

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FLUOR ENTERPRISES, INC., a)	
California corporation,)	No. 59806-6-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
WALTER CONSTRUCTION, LTD., a)	
Washington corporation, formerly)	
known as WALTER AND SCI)	
CONSTRUCTION, LTD., WALTER)	
CONSTRUCTION (USA), INC, a)	PUBLISHED IN PART
Washington corporation; WALTER)	
CONSTRUCTION (USA), LLC, a)	FILED: November 19, 2007
Washington limited liability company,)	
)	
Appellant.)	
_____)	

AGID, J.—This appeal involves consolidated claims for breach of a settlement agreement and breach of a construction subcontract that arose out of a construction dispute between a contractor and subcontractor. The trial court entered judgment for the contractor on an arbitration award on the settlement agreement claim. The contractor sought to enforce the judgment by obtaining a writ of execution and directing a sheriff's sale of the subcontractor's pending construction claim against the contractor.

The subcontractor moved to quash the writ and stay the sheriff's sale, but the trial court denied the motion. We granted discretionary review. Because both parties' claims were consolidated in the same lawsuit and the trial court did not enter CR 54(b) findings that the judgment confirming the award was final and there was no just reason to delay its entry, the judgment was not yet enforceable. Accordingly, we reverse and remand to the trial court.

FACTS

In 1996, the Department of Corrections (DOC) entered into a construction contract with Fluor Enterprises, Inc. (Fluor) to construct the Stafford Creek Corrections Center for approximately \$127 million. Fluor then subcontracted the structural steel and concrete work to Walter Construction, Ltd. (Walter). Disputes arose between DOC and Fluor and between Fluor and Walter resulting in several lawsuits which have a complicated procedural history.

The litigation between Fluor and Walter that is the subject of this appeal involves two sets of claims. The first arose out of a settlement agreement between Walter and Fluor (the "Settlement Agreement" suit), and the other related to the construction subcontract (the "Construction Claims" suit). These claims arose when DOC sought a declaratory judgment in King County Superior Court to end or limit its liability to Fluor. Walter and Fluor decided to join forces against DOC. They entered into an agreement (the "Settlement Agreement") in which Walter agreed to assign its claims against DOC to Fluor and to share in whatever Fluor recovered from DOC in its suit against DOC. Walter also agreed to release Fluor from a \$3 million subcontract balance, and Fluor

agreed to pay Walter \$3 million up front.

Fluor then asserted the claims Walter had assigned to it in its answer to DOC's complaint. DOC moved to strike those portions of Fluor's claim. The trial court granted the motion, ruling that the Settlement Agreement was invalid under the Severin¹ doctrine.

Following this order, Fluor and Walter pursued independent claims against each other. Fluor first sued Walter in King County Superior Court seeking the return of the \$3 million paid under the Settlement Agreement (the "Settlement Agreement" suit). Walter counterclaimed, asserting that Fluor breached the Settlement Agreement and claiming resulting damages. Walter then sued Fluor in Grays Harbor County Superior Court, alleging it breached the construction contract and reserving its right to compel arbitration under the subcontract (the "Construction Claim" suit). This case was later transferred to King County Superior Court.

In September 2005, Fluor moved for sanctions against Walter for discovery violations in the Settlement Agreement suit. In October 2005, the trial court granted the motion, ordering sanctions against Walter and striking Walter's counterclaims. Fluor then amended its complaint to seek additional damages arising from Walter's breach of the construction subcontract.

In February 2006, Walter filed a motion in the court to which the Construction Claims suit was assigned to consolidate both cases, compel arbitration of the construction claims, and stay other proceedings. That trial judge granted the motion

¹ Under the Severin doctrine, a prime contractor who has been wholly released by a subcontractor may not prosecute the subcontractor's claims up the chain of privity against the owner. Severin v. United States, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944).

and consolidated the cases before the judge who was presiding over the Settlement Agreement suit.

The parties ultimately proceeded to arbitration on the Settlement Agreement suit in the summer of 2006. Arbitration on the Construction Claims was set for September 2007 before a panel of American Arbitration Association (“AAA”) arbitrators. In August 2006, Fluor prevailed in the Settlement Agreement arbitration. The arbitrator awarded it \$3 million, but he denied Fluor’s request to enjoin Walter from pursuing its construction claims. Fluor then moved in the trial court to confirm the arbitrator’s award and to enter judgment on that award. Fluor also moved to clarify the trial court’s original 2005 sanctions order that dismissed Walter’s counterclaims in the Settlement Agreement suit.

On October 11, 2006, the trial court entered judgment for Fluor on the Settlement Agreement claim and clarified the previous sanctions order by stating: “any counterclaim by Walter against Fluor on the Stafford Creek Project is precluded.” Fluor then executed on the judgment and obtained writs of garnishment. Walter moved to quash these writs, but the trial court denied the motion. Fluor also asked the arbitrators who were scheduled to hear the Construction Claims to terminate those claims based on the trial court’s October 11, 2006 order dismissing Walter’s counterclaims.

Walter then filed a notice of appeal of the trial court’s October 11, 2006 order, but shortly thereafter asked this court to dismiss it as premature. Walter argued that the appeal was premature because the AAA arbitrators had not yet decided whether the trial court’s order terminated Walter’s claims in the Construction Claims suit.

Walter reasoned that if the AAA arbitrators did not terminate its construction claims, there would be nothing from which to appeal. While Walter's motion to dismiss the appeal was pending in this court, the AAA arbitrators denied Fluor's motion to terminate Walter's construction claims. On March 12, 2007, this court granted Walter's motion to dismiss the appeal, determining that it was only final as to some of the claims and therefore not yet appealable.

Meanwhile, Fluor obtained an ex parte writ of execution for the Settlement Agreement judgment which directed a sheriff's sale of Walter's pending construction claim, Walter's only claimed asset. Walter moved to quash the writ of execution and stay the sale. On March 23, 2007, the trial court denied the motion and Walter sought discretionary review. While Walter's motion for discretionary review was pending, Fluor moved in the trial court to sever the Construction Claims from the Settlement Agreement claims. The trial court denied the motion on May 15, 2007. On June 17, 2007, this court granted discretionary review of the trial court's order denying Walter's motion to quash the writ of execution

I. Enforceability of the Settlement Agreement Judgment

Walter challenges the trial court's order allowing Fluor to execute on the Settlement Agreement judgment by directing a sheriff's sale of Walter's construction claim, its only asset. Walter argues that (1) the trial court cannot order enforcement of the judgment because it is not a final judgment, and (2) even if it were a final judgment, to allow Fluor to execute on this judgment would result in Fluor's improper control of Walter's pending claims against it. Fluor maintains that under former RCW 7.04,² the

judgment is final and it may properly execute on it. Alternatively, Fluor argues that this court should remand and order the trial court to sever the claims.

Civil Rule 54(b) governs entry of judgments on multiple claims and provides that “the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment.”³ Thus, we have held that four things are required for entry of a final judgment under CR 54(b): “(1) more than one claim for relief or more than one party against whom relief is sought; (2) an express determination that there is no just reason for delay; (3) written findings supporting the determination that there is no just reason for delay; and (4) an express direction for entry of the judgment.”⁴ In Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.),⁵ the court held that entry of a final judgment should await the resolution of all claims for and against all

² RCW 7.04 was repealed effective January 1, 2006, and replaced by RCW 7.04A. The repealed version applies here because the action was commenced before January 12, 2006. RCW 7.04A.913.

³ Washington adopted the identical federal rule, Fed. R. Civ. P. 54(b). CR 54(b) provides:

Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

⁴ Nelbro Packing Co. v. Baypack Fisheries, 101 Wn. App. 517, 523, 6 P.3d 22 (2000) (citing Pepper v. King County, 61 Wn. App. 339, 345, 810 P.2d 527 (1991)).

⁵ 119 Wn. App. 665, 82 P.3d 1199, review denied, 152 Wn.2d 1023 (2004).

parties. The court found that the following reasons justified the trial court's delay of the entry of a final judgment until all claims had been resolved: "(1) to offset judgments favorable to each side before any enforcement activity takes place; (2) to preclude the disruptive effects of enforcement and appellate activity while trial court proceedings are still ongoing; and (3) to avoid a multiplicity of appeals."⁶

While there is substantial Washington case law on whether a partial judgment is appealable, there is no case law specifically addressing whether a partial judgment is immediately enforceable if it is not appealed.⁷ The federal approach turns on whether a judgment satisfies CR 54(b) and is supported by (1) the trial court's finding that there is no just reason for delay and (2) its express direction for entry of the partial final judgment.⁸ If the trial court does not enter the requisite findings, the judgment has no binding effect and cannot be the subject of execution proceedings or other enforcement efforts until a final judgment is entered in the case.⁹ As the court explained in Redding & Co. v. Russwine Construction Corp.:

The rule's [CR 54(b)] requirement of explication in the two respects mentioned is not a technicality in the interest of form; rather, it serves primarily the important function of denoting unmistakably that a final order has been entered so that the losing party may either file a timely appeal or pay the judgment. We think the role Rule 54(b) plays with reference to the finality of a judgment for purposes of appeal has implications as regards its finality for purposes of execution as well.^[10]

Likewise, other state courts addressing this issue have applied CR 54(b) and

⁶ Id. at 694.

⁷ See 14A Karl B. Tegland, Wash. Practice: Civil Procedure § 25.25A (1st ed. Supp. 2006).

⁸ Id.

⁹ Id.

¹⁰ 417 F.2d 721, 727 (D.C. Cir. 1969) (footnotes omitted).

held that execution of a partial judgment was unlawful when no final judgment had been rendered on all of the claims.¹¹ In Electrolert v. Lindeman, the Ohio court held that the trial court unlawfully exercised judicial power by authorizing a party to execute on a judgment that was not certified as final under CR 54(b) and a separate related claim was unresolved at the time the trial court entered the judgment.¹² The court held that “[o]ne cannot execute on a claim absent a final judgment as to that claim.”¹³ Otherwise, the court explained, “a prevailing party could, under court authority, seize the property, garnish the proceeds, or sell the assets of the losing party without the latter having any immediate avenue available for challenging the underlying interlocutory judgment.”¹⁴

In the ruling granting discretionary review here, the commissioner echoes this rule, explaining:

An order that is not appealable because it is not final is also not subject to execution. While there is no case law spelling out this axiom, it makes sense because otherwise a prevailing party could execute on a judgment before the losing party has the opportunity to seek appellate review to which it is not entitled by right until all claims are resolved. RAP 2.2(d). . . .^[15]

Thus, to determine whether the judgment was enforceable, we must decide whether it was a final order under the CR 54(b) criteria.

Here, there is no dispute that there is more than one claim for relief. Nor do the parties dispute that the trial court’s order does not expressly direct entry of a CR 54(b)

¹¹ See State ex rel. Electrolert v. Lindeman, 99 Ohio App. 3d 154, 650 N.E.2d 137 (1994), City of Salina v. Star B., Inc., 241 Kan. 692, 739 P.2d 933, 936 (1987).

¹² 99 Ohio App. 3d 154, 650 N.E.2d 137, 140 (1994).

¹³ Id. (footnote omitted).

¹⁴ Id.

¹⁵ (Footnote omitted.)

final judgment or make any findings that there was no just reason for delay. Thus, the order does not meet the requirements of CR 54(b).

Indeed the reasons justifying the trial court's decision to delay entering a final judgment in Leoffelholz existed here: to preserve the opportunity to offset judgments favorable to each side before any enforcement took place, and to prevent the disruptive effects of enforcement and appeal on the ongoing trial proceedings.¹⁶ Because the cases had earlier been consolidated and the Construction Claim was still unresolved, delaying entering final judgment on the Settlement Agreement claim was necessary so the trial court could offset the judgments on both claims before allowing enforcement of them. Obviously, this cannot be done until after the AAA arbitration of Walter's Construction Claims. The effect of enforcement here was also more than disruptive: allowing the sheriff's sale of Walter's construction claim would have completely eliminated its ability to pursue that claim. Thus, absent express CR 54(b) findings that there is no just reason for delay, we hold that the order was not final and therefore not enforceable.

A. Effect of RCW 7.04 on Enforceability of Arbitration Awards

Fluor contends that under former RCW 7.04.150, 7.04.190 and 7.04.210 (2004), the trial court was authorized to enter and enforce a judgment confirming the arbitrator's award. Former RCW 7.04.210 provided that "judgment so entered has the same effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action." Former RCW 7.04.150 stated:

At any time within one year after the award is made, unless the parties

¹⁶ See 119 Wn. App. at 694.

shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order unless the award is beyond the jurisdiction of the court, or is vacated, modified, or corrected, as provided in RCW 7.04.160 and 7.04.170. . . .

Former RCW 7.04.190 stated: “Upon the granting of an order, confirming, modifying, correcting or vacating an award, judgment or decree shall be entered in conformity therewith.”

Fluor argues that these statutes authorize the trial court to enforce such a judgment upon its entry. Fluor would be correct if there were only one set of claims and counterclaims and an arbitrator had entered an award resolving those claims. Here not all the issues have been resolved because they involve two contracts with two separate arbitration provisions. We hold that arbitration awards are not automatically enforceable by virtue of an order confirming and entering judgment on the award when there are still unresolved claims pending in the same lawsuit and no CR 54(b) order has been entered.¹⁷ Under these circumstances, Fluor’s reliance on former RCW 7.04 is misplaced. The remainder of this opinion has no precedential value. Therefore, it will not be published but has been filed for public record. See RCW 2.06.040; CAR 14.

B. Consolidation of the Claims

Fluor also argues that treating the two arbitrations as part of the same proceeding violates the rule in Balfour, Guthrie & Co. v. Commercial Metals Co.¹⁸ against consolidating arbitrations arising from different arbitration clauses. Fluor maintains that the Settlement Agreement claims and the Construction Claims were

¹⁷ This holding has no impact on the enforceability of judgments entered under chapter 7.04 or 7.04A RCW confirming an arbitration award that resolves the parties’ claims.

¹⁸ 93 Wn.2d 199, 607 P.2d 856 (1980).

separate suits, involving separate contracts and separate arbitrations and that the trial court's consolidation order was erroneous. Thus, Fluor argues, it should be able to enforce the judgments separately. But Fluor did not file a cross-appeal or assign error to the trial court's consolidation order as required by RAP 5.1(d) and RAP 10.3(a)(4). Thus, this issue is not properly before us.¹⁹

But even if the issue were properly raised, Fluor's argument is without merit. Balfour involved two separate contracts providing for two separate arbitrations in two different states.²⁰ The trial court ordered consolidation of the arbitrations and ordered that it take place in one location which was not agreed upon by the parties.²¹ The Supreme Court held that the trial court did not have authority to consolidate multiparty arbitration at a location that was not agreed upon when the contracts were silent on consolidation.²² But here, the order consolidated two sets of claims in front of a single judge, while maintaining the two separate arbitrations for each set of claims. Thus, the Balfour holding does not invalidate the trial court's consolidation order.

In fact, the civil rules give the court "broad authority to manage the scope of litigation," to "manage complex multiparty and multi-claim litigation," and "to fashion an appropriate result on a case-by-case basis."²³ Consequently, a reviewing court gives substantial deference to orders consolidating separate actions into a single lawsuit, or refusing to sever claims under CR 21, and will reverse only for manifest abuse of

¹⁹ Phillips Bldg. Co. v. An, 81 Wn. App. 696, 700, 915 P.2d 1146 (1996) (failure to cross appeal precludes this court from granting affirmative relief).

