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SUPREME COURT OF THE STATE OF WASHINGTON

No. 94118-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION III

No. 34022-8-III

INLAND EMPIRE DRY WALL SUPPLY, CO.,

Respondent,

v.

WESTERN SURETY CO.

Petitioner.

WESTERN SURETY CO.'S REPLY TO ANSWER
TO PETITION FOR REVIEW

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2. Whether general suretyship law principles can be properly applied when determining whether a lien claimant complied with RCW 60.04.141’s procedural requirements to enforce its lien against an RCW 60.04.161 release bond?

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I. INTRODUCTION AND ISSUES ADDRESSED BY REPLY

Petitioner