IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TACOMA PIERCE COUNTY SMALL BUSINESS INCUBATOR, a Washington Non-Profit Corporation, d/b/a WILLIAM M. FACTORY, SMALL BUSINESS INCUBATOR, Appellant, v. SANDRA KENNEDY and JOHN DOE KENNEDY, a marital community; SCOTT KENNEDY and JANE DOE KENNEDY, a marital community; d/b/a SK ENTERPRISES, a sole proprietorship; SK LANDSCAPE, LLC, a Washington limited liability company; Respondents.	No. 40767-1-II UNPUBLISHED OPINION

Penoyar, C.J. — Tacoma Pierce County Small Business Incubator (Incubator) appeals the trial court's order denying its motion to set aside Sandra and Jack Kennedy's[1] request for a trial de novo following arbitration between the parties. Incubator argues that the trial court erred because Sandra and Jack[2] did not serve their request on all parties of record or file proof of service within 20 days of the arbitration award, as required by former MAR 7.1(a) (2001).[3] We hold that the trial court erred in denying Incubator's motion and reverse and vacate the order

[1] The summons and complaint for damages named Sandra and John Doe Kennedy as a marital community. In his notice of appearance, respondent Jack Kennedy identified himself as the John Doe Kennedy named in the complaint for damages.

[2] Because four respondents share the same last name, this opinion uses first names where necessary to avoid confusion. No disrespect is intended.

[3] We note that MAR 7.1 was amended on September 1, 2011. Former MAR 7.1 (2001) applies here. Unless otherwise noted, all references to "former MAR 7.1" are references to former MAR 7.1 (2001).

granting Sandra and Jack's request for trial de novo.

FACTS

According to Incubator's complaint for damages, Scott Kennedy,[4] doing business as SK Enterprises, entered into a lease agreement with Incubator in July 2005. On August 15, 2006, SK Enterprises vacated the rented premises and, at the time, allegedly owed $5,159.90 in past due rent and telecommunication charges.

The next day, Sandra, the managing member of SK Landscape LLC, entered into a lease to rent the room SK Enterprises formerly occupied. According to the complaint for damages, Sandra and SK Landscape promised to repay SK Enterprises' past due balance. SK Landscape vacated the premises in September 2008 and, allegedly, the Kennedys and SK Landscape failed to pay the past due balance. During the two years of occupancy, Sandra, as a representative of SK Landscape, signed two leases; both leases contained a clause that read, "In the event that a dispute arises between the parties and either party secures the assistance of legal council [sic], the non-prevailing party shall pay the prevailing party his or her actual attorney's fees and costs incurred, with or without suit or other legal proceeding." Clerk's Papers (CP) at 30, 45.

On January 12, 2009, Incubator sued Sandra and Jack; Scott and his wife, Mary Kennedy;[5] and SK Landscape for breach of a lease agreement and breach of a personal guarantee. The case was assigned to arbitration.

On March 5, 2010, the arbitration award was filed. On March 22, Sandra and Jack

[4] According to the complaint for damages, Sandra is Scott's mother.

[5] The summons and complaint for damages named Scott and Jane Doe Kennedy as a marital community. In her notice of appearance, respondent Mary Kennedy identified herself as the Jane Doe Kennedy named in the complaint for damages.

electronically filed a request for a trial de novo and for the sealing of the arbitration award. Sandra and Jack also filed a note for trial setting. On April 1, Incubator moved to set aside Sandra and Jack's request for trial de novo and to unseal the arbitration award, arguing that Sandra and Jack had failed to file proof of service of the request for trial de novo. Incubator also requested attorney fees.

On April 14, Sandra and Jack filed a certificate of service, stating that, on March 23, a request for trial de novo and a note for trial setting were delivered to Incubator's attorney and to the Arbitration Department at the Pierce County Superior Court. On April 16, the trial court denied Incubator's motion to set aside Sandra and Jack's request for trial de novo and granted Sandra and Jack's request for trial de novo. In an oral ruling, the trial court stated, "*Nevers*[6] was decided before we went to the great days of electronic filing; so I'm going to deny the motion." Report of Proceedings (RP) (April 16, 2010) at 8.

On April 19, Incubator filed a motion for reconsideration of the trial court's denial of its motion to set aside the trial de novo request, under CR 59(a)(7) and CR 59(a)(9). Incubator argued that "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law" and "substantial justice has not been done." CP at 315 (quoting CR 59(a)(7), (9)). At the hearing on the motion, Sandra and Jack's attorney indicated that he also represented Scott and Mary, so it had been unnecessary to serve them. The trial court denied Incubator's motion for reconsideration. Incubator appeals.

[6] *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 947 P.2d 721 (1997).

ANALYSIS

I. Order Granting Trial de Novo

Incubator argues that the trial court erred in denying its motion to set aside Sandra and Jack's request for trial de novo because the request "was admittedly not sent to all parties of record." Appellant's Br. at 12 (underline omitted). Further, Incubator argues that the trial court should have dismissed Sandra and Jack's request for a trial de novo because they did not file proof of service within 20 days of the arbitration award. We agree.

A. Failure To Serve Scott and Mary

Incubator asserts that the trial court erred in denying its motion to dismiss Sandra and Jack's request for trial de novo because the request was not served on Scott and Mary as required by former MAR 7.1(a).[7] We conclude that Sandra and Jack failed to comply with former MAR 7.1(a)'s requirements when they did not serve Scott and Mary with the request for trial de novo.

Former MAR 7.1(a) requires the party requesting a trial de novo to "serve and file with the clerk . . . proof that a copy has been served upon all other parties appearing in the case." On April 14, 2010, Sandra and Jack filed a certificate of service, stating that a request for trial de novo and note for trial setting were delivered to Incubator's attorney and to the Arbitration

[7] Both parties argue this issue on appeal as a basis for whether the trial court should have denied Sandra and Jack's request for a new trial; however, we note that Incubator made this argument only in its motion for reconsideration. Generally, we review the trial court's denial of a motion for reconsideration for an abuse of discretion. *Lilly v. Lynch*, 88 Wn. App. 306, 321, 945 P.2d 727 (1997). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). Because Sandra and Jack failed to comply with former MAR 7.1(a) by not serving Scott and Mary, the trial court abused its discretion when it denied Incubator's motion for reconsideration.

Department at the Pierce County Superior Court on March 23. The certificate does not indicate that the request was sent to Scott and Mary. At the hearing on the motion for reconsideration, Sandra and Jack's attorney indicated that he represented Scott and Mary, so it was unnecessary to serve them. But, aside from counsel's assertion at the hearing, the record indicates that Scott and Mary represented themselves pro se.

Sandra and Jack assert that "[t]here is no evidence in the file that Scott and Mary Kennedy were contesting the arbitrator's decision. Therefore, the [t]rial de [n]ovo had no applicability to them, and their not having received it in no-way prejudiced them or . . . Incubator." Resp'ts' Br. at 15. Former MAR 7.1(a) requires the requesting party to serve "all other parties appearing in the case." The rule does not give the requesting party discretion to determine whether a party should be served. All parties must be served. We hold that Sandra and Jack's failure to serve Scott and Mary with the request for trial de novo constituted a failure to comply with former MAR 7.1(a).

B. Failure To File Proof of Service

Incubator also contends that Sandra and Jack's trial de novo request was deficient and, thus, should have been dismissed because proof of service was not filed within 20 days of the arbitration award as former MAR 7.1(a) requires. Sandra and Jack contend that they substantially complied with former MAR 7.1(a) and that, unlike former MAR 7.1(a), the Pierce County Local Mandatory Arbitration Rule (PCLMAR) 7.1 does not require that the requesting party file proof of service of the request within 20 days of the arbitration award. Further, they assert that their electronically filed request "has bearing on whether proof of service was properly filed within twenty days of the arbitration award."[8] Resp'ts' Br. at 15. We agree with Incubator.

The trial court's application of court rules to a particular set of facts is a question of law which we review de novo. *Kim v. Pham*, 95 Wn. App. 439, 441, 975 P.2d 544 (1999). Former MAR 7.1(a) provides:

> Within 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may serve and file with the clerk a written request for a trial de novo in the superior court *along with proof that a copy has been served upon all other parties appearing in the case*. The 20-day period within which to request a trial de novo may not be extended.

(Emphasis added.)

This rule expressly requires the aggrieved party to serve and file two documents with the clerk: (1) a written request for a trial de novo in the superior court and (2) proof that a copy has been served upon all other parties appearing in the case. "One act, in short, is not complete without the other. That . . . is made manifest by the clear language of MAR 7.1(a) to the effect that the request for a trial de novo be filed 'along with' proof of service." *Nevers*, 133 Wn.2d at 813-14.[9]

> If we were to conclude that it is not necessary to timely file proof of service of the request for trial de novo in order to obtain a trial de novo in superior court, we would in essence be extending the time within which to request a trial de

[8] Sandra and Jack also assert that the trial court has jurisdiction to conduct a trial de novo, citing *Haywood v. Aranda*, 143 Wn.2d 231, 19 P.3d 406 (2001). In *Haywood*, our Supreme Court considered whether former MAR 7.1(a) (1989)'s proof of service requirement is "jurisdictional" in nature, allowing a party to raise, at any time, a party's noncompliance with former MAR 7.1(a) (1989)'s proof of service requirement. 143 Wn.2d at 236. Former MAR 7.1(a) (1989)'s proof of service requirement is not substantively different from former MAR 7.1(a)(2001). The parties in *Haywood* conceded "that an objection to a trial de novo on grounds that the party requesting the trial failed to file proof of service of the request, when raised prior to trial de novo, is grounds for denial of the request for trial." 143 Wn.2d at 236. Incubator objected before the trial de novo. Accordingly, *Haywood* does not apply.

[9] The *Nevers* court interpreted the requirements of former MAR 7.1(a) (1989); however, former MAR 7.1(a) (1989)'s proof of service requirement is not substantively different from former MAR 7.1(a) (2001).

> novo. This we cannot do because we would be contradicting the additional language in MAR 7.1(a) that "[t]he 20-day period within which to request a trial de novo may not be extended."

Nevers, 133 Wn.2d at 812 (alteration in original).

Sandra and Jack also assert that they substantially complied with former MAR 7.1.[10] Our Supreme Court has rejected the argument that former MAR 7.1's requirements may be satisfied by substantial compliance:

> Were we to conclude that the specific requirement of MAR 7.1 that copies of a request for trial de novo be served within 20 days of the filing of the arbitration award and that proof of that service be filed within that same period may be satisfied by substantial compliance, we would be subverting the Legislature's intent by contributing, inevitably, to increased delays in arbitration proceedings.

Nevers, 133 Wn.2d at 815. Accordingly, substantial compliance does not satisfy the requirements of former MAR 7.1.

Sandra and Jack further contend that they complied with PCLMAR 7.1; thus, their request was not defective. PCLMAR 7.1(a) states: "A written request for a trial de novo shall be accompanied by a note of issue placing the matter on the assignment calendar. Failure to submit the note for assignment is not grounds for dismissal; however, the court may impose terms in its discretion." Sandra and Jack contend that the rule does not require a requesting party to file proof of service within 20 days of the arbitration award. We note that the local rule is misleading and appears to be less exacting than former MAR 7.1. But local mandatory arbitration rules merely supplement the State's mandatory arbitration rules. *See* PCLMAR 1.1(a) ("The

[10] This assertion appears to be based on the fact that Sandra and Jack timely filed their request for trial de novo. In addition, Sandra and Jack filed a certificate of service on April 14, more than 20 days after the March 5 arbitration award, stating that a request for trial de novo and note for trial setting had been delivered to Incubator's attorney and to the Pierce County Superior Court's Arbitration Department on March 23, a date that falls within the 20-day period.

Mandatory Arbitration Rules, as supplemented by these local rules, are not designed to address every question which may arise during the arbitration process, and the rules give considerable discretion to the arbitrator."). Thus, PCLMAR 7.1(a) does not eliminate former MAR 7.1's requirement that the requesting party file proof of service with the superior court.

Sandra and Jack also argue that "the fact that the request for trial de novo was electronically filed has bearing on whether proof of service was properly filed within twenty days of the arbitration award." Resp'ts' Br. at 15 (capitalization omitted). Under GR 30(B)(4), "Parties may electronically serve documents on other parties of record only by agreement." This record contains no evidence of such an agreement. Accordingly, that the request was electronically filed is not evidence of proof of service.[11]

Former MAR 7.1(a) requires strict compliance. Sandra and Jack filed their request for a trial de novo within 20 days of the arbitration award, but they did not comply with former MAR 7.1(a) when they failed to file proof of service on all other parties within the required time period. Sandra and Jack filed a certificate of service with the court on April 14, 2010, more than 20 days after filing the arbitration award on March 5, 2010. Accordingly, we hold that the trial court erred in denying Incubator's motion to set aside Sandra and Jack's request for a trial de novo.

[11] Further, at the hearing for the motion for reconsideration, Incubator's counsel argued, "Defendants submit absolutely no proof that Plaintiff was [e]-served other than to make the bald assertion that any document [e]-filed is automatically [e]-served on the other party. That's simply not the case, and a party has to affirmatively request that the pleadings be [e]-served on the other party." RP (May 14, 2010) at 8.

II. Attorney Fees

Incubator asserts that it is entitled to attorney fees incurred after the arbitration award because Sandra and Jack failed to improve their position at trial. Incubator specifically requests attorney fees incurred in "pursuing the motion to dismiss the [r]equest for [t]rial de [n]ovo and the motion for reconsideration" as well as attorney fees on appeal, citing RAP 18.1, RCW 4.84.330, MAR 7.3, and RCW 7.06.060. Appellant's Br. at 18.

Under RAP 18.1(a), a party may recover reasonable attorney fees or expenses on appeal if applicable law grants the party that right. Under RCW 4.84.330, in an action on a lease, where the lease specifically provides that attorney fees and costs that are incurred to enforce the provisions of the lease shall be awarded to one of the parties, the prevailing party is entitled to reasonable attorney fees and costs. The SK Landscape leases contained an attorney fees and costs provision.

Further, MAR 7.3 provides:

> The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo. "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

In *Kim*, Division One of this court held, "[W]e interpret MAR 7.3 as requiring a mandatory award of attorney fees when one requests a trial de novo and does not improve their position at trial because they failed to comply with requirements for proceeding to a trial de novo such as MAR 7.1(a)." 95 Wn. App. at 446-47. Similarly, RCW 7.06.060(1) states, "The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to

improve his or her position on the trial de novo." Here, the trial court erred in denying Incubator's motion to set aside Sandra and Jack's request for trial de novo because Sandra and Jack failed to comply with requirements for proceeding to a trial de novo. Accordingly, we award Incubator attorney fees and costs incurred after the arbitration award, including fees and costs on appeal, upon compliance with RAP 18.1.

We reverse and vacate the order granting Sandra and Jack's request for trial de novo.

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 pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.