²⁰ 93 Wn.2d at 201.

²¹ Id.

²² Id. at 202.

²³ 3A Tegland, Wash. Practice: Rules Practice 456 (5th ed. 2006)).

discretion and upon proof that the trial court's order substantially prejudiced the appellant.²⁴

Here the trial court's consolidation order allowed the related disputes to be managed by a single judge. This made sense because the two cases were constantly intertwined by the parties and were in need of consistent rulings by one judge. In fact, Fluor contributed to the problem consolidation was designed to solve when it added construction claims to the Settlement Agreement suit and moved to terminate the Construction Claims arbitration based on orders issued in the Settlement Agreement case. Indeed the trial court's denial of Fluor's motion to sever the claims demonstrates that the court did not view these as separable claims. Fluor fails to show that the consolidation order was a manifest abuse of discretion.

II. Judicial Estoppel

Fluor further contends that Walter is estopped from challenging the trial court's order authorizing execution of the Settlement Agreement judgment because Walter's attorney took a contrary position at oral argument on Walter's motion to dismiss an appeal of the trial court's October 2006 sanctions order. Fluor points to the following comments made by Walter's attorney at oral argument before the commissioner:

[Fluor's attorney] also has a conspiratorial view of history. He says this is all some grand plot to stop collection of the award, or the judgment.

We haven't done that. We haven't appealed. He can continue his collection efforts. . . .

Fluor asserts that these comments were made in response to its attorney's statements

²⁴ Shelby v. Keck, 85 Wn.2d 911, 918, 541 P.2d 365 (1975); Leader Nat'l Ins. Co. v. Torres, 51 Wn. App. 136, 142, 751 P.2d 1252 (1988), aff'd, 113 Wn.2d 366, 779 P.2d 722 (1989).

that Fluor feared that if the court determined the order was not a final judgment, “Walter then will use that as a sword to stop us from enforcing our final judgment.” Fluor contends that by making such representations to the court, Walter is barred by the doctrine of judicial estoppel from taking a contrary position and challenging Fluor’s enforcement efforts in this appeal.

Judicial estoppel is designed to “preserve respect for judicial proceedings,” “to avoid inconsistency, duplicity and . . . waste of time.”²⁵ The doctrine applies when (1) “a party’s later position’ is ‘clearly inconsistent’ with its earlier position,” (2) “judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled,” and (3) “the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”²⁶

A review of the transcript of the oral argument on Walter’s motion to dismiss the appeal supports Walter’s contention that it has consistently taken the position that the Settlement Agreement judgment was not final until the Construction Claims were resolved. The transcript reveals that the focus of Walter’s appeal was the sanctions portion of the trial court’s October 2006 order dismissing Walter’s counterclaims, rather than the actual judgment confirming the arbitration award. At the time of oral argument on Walter’s motion to dismiss the appeal, Fluor’s motion to terminate Walter’s Construction Claims was still pending before the AAA arbitrators. Thus, Walter argued

²⁵ Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 12 (2007) (alteration in original) (internal quotation marks omitted) (quoting Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 225, 108 P.3d 147 (2005)).

²⁶ Id. (citations omitted) (internal quotation marks omitted).

to the commissioner here that “there was nothing to appeal from” until there was a final resolution of the Construction Claims. Walter acknowledged that if the arbitrators dismissed its Construction Claims based on the trial court’s sanctions order in the Settlement Agreement case, then the Settlement Agreement judgment would be final. But, Walter’s attorney argued, if the arbitrators did not dismiss Walter’s Construction Claims, the Settlement Agreement award would not be final until the trial court confirmed an arbitration award of the pending Construction Claims.

The record also supports Walter’s assertion that it did not mislead any court. By dismissing its appeal of the trial court’s October 2006 order, Walter took the position that it was not a final order, which is the position it is taking now. While Walter did not challenge enforcement of the judgment at that time,²⁷ it did so when it became apparent that enforcement would involve the sale of its pending construction claim. Walter’s attorney made the comment on which Fluor is relying here on February 9, 2007, but Fluor did not get the writ of execution directing the sheriff’s sale of Walter’s claim until February 27, 2007, more than two weeks later.

Finally, Fluor has not sufficiently demonstrated that Walter would gain an “unfair advantage” by being permitted to challenge Fluor’s enforcement efforts. In doing so, Walter only seeks a chance to pursue its pending claims before Fluor can collect on the Settlement Agreement judgment. The advantage of this—allowing Walter to offset the Settlement Agreement judgment by any recovery in the Construction Claims suit before Fluor enforces the Settlement Agreement judgment—would undoubtedly be in

²⁷ Earlier, in December 2006, Walter moved to quash writs of garnishment Fluor obtained, but the trial court denied the motion.

Walter's favor. But Fluor fails to demonstrate that this is an "unfair" advantage. In fact, were Walter estopped from doing so, Fluor would most certainly gain an unfair advantage by being able to sell and/or purchase Walter's pending claim against it before Walter could pursue it. We hold that Walter is not judicially estopped from challenging Fluor's enforcement of the Settlement Agreement judgment.

III. Law of the Case

Walter contends that Fluor is bound by the commissioner's ruling on its motion to dismiss the earlier appeal. Specifically, Walter argues the commissioner's conclusion that the Settlement Agreement judgment was not final as to all claims is the law of the case and should be applied to resolve the issues raised in this appeal. Fluor responds that the commissioner's ruling did not address the effect of former RCW 7.04.150, 7.04.190 and 7.04.210, but only concluded that the appeal was premature and that the judgment did not contain CR 54(b) findings.

Generally the law of the case doctrine prevents a court from reconsidering the same legal issue already determined as part of a previous appeal.²⁸ This court may apply a prior appellate court decision as law of the case "where justice would be best served."²⁹ A commissioner's ruling becomes a final decision of this court if an aggrieved party fails to seek modification of the ruling within the time permitted by RAP 17.7. The law of the case doctrine may apply to a commissioner's ruling on finality even in the same review proceeding.³⁰

Here, the commissioner ruled:

It appears that the October 2005 [sic]³¹ judgment on Fluor's settlement claim is a final judgment. Two of the three sanctions orders were entered before the judgment. Any review of the two orders would likely bring up for review the third order after judgment. But the judgment is final only as to some of the claims pending between the parties and as such under RAP 2.2(d) is not appealable absent CR 54(b) findings and a determination by the trial court that there is no just reason for delay. . . .³²

²⁸ Lian v. Stalick, 115 Wn. App. 590, 598-99, 62 P.3d 933 (2003).

²⁹ RAP 2.5(c)(2).

³⁰ Gould v. Mut. Life Ins. Co., 37 Wn. App. 756, 758, 683 P.2d 207 (1984).

³¹ This should state: "October 2006 order," not October 2005.

³² (Citation omitted.)

The commissioner then noted that CR 54(b) findings were not entered and concluded that they would not be appropriate. She further concluded that “[a]ppeal in this matter should await final judgment on all claims between the parties” and ordered the appeal dismissed “as premature.” Neither party moved to modify the ruling.

While addressing the finality of the judgment, the commissioner’s ruling focused on its appealability, not its enforceability, which is at issue in this appeal. Also, as discussed above, this appeal was directed at the sanctions portion of the trial court’s October 2006 order rather than its entry of judgment on the Settlement Agreement arbitration award. Part of the reason Walter sought to dismiss its appeal of this order was because the AAA arbitrators had not yet decided whether the order terminated Walter’s construction claims and the appeal was premature. Thus, the precise issue before the commissioner was whether the trial court’s October 2006 order was appealable at that time.

As discussed above, the issue of finality as it relates to enforceability involves essentially the same inquiry we use to determine appealability. The commissioner uses this analysis when she applies the criteria in CR 54(b) and Nelbro Packing.³³ The commissioner concludes that the order was final, although not as to all claims, but finds that the order lacked CR 54(b) certification. This conclusion does not address the issue presented in this appeal, specifically whether a partial final judgment may be immediately enforceable. Fluor’s enforcement efforts at that time did not involve the sale of Walter’s pending construction claims, which is a significant fact to be

³³ Nelbro Packing Co. v. Baypack Fisheries, 101 Wn. App. 517, 523, 6 P.3d 22 (2000).

considered in the CR 54(b) determination. Additionally, the issues raised in the appeal pending before the commissioner involved the sanctions portion of the trial court's order which is not challenged in this appeal. Thus, the commissioner's ruling does not determine the issues presented here, and the law of the case doctrine does not operate to resolve them.

IV. Equitable Powers of the Trial Court

Walter further argues that even if the Settlement Agreement judgment was not a final order, the trial court's denial of its motion to quash the writ and stay the sheriff's sale was an improper exercise of its equitable powers. Walter argues that trial court's decision would eliminate Walter's pending claim, a result which is prohibited by the court's decision in Paglia v. Breskovich.³⁴ Fluor responds that because Walter's motion to quash was a request for equitable relief, the trial court had broad discretion³⁵ and Walter failed to show an abuse of discretion. Fluor contends the trial court properly exercised its discretion, pointing to the reasons it presented to the trial court to explain why the equities overwhelmingly favored Fluor. But because we hold that the judgment was not a final order and therefore not enforceable as a matter of law, we need not reach the issue of whether the trial court's denial of Walter's motion to quash the writ of execution was a proper exercise of its equitable powers. There was no authority to issue the writ or otherwise order enforcement in the first place.

V. Remand for Severance

In the alternative, Fluor urges us to remand to the trial court with instructions to

³⁴ 11 Wn. App. 142, 522 P.2d 511, review denied, 84 Wn.2d 1004 (1974).

³⁵ (citing Hough v. Stockbridge, 150 Wn.2d 234, 236, 76 P.3d 216 (2003)).

sever the claims. Fluor argues that severance “would return the different parties to the separate contracts . . . to the position and dispute resolution process that they actually bargained for” and would solve any problem with Fluor’s ability to execute on the judgment that was created when the separate actions were consolidated by the trial court. We disagree for the reasons discussed in section I B above. A remand for severance would be improper and we decline to order it.³⁶

VI. Motion to Modify the Commissioner’s Ruling

Fluor also moves to modify the commissioner’s discretionary review ruling, arguing that the ruling mischaracterized the facts regarding the “ownership structure and interrelationship of Walter entities,” Fluor’s assessment of Walter’s damages as largely attributable to DOC’s wrongdoing, and Fluor’s “attempts” to execute on the judgment. Fluor further requests that the ruling be clarified to state that it does not decide the merits of the issue raised in Walter’s petition for discretionary review which is to be decided by this Court.

Under RAP 17.7, “[a]n aggrieved person may object to a ruling of a commissioner . . . only by a motion to modify the ruling directed to the judges.” Fluor fails to demonstrate that it was “aggrieved” by the order granting discretionary review. Fluor does not challenge the propriety of the ruling; it simply takes issue with the commissioner’s characterization of the facts. Because we accepted review, Fluor had the opportunity to address these issues in the appeal on the merits. We therefore deny the motion to modify. We likewise deny Fluor’s clarification request as unnecessary:

³⁶ See also Spencer, White & Prentis Inc. v. Pfizer Inc., 498 F.2d 358, 362 (2d Cir. 1974) (holding that trial court abused its discretion by entering a CR 21 severance order in an attempt to evade CR 54(b) finality).

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the commissioner's grant of discretionary review necessarily means that a panel of this

court will decide the merits of the issue.

Ajid, J.

WE CONCUR:

Grosse, J.

Becker, J.