IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KIMACO, LLC, a Washington limited liability company, Plaintiff, v. WRIGHT DEVELOPMENT WEST COAST, LLC, an Oregon limited liability company, Appellant, MUKILTEO HOTEL, LLC, a Washington limited liability company, Respondent, WESTCHESTER FIRE INSURANCE COMPANY, Bond No. KO8367309, a New York corporation; OLD REPUBLIC CONSTRUCTION INSURANCE AGENCY, INC., Bond No. YL1264708, a Washington corporation; WELLS FARGO BANK NATIONAL ASSOCIATION, a national banking institution; SALO STEEL, INC., a Washington corporation; JABEZ HOLDINGS, INC., a Washington corporation; MONCRIEFF CONSTRUCTION, INC., a Washington corporation; SONOMA PACIFIC CONSTRUCTION, LTD., a Washington corporation; TRADESMAN, LLC, a Washington limited liability company; KVN CONSTRUCTION, INC., a Washington corporation; PAPÉ MACHINERY, INC., a Washington corporation; J&R EXTERIORS, LLC, a Washington limited liability company; PACIFIC LUMBER SUPPLY, INC., a Washington corporation; RIVERSIDE SAND AND GRAVEL, INC., a Washington corporation; DON'S A1 GLASS, LLC, a Washington limited liability company; HRM NORTHWEST, LLC, a Washington limited liability company; RESIDENTIAL FIRE SPRINKLERS, INC., A Washington corporation; NORTWEST CUSTOM GUTTERS, LLC, a Washington limited liability company; NORTHSHORE PAVING, INC., a Washington corporation; FASTRACK CONTRACTING, LLC, a Washington limited liability company; and	)	No. 66453-1-I DIVISION ONE UNPUBLISHED OPINION FILED: February 21, 2012

Appelwick, J. — When a dispute arose between Wright and Mukilteo Hotel, Wright brought a motion to compel arbitration. The trial court denied that motion, finding Mukilteo Hotel did not agree to arbitration. Wright appeals the trial court's order, arguing that the contract should not be read to impose a unilateral arbitration obligation on Wright, while giving Mukilteo Hotel the option to choose arbitration. Because the contract's terms plainly reflect the arbitration requirement was solely applicable to Wright and not reciprocal, we affirm.

FACTS

Mukilteo Hotel LLC hired Wright Development West Coast LLC to provide general contractor services in building a hotel in Mukilteo, Washington.[1] The parties entered into a fixed sum construction contract containing terms and conditions, one of which was titled "CLAIMS AND DISPUTE RESOLUTION." It stated in part: "Contractor agrees to resolve any dispute arising from the Agreement by binding arbitration." Wright was identified as the contractor.

In April 2010, Kimaco LLC filed a lawsuit naming Mukilteo Hotel and Wright as defendants. Wright filed a claim of lien against property owned by Mukilteo Hotel in May 2010 and amended that claim of lien the following month. Mukilteo Hotel responded by filing a motion for summary judgment in November 2010, seeking to invalidate the lien. Wright filed a motion to compel arbitration in December 2010, contending this dispute was subject to the arbitration clause in the terms and conditions of their contract. Mukilteo Hotel responded with its

[1] Wright Development West Coast LLC has since ceased to exist following a merger. The surviving entity and successor in interest is Wright Hotel Development Inc. They are hereafter referred to collectively as "Wright."

own motion arguing it never agreed to arbitrate disputes. The trial court denied Wright's motion and granted Mukilteo Hotel's, finding that the contract does not contain Mukilteo Hotel's assent to arbitration, and therefore Mukilteo Hotel is not bound by any enforceable arbitration agreement. Wright timely appealed the trial court's order.

DISCUSSION

I. The Arbitration Provision

RCW 7.04A.070 governs motions to compel or stay arbitration. Mukilteo Hotel responded to Wright's motion to compel arbitration in accordance with RCW 7.04A.070(2), arguing that there was no enforceable agreement to arbitrate. RCW 7.04A.070(2) provides:

> 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.

Arbitrability is a question of law we review de novo. McKee v. AT&T Corp., 164 Wn.2d 372, 383, 191 P.3d 845 (2008). The burden of proof is on the party seeking to avoid arbitration. Id. Washington has a strong public policy favoring arbitration. Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc., 148 Wn. App. 400, 403-04, 200 P.3d 254 (2009). But despite this public policy, "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" Woodall v. Avalon Care Ctr.-Fed. Way, LLC, 155 Wn. App. 919, 923, 231 P.3d

1252 (2010) (quoting Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 810, 225 P.3d 213 (2009)). When the validity of an agreement to arbitrate is challenged, courts apply ordinary state contract law. McKee, 164 Wn.2d at 383; First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995).

Washington follows the objective manifestation test for contracts. Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 177, 94 P.3d 945 (2004). For a contract to form, the parties must objectively manifest their mutual assent, and the terms assented to must be sufficiently definite. Id. at 177-78.

The relevant term of the contract between Mukilteo Hotel and Wright provides:

> In the event a dispute arises between [Mukilteo Hotel] and Contractor, Contractor shall continue to perform the Work without interruption or delay, provided that [Mukilteo Hotel] pays all undisputed amounts due Contractor. Contractor agrees to resolve any disputes arising from the Agreement by binding arbitration to be held in King County, Washington, in accordance with the rules of the American Arbitration Association then in effect.

Wright is the contractor. This term establishes Wright's assent to arbitration, but it does not contain a reciprocal provision reflecting the same agreement by Mukilteo Hotel. Wright nevertheless argues that Mukilteo Hotel is required to arbitrate the dispute, and that the trial court erred by finding the term created a unilateral or one-sided obligation to arbitrate.

Wright concedes that unilateral arbitration provisions are enforceable in Washington, provided they are not unconscionable. Satomi, 167 Wn.2d at 815. But, Wright contends that the contract cannot be read to create such a one-

sided obligation and option, because the contract fails to do so affirmatively or explicitly. Wright relies on Satomi for this proposition, where the Washington

Supreme Court considered an arbitration clause that similarly created a one-sided option. Id. at 815-16. The clause stated, in relevant part:

> 7. *Seller's Right to Arbitration*. At the option of the Seller, Seller may require that any claim asserted by Purchaser or by the Association under this Warranty or any other claimed warranty relating to the Unit or Common Elements must be decided by arbitration.

Id. at 790 n.4. Wright suggests this provision in Satomi created a valid and enforceable agreement with a one-sided arbitration option, only by virtue of its explicit mention of the "option." Wright then contrasts this provision with the one in the contract at issue here, where the word "option" is not used, and asserts that the language in the clause cannot be read to create an unwritten option. But, Satomi does not stand for the proposition that an arbitration option or a unilateral arbitration clause may only be created by the express inclusion of precise words such as "option." This argument is unsupported by authority, and we reject it.

Under the objective manifestation test of contract law, courts look to the plain terms of the contract, whether they are sufficiently definite, and whether the parties objectively manifested mutual assent to those terms. Keystone, 152 Wn.2d at 177-78. The plain language of the arbitration term reflects that Wright will be bound by a requirement to arbitrate, without imposing the same obligation on Mukilteo Hotel. Where a party has not agreed to arbitrate, it cannot be forced to do so. Satomi, 167 Wn.2d at 810. And, it is undisputed that the parties mutually assented to the contract's terms and conditions, by signing them. Wright concedes it negotiated and signed the contract freely. Indeed, both

parties had the assistance of an attorney during the negotiation and drafting of the contract, and Wright's attorney made multiple edits, redlines and markups to the contract. Nevertheless, Wright left the dispute resolution provision unchanged.

In its reply brief, Wright argues that even if the plain language in the contract establishes that Mukilteo Hotel did not agree to arbitrate, such a mutual agreement must be implied. It cites to Reeker v. Remour, where the Supreme Court observed:

> "It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied."

40 Wn.2d 519, 523, 244 P.2d 270 (1952) (quoting Nat. Refining Co. v. Cox, 227 Mo. App. 778, 781, 57 S.W. 2d 778 (1933)). But Reeker does not change the conclusion here, because there is no evidence that the parties intended such mutuality. In fact, as Mukilteo Hotel points out, the evidence on record demonstrates Wright knew the difference between a one-sided arbitration provision and a mutually binding one, and nevertheless failed to negotiate for the latter. Wright has entered into arbitration agreements with subcontractors that were binding on both parties. For example, one such subcontract provided that "[a]ny controversy, dispute or claim arising out of or related to this Agreement or any other agreement concerning the Project shall be settled by final and binding arbitration." Wright's arbitration provision in the contract with

Mukilteo Hotel could easily have been similarly two-sided, but instead it is drafted to apply solely to Wright.

Wright next relies on Washington's public policy in favor of arbitration, whereby courts "indulge every presumption in favor of arbitration." Rimov v. Schultz, 162 Wn. App. 274, 285, 253 P.3d 462, review denied, ___ Wn.2d ___, ___ P.3d ___ (2011). It argues that the trial court erred by reading an option into the arbitration term, because doing so failed to construe an ambiguity in favor of arbitration. But, no ambiguity existed and the court did not read an option into the contract. Again, "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit.'" Woodall, 155 Wn. App. at 925 (alteration in original) (quoting Satomi, 167 Wn.2d at 810). Where the contract does not contain an agreement by Mukilteo Hotel to arbitrate, Wright's public policy argument is inapplicable. We hold that Mukilteo Hotel did not agree to submit to arbitration and affirm.

II. Attorney Fees

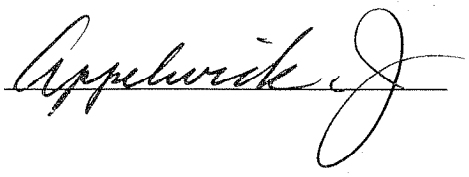
Mukilteo Hotel seeks an award of reasonable attorney fees on appeal under the contract and RAP 18.1. The contract provides:

> [I]n the event an action is instituted to enforce any of the terms of this Agreement, the prevailing party shall be entitled to recover from the other party such sum as the court or arbitrator may adjudge reasonable as attorneys' fees in arbitration, at trial, and on appeal of such action, in addition to all other sums provided by law.

We hold that Mukilteo Hotel is the prevailing party on appeal, entitled to its reasonable attorney fees.

Wright argues that even if it loses this appeal, Mukilteo Hotel should not be deemed the prevailing party under RCW 4.84.330, because the two parties remain involved in an ongoing construction lien dispute. Under that statute, the prevailing party is "the party in whose favor final judgment is rendered." RCW 4.84.330. Wright suggests that Mukilteo Hotel would not have a final judgment in its favor until that separate dispute is resolved. We reject that argument. The ongoing lien dispute is beyond the scope of this appeal and has no bearing on an award of fees here, where such an award is limited to the costs and fees associated with the matter of arbitrability. Mukilteo Hotel is the prevailing party on this appeal, regardless of any other ongoing litigation between the parties on other matters, and is entitled to its reasonable fees.

We affirm.



WE CONCUR: