting Motion to Modify (granting the County's motion to allow the trial court to hear and decide the County's summary judgment motion while Swinerton's appeal of the order denying its motion to arbitrate was pending), *Swinerton Builders NW, Inc. v. Kitsap County*, No. 40924-1-II (Wash. Ct. App., Oct. 14, 2010).

The trial court heard the County's summary judgment motion on January 14, 2011. Noting that the stipulation "addresse[d] potential future actions," and finding no issue of material fact, the trial court granted the County's motion. RP (No. 41780-4-II) at 12. Swinerton appealed that order and that appeal was pending under our cause number 41780-4-II when we held oral argument on Swinerton's appeal of the trial court's denial of its motion to arbitrate the new dispute on June 30, 2011. Following oral argument, we stayed consideration in Swinerton's appeal on the arbitration motion and consolidated it with Swinerton's appeal of the trial court's later summary judgment order. We now consider the consolidated cases.

ANALYSIS

We first address the trial court's order granting summary judgment to the County based on the stipulation and order of dismissal entered in the earlier dispute among Diddy, Swinerton, and the County. This is dispositive in this instance, but we attempt to briefly address Swinerton's appeal of the trial court's denial of its motion to compel arbitration of its contract dispute to clarify that the contract between Swinerton and the County did not contain an arbitration provision.

I. Summary Judgment

A. Standard of Review

We review an order granting summary judgment de novo, engaging in the same inquiry as the trial court. *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party has the burden of proving that there is no genuine issue of material fact. *Black*, 153 Wn.2d at 160–61. If the moving party meets its burden, the burden shifts to the nonmoving party to "'set forth specific facts showing that there is a genuine issue for trial.'" *Black*, 153 Wn.2d at 161 (quoting *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)). The nonmoving party must set forth evidentiary facts and cannot meet its burden by relying on "speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). In determining whether a genuine issue exists, we construe the facts and reasonable inferences from them in the light most favorable to the nonmoving party. *Black*, 153 Wn.2d at 160–61.

B. Same Parties

Swinerton first argues that summary judgment, based on the prior stipulation and order of dismissal, was improperly granted because a material issue of fact exists about whether the parties to the stipulation and the parties in the present lawsuit are the same. We disagree.

Swinerton argues that "Kitsap County was not a party to the *M.B. Diddy* Stipulation and Order of Dismissal." Second Br. of Appellant (No. 40924-1-II) at 9. Swinerton relies on the fact that the stipulation names Kitsap County *Administration* as a defendant and stipulating party, while the breach of contract case names Kitsap County as defendant. But Swinerton offers no explanation about how the inclusion of the word "administration" denotes separate and distinct legal entities between Kitsap County and Kitsap County Administration. Both designations clearly refer to the Kitsap County government.[3]

Also, throughout the various proceedings, Swinerton has repeatedly referred to the government entity defendant in the Diddy-Swinerton-County lawsuit as "Kitsap County." Swinerton acknowledged in its oral arguments before the superior court[4] and briefing in the

[3] Swinerton notably does not contend that different parties were served in the two lawsuits. Also, the County is represented by the same counsel in both lawsuits.

[4] At the July 2, 2010, hearing on Swinerton's Motion to Compel Arbitration, Swinerton's counsel stated that "Kitsap County was listed . . . as a defendant" in the original lawsuit. RP (No. 40924-1-II) at 9. Similarly, at the September 26, 2008, hearing on the Swinerton/Diddy joint motion to vacate the stipulation and order of dismissal, Swinerton's counsel identified the County as a named party in the first lawsuit.

Court of Appeals[5] and in our Supreme Court[6] that "Kitsap County" was in fact a party to that first lawsuit.

Moreover, the Division One unpublished decision in the *Diddy* appeal acknowledged that the case caption and the stipulation and dismissal order then at issue identified the involved governmental party as "Kitsap County Administration." 2009 WL 333724, at *1. But in discussing the "undisputed" facts, Division One noted that Diddy "sued *Kitsap County*." *Diddy*, 2009 WL 3337249, at *1 (emphasis added). Division One held that "Diddy and Swinerton's attorneys, with their clients' authority, drafted and entered into the stipulation and order of dismissal *with Kitsap County*." *Diddy*, 2009 WL 3337249, at *4 (emphasis added).

Swinerton must do more than baldly allege that Kitsap County was not a party to the stipulation and order of dismissal in the first lawsuit. *See Seven Gables*, 106 Wn.2d at 13 (nonmoving party must set forth evidentiary facts and cannot meet its burden by relying on

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[5] In Diddy/Swinerton's joint respondents' brief in Division Two Court of Appeals Cause No. 38457-4-II (Appeal of Order Granting Motion to Vacate Stipulation and Order of Dismissal), Swinerton acknowledged, "M.B. Diddy and Swinerton filed a stipulation and order of dismissal that *the County* signed." Clerk's Papers (CP) (No. 41780-4-II) at 258 (emphasis added). The same brief also acknowledged "M.B. Diddy also named *the County* as a nominal defendant. . . . *The County* also appeared." CP at 259 (No. 41780-4-II) (emphasis added) (footnote omitted).

In the arbitration appeal (No. 40924-1-II), Swinerton filed a document entitled "Appellant's Opposition to Respondent's Motion to Permit Trial Court Action," in which Swinerton stated, "[T]he County focuses on the resolution of a prior lawsuit in which Swinerton was sued by M.B. Diddy, a subcontractor that had performed work on the Project. The subcontractor alleged breach of contract claims against Swinerton and named *the County* as a defendant . . ." CP (No. 41780-4-II) at 268, 272 (emphasis added) (capitalization altered).

[6] In Swinerton's petition for review regarding *Diddy*, 2009 WL 3337249 (Division One's reversal of the trial court's order vacating the trial court's prior order, which granted Swinerton's motion to vacate the stipulation and order of dismissal in the first lawsuit), Swinerton stated, "Diddy also alleged a claim against Swinerton's retainage fund, naming *the County* as merely a nominal party." CP (No. 41780-4-II) at 265 (emphasis added). Swinerton's petition also stated, "because *the County* was also a party of record they had *the County's* attorney sign [the Stipulation and Order of Dismissal]." CP (No. 41780-4-II) at 266 (emphasis added).

speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value). In light of this record, we hold that there is no material factual question about whether Kitsap County was a party to the first lawsuit.

C. Unripe Claims

Swinerton next argues that the trial court erred in granting Kitsap County summary judgment because the *Diddy* stipulation and dismissal order did not cover Swinerton's present breach of contract claims against the County. Swinerton argues that when the parties entered into the *Diddy* stipulation and dismissal, the administrative procedures for claims and disputes in its contract with the County had not been exhausted as to Swinerton's breach of contract claims. Thus, Swinerton contends, such claims were not ripe under the terms of the stipulation and were not waived by that stipulation. We disagree.

Swinerton's argument relies on language appearing in the first paragraph of the stipulation, noting that the signing parties "stipulate that all claims asserted herein, or which could have been asserted herein, by and between them, shall be dismissed with prejudice." Clerk's Papers (CP) (No. 41780-4-II) at39. Swinerton's view is that its breach of contract claims do not qualify as claims that "could have been asserted" in the *Diddy* lawsuit because the claims were not yet ripe. But that view ignores the second paragraph of the stipulation, which additionally provides that "[t]he parties to this action hereby release and discharge each other, their employees, officers, agents, successors, assigns, and sureties from any [and] all claims, demands, causes of action and liabilities . . . known or unknown, asserted or unasserted . . . arising from the Project in any manner." CP (No. 41780-4-II) at 39. This language is not limited to ripe claims (i.e., claims that could have been asserted in the *Diddy* lawsuit), and by its express terms waives

all claims arising from "the Project" in any manner, even if unknown or unasserted.[7] CP (No. 41780-4-II) at 39.

A valid stipulation is binding unless fraud, mistake, misunderstanding, or lack of jurisdiction is established. *De Lisle v. FMC Corp*., 41 Wn. App. 596, 597, 705 P.2d 283 (1985); *cf. Estate of Harford*, 86 Wn. App. 259, 266, 936 P.2d 48 (1997) (trial court's decision to vacate a stipulated order under CR 60(b) reversed where court found only that a unilateral mistake was made). Division One of our court previously determined that the stipulation binds Swinerton, stating, "Diddy and Swinerton's attorneys, with their clients' authority, drafted and entered into the stipulation and order of dismissal with Kitsap County. Accordingly, Diddy and Swinerton are bound by the acts of their attorneys including their attorneys' mistakes in drafting the stipulation and order." *Diddy*, 2009 WL 3337249, at *4 (footnote omitted). Because Swinerton's breach of contract claims arise from the project, we hold the stipulation bars these claims.

D. Arbitration

Swinerton next contends that the trial court improperly granted summary judgment because the parties had agreed to arbitrate disputes and, thus, the trial court lacked jurisdiction to decide the County's summary judgment motion. This contention is resolved on alternative threshold matters. First, Swinerton's argument is built on the underlying contention that the parties incorporated American Institute of Architects (AIA) A201 arbitration provisions into their

[7] We do not suggest that any agency named even as a nominal party to a lawsuit must respond with all potential or actual claims to avoid a later bar to assertion of those claims. The broad language of the stipulation here encompasses the entire project involved in constructing the new county administration building. And although the stipulation provides exceptions to this release (i.e., for contractual warranty claims, claims for defective work or products, or indemnity obligations owed for work performed on the project and for Diddy's negligence), Swinerton does not contend that any of the exceptions apply to its breach of contract claims against the County.

contract by way of the change orders executed on the project. We address that contention in Part II of this opinion, which addresses Swinerton's challenges to the trial court's denial of Swinerton's motion to compel arbitration. For the reasons discussed therein, the parties did not incorporate AIA A201 arbitration provisions into their contract. Accordingly, Swinerton's assertion that the trial court lacked jurisdiction to address the summary judgment motion because of the incorporated arbitration provisions fails.

Alternatively, as we discussed above, Swinerton is bound by the stipulation in any event. As noted, the stipulation bars Swinerton's claims against the County "arising from the Project in any manner." CP (No. 41780-4-II) at 39.

E. Res Judicata

Swinerton next argues that res judicata does not bar its breach of contract suit against the County. Given the facts of this case, we disagree.[8]

The purpose of the doctrine of res judicata is to ensure the finality of judgments. *Hayes v. City of Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179, 943 P.2d 265 (1997). "Under this doctrine, a subsequent action is barred when it is identical with a previous action in four respects: (1) same subject matter; (2) same cause of action; (3) same persons and parties; and (4) same quality of the persons for or against whom the claim is made." *Hayes*, 131 Wn.2d at 712.

Here because Swinerton and the County were parties in the first suit, the third factor is met. As for the remaining factors, the breadth of the agreed stipulation and order that resolved

[8] The County argued to the trial court that the stipulation's release of all claims alone required summary judgment dismissal of Swinerton's claims. The County, noting that the trial court need not reach any other issue, alternatively argued that res judicata also required dismissal of Swinerton's suit. In granting summary judgment, the trial court appears to have relied on only the stipulation.

the Diddy-Swinerton-County lawsuit appears to encompass these considerations. The stipulation and release covered "all claims, demands, causes of action and liabilities . . . known or unknown, asserted or unasserted . . . arising from the Project in any manner." CP (No. 40924-1-II) at 195. That language is broad enough to include the breach of contract suit, which involved another claim arising from the same project. Because the stipulation resolved *all* claims arising from the project in any manner, including unknown and unasserted claims, it encompassed the subject matter, cause of action, and quality of persons involved in Swinerton's subsequent claim against the County. Accordingly, we hold that the broad language of the agreed stipulation and order resolving all claims arising from the project effectively precluded Swinerton's subsequent breach of contract claim against the County.

F. Failure To Plead Defenses in Answer

Swinerton also contends that the County waived any reliance on the agreed stipulation and order because it did not affirmatively assert the defenses of release, waiver, or res judicata in its answer. We disagree.

CR 8(c) provides that a party "shall set forth" in a "pleading to a preceding pleading" (answer) "any . . . matter constituting an avoidance or affirmative defense" including release, res judicata, and waiver. "'Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties.'" *Henderson v. Tyrrell*, 80 Wn. App. 592, 624, 910 P.2d 522 (1996) (quoting *Bernsen v. Big Bend Elec. Coop.*, 68 Wn. App. 427, 433-34, 842 P.2d 1047 (1993)). But affirmative pleading is not always required "'[w]here a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered

harmless.'" *Henderson*, 80 Wn. App. at 624 (quoting *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975)); *see also Dixon v. Crawford, McGilliard, Peterson & Yelish et al.*, 163 Wn. App. 912, 919 n.7, 262 P.3d 108 (2011), *review denied*, 173 Wn.2d 1015 (2012).

Here, while the County did not affirmatively set forth its reliance on the agreed stipulation and waiver in its answer, that noncompliance is harmless. Swinerton does not allege any surprise or prejudice by the County's noncompliance, and the record shows none.

The agreed stipulation and order in the first lawsuit was presented to and signed by the superior court on January 15, 2008. *Diddy*, 2009 WL 3337249, at *1. Swinerton then served the County with the complaint in the present action for breach of contract. *Diddy*, 2009 WL 3337249, at *1. In response to this second lawsuit, the County notified Swinerton of its intention to move for summary judgment based on the prior agreed stipulation and order. *Diddy*, 2009 WL 3337249, at *1. Swinerton (and Diddy) then moved to vacate the stipulation and order of dismissal and fully litigated the vacation matter over the next year. *Diddy*, 2009 WL 3337249, at *1. We lifted the stay imposed in Swinerton's breach of contract suit pending appeal of the vacation litigation in June 2010, and the County immediately filed a motion for summary judgment, arguing that Swinerton had waived all claims against the County in the prior agreed stipulation and order.

In light of the parties' extended litigation about the stipulation's vitality, which preceded the County's summary judgment motion by some two years, the County's failure to specifically assert reliance on the agreed stipulation and order in its answer did not result in any surprise or prejudice to Swinerton, Under these facts, we hold that the County's noncompliance with CR 8(c) was harmless and Swinerton's challenge to the trial court's summary judgment order

dismissing its breach of contract claims against the County fails. *See Dixon*, 163 Wn. App. at 919 n.7.

II. Denial of Motion To Compel Arbitration

In asserting that the trial court erred in denying its motion to compel arbitration, Swinerton relies heavily on the presumption in favor of arbitration Washington courts impose. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342, 103 P.3d 773 (2004); *Kamaya Co., Ltd. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 714, 959 P.2d 1140 (1998); *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 739, 862 P.2d 602 (1993). Swinerton asks us to apply this presumption and reverse, remand, and direct the trial court to issue an order compelling arbitration.

We review de novo a trial court's decision granting or denying a motion to compel arbitration. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009). We may sustain the trial court on any correct ground, even though the trial court did not consider that ground in making its ruling. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); *see also Rainier View Court Homeowners Ass'n, Inc. v. Zenker*, 157 Wn. App. 710, 723, 238 P.3d 1217 (2010), *review denied*, 170 Wn.2d 1030 (2011); *State v. Williams*, 93 Wn. App. 340, 347-48, 968 P.2d 26 (1998) ("Although our reasoning differs from that of the trial court, we can affirm the decision of the trial court upon other valid grounds.").

But we must first resolve the threshold matter of whether there is an agreement to arbitrate disputes between the parties. "As arbitration is a matter of contract, parties cannot be compelled to arbitrate unless they agreed to do so." *Weiss v. Lonnquist*, 153 Wn. App. 502, 510, 224 P.3d 787 (2009). RCW 7.04A.070(1) provides that "the court shall order the parties to

arbitrate," but that directive is premised on a "showing [of] an agreement to arbitrate."[9] The party asserting a valid arbitration agreement has the burden of proving the existence of such agreement. *Weiss*, 153 Wn. App. at 514-15.

Under Washington law, a valid contract requires the parties' mutual assent to essential terms, and such mutual assent must be gleaned from the parties' outward manifestations and conduct. *Weiss*, 153 Wn. App. at 511. A fact finder "may deduce mutual assent to an agreement from the circumstances surrounding a transaction, inferring the existence of a contract based on a course of dealings between the parties or a common understanding within a particular commercial setting." *Weiss*, 153 Wn. App. at 511.

Swinerton contends that the agreement between the parties consists of three separate documents: (1) the Capital Project Contract; (2) the General Conditions For Kitsap County Facility Construction; and (3) the AIA Document A201, General Conditions of the Contract for Construction.[10] Swinerton acknowledges that the parties' agreement originally consisted of only

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[9] RCW 7.04A.070 states in part:

> (1) On motion of a person showing an agreement to arbitrate 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.
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> (2) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an 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.

[10] AIA Document A201 is produced by the American Institute of Architects and contains standardized contract terms and provisions for use in the construction industry. *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 491, 496-98, 7 P.3d 861 (2000).

the Capital Project Contract and the General Conditions for Kitsap County Facility Construction (General Conditions), but Swinerton contends that the parties' subsequent execution of several change orders "unequivocally incorporate[d] the AIA A201." Corrected Br. of Appellant (No. 40924-1-II) at 10. Swinerton thus relies on the AIA's arbitration provision contained in AIA Document A201, section 4.6. After close review of the parties' agreement, we reject Swinerton's contention that the AIA arbitration provision has been incorporated by reference into the parties' contract through the change orders.

"Incorporation by reference allows the parties to 'incorporate contractual terms by reference to a separate agreement to which they are not parties.'" *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000) (alteration in original) (footnotes omitted in original) (quoting 11 Samuel Williston, The Law of Contracts § 30:25, at 234 (Richard A. Lord, 4th ed.1999)). "Incorporation by reference must be clear and unequivocal." *Ferrellgas*, 102 Wn. App. at 494; *Navlet v. Port of Seattle*, 164 Wn.2d 818, 845 n.15, 194 P.3d 221 (2008); *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941 (1994). It must also be clear that "'the parties to the agreement had knowledge of and assented to the incorporated terms.'" *Ferrellgas*, 102 Wn. App. at 494 (quoting 11 Contracts at 234).

In *Ferrellgas*, we addressed whether a provision in AIA Document A201 that waived subrogation had been incorporated by reference into two construction contracts. *Ferrellgas*, 102 Wn. App. at 494-501. We held that the "Trade Contract," between the general contractor and a furnace subcontractor contained the AIA Document A201 subrogation waiver because, under the contract, the subcontractor agreed to perform in accordance with the "Project Contract Documents," which included the "mechanical specifications." *Ferrellgas*, 102 Wn. App. at 492,

494. Those mechanical specifications repeatedly stated (in nine separate subsections) that "*Division I of Specification Sections* apply to this Section," and it was undisputed that the "Division I" document expressly incorporated AIA Document A201, which included the waiver provision. *Ferrellgas*, 102 Wn. App. at 492-93, 498-99. The parties' knowledge and assent regarding the incorporation was shown in that AIA Document A201 was referred to in the instructions to the contract bidders and the mechanical specifications were delivered to the furnace subcontractor the same day it signed the Trade Contract. *Ferrellgas*, 102 Wn. App. at 498.

But also in *Ferrellgas*, we rejected a different subcontractor's assertion that the AIA subrogation waiver had been incorporated by reference into the "Owner/Architect Agreement." 102 Wn. App. at 499. Unlike the Trade Contract, the Owner/Architect Agreement did not incorporate the AIA document "in its entirety." *Ferrellgas*, 102 Wn. App. at 499. Instead, the Owner/Architect Agreement incorporated by reference only specific provisions of the AIA, such as the AIA's term definitions and an insurance provision related to the subrogation waiver, but the Owner/Architect Agreement never referenced the specific subrogation waiver.[11] *Ferrellgas*, 102 Wn. App. at 500-01. We applied the rule: "'[W]here incorporated matter is referred to for a specific purpose only, it becomes a part of the contract for such purpose only, and should be treated as irrelevant for all other purposes.'" *Ferrellgas*, 102 Wn. App. at 499 (alteration in the original) (quoting 11 Contracts at 238). We also noted that treating the AIA subrogation waiver

[11] The Trade Contract incorporated the entire AIA Document A201 that contained the subrogation waiver. *Ferrellgas*, 102 Wn. App. at 494-99. The Owner/Architect Agreement did not incorporate in its entirety the AIA Document A201; instead the Owner/Architect Agreement incorporated only specific provisions of the AIA Document A201 regarding administration, term definitions, and insurance. *Ferrellgas*, 102 Wn. App. at 499-501.

as incorporated by reference into the Owner/Architect Agreement would be "inconsistent with the other provisions of the Owner/Architect Agreement." *Ferrellgas*, 102 Wn. App. at 501.

Swinerton's contract is like the Owner/Architect Agreement in *Ferrellgas.* Here, each change order contains a notation stating that the change order does not contain a change in the money or time that is "in dispute as described in Subparagraph 7.3.8 of AIA Document A201."[12] CP (No. 40924-1-II) at 114-19, 121. Thus, the change order notation refers to a single AIA provision, for the limited purpose of describing a "dispute[d]" cost.

Like the Owner/Architect Agreement in *Ferrellgas*, the change order notation does not reference AIA Document A201 in general or incorporate that document in its entirety, instead the change order notation references only a single provision, subparagraph 7.3.8, and that reference is for the limited purpose of describing a disputed cost, which the notation verifies is *not* included in the change order. Thus, subparagraph 7.3.8's further reference to Article 4's contract administration and claim provisions for *disputed* amounts is not relevant to the purpose for which

[12] The notation reads in full: "NOTE: This Change Order does not include changes in the Contract Sum or Contract Time which have been authorized by Construction Change Directive for which the cost or time are in dispute as described in Subparagraph 7.3.8 of AIA Document A201." CP (No. 40924-1-II) at 114-19, 121. Subparagraph 7.3.8 of AIA Document A201 states in relevant part, "[p]ending final determination of the total cost of a Construction Change Directive to the Owner, *amounts not in dispute for such changes in the Work* shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs." CP (No. 40924-1-II) at 148 (emphasis added). The subparagraph then provides:

> For any portion of such cost that remains in dispute, the Architect will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a claim in accordance with Article 4.

CP (No. 40924-1-II) at 148. Article 4 addresses administration of the contract and contains provisions addressing claims and disputes (section 4.3), resolution of claims and disputes (section 4.4), mediation (section 4.5), and arbitration (section 4.6).

subparagraph 7.3.8 is referenced.

Moreover, incorporating AIA Document A201's section 4.6 arbitration provision would be inconsistent with the other provisions of the parties' contract.[13] And finally, there is no contention that AIA Document A201 was ever referred to by the parties before or during the signing of the Project Contract, unlike the contemporaneous notice to the bidders in *Ferrellgas*. 102 Wn. App. at 498.

Under these circumstances and in accord with *Ferrellgas,* we hold that the arbitration agreement contained in AIA Document A201 was not incorporated by reference into the parties' agreement via the change orders as Swinerton contends. Accordingly, the record does not show that the parties entered into an arbitration agreement, and thus, the trial court did not err in

[13] The Capital Project Contract between Swinerton and the County contains its own claim and dispute resolution provisions (section 23) that do not include arbitration. The Capital Project Contract also contains an integration clause (section 27). And it contains a modification clause (section 30) that provides "[e]xcept as provided in Section 16, all . . . modifications . . . shall be in writing, signed by both parties, and attached to this Contract." CP (No. 40924-1-II) at 68. No attachments reference AIA Document A201 or its arbitration clause. Section 16 addresses "changes in the *work*," and provides that such changes "shall be incorporated into the Contract documents through the execution of change orders." CP (No. 40924-1-II) at 64 (emphasis added). Section 16(c) specifically limits the contractor's dispute resolution options, stating that "the Contractor shall pursue resolution of [any] disagreement [regarding the change orders] pursuant to Section 23." CP (No. 40924-1-II) at 64 (capitalization altered).

The General Conditions document also does not contain any arbitration provision. Notably, the table of contents lists the title of subsection 8.02 in the Claims and Dispute Resolution section as "Arbitration" and lists subsection 8.03 as "Claims Audits," but the document itself does not contain an arbitration subsection. The Claims and Dispute resolution section contains only subsection 8.01, "Claims Procedures," and subsection 8.02, which replaces the arbitration subsection with the information on "Claims Audits." Neither subsection contains any mention of the term arbitration; indicating that all references to arbitration were deleted from the General Conditions for purposes of the Swinerton contract. Instead, the General Conditions document provides detailed claims provisions, stating, "If the parties fail to reach agreement on the terms of any Change Order . . . Contractor's only remedy shall be to file a Claim with Owner as provided in this section." CP (No. 40924-1-II) at 105.

denying Swinerton's motion to compel arbitration.[14] *See Weiss*, 153 Wn. App. at 515.

Alternatively, the parties' stipulation and order bars the claims that Swinerton seeks to have arbitrated. Accordingly the parties' stipulation and order provides an additional basis for affirming the trial court's denial of Swinerton's motion to compel arbitration.

We hold that the express terms of the agreed stipulation and order barred Swinerton's subsequent breach of contract claims against the County. Accordingly, the trial court did not err in granting the County's summary judgment motion or in denying Swinerton's motion to compel arbitration of the breach of contract claims. In addition, we hold that the parties' contract did not compel arbitration of contract disputes. We affirm the trial court's rulings in both matters.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Van Deren, J.

I concur:

Armstrong, J.

[14] Because resolution of this threshold matter is determinative of Swinerton's appeal in No. 40924-1-II, we do not reach the parties' other issues regarding the motion to compel arbitration. *See Weiss*, 153 Wn. App. at 515 n.10.

Quinn-Brintnall, J. (concurring) — Swinerton Builders Northwest, Inc. argues that Kitsap County was not a party to M.B. Diddy Construction, Inc.'s lawsuit against Swinerton—*M.B. Diddy Construction, Inc. v. Swinerton Builders, Northwest*, noted at 152 Wn. App. 1044 (2009), *review denied*, 168 Wn.2d 1033 (2010)—and that it was precluded from bringing its breach of contract claim against the County in Diddy's action. This argument would be persuasive under other circumstances *because* Kitsap County was only a *nominal* party in Diddy's lawsuit. Pursuant to RCW 60.28.030, Diddy named Kitsap County as a defendant in light of it being the statutorily mandated repository of the retainage fund former RCW 60.28.011 (2007) required for public projects. *See, e.g., U.S. Filter Distrib. Grp. v. Katspan, Inc.*, 117 Wn. App. 744, 754, 72 P.3d 1103 (2003) ("A surety's liability to subcontractors and suppliers is governed by the surety statute and the surety agreement, not by the contract between a supplier and a primary contractor."). But despite Kitsap County's role as a nominal party in the *Diddy* case, the stipulation, *which Swinerton assisted Diddy in drafting and which Kitsap County signed*, expressly provides, "The parties to this action hereby release and discharge each other, their employees, officers, agents, successors, assigns, and sureties from any all claims, demands, causes of action and liabilities . . . *known or unknown, asserted or unasserted* . . . arising from the Project in *any manner*." Clerk's Papers (No. 41780-4-II) at 39 (emphasis added). Thus, Swinterton released Kitsap County of *any* liability—whether as a primary party or a retainage holder—and, accordingly, I concur with the result reached by the majority.

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QUINN-BRINTNALL, J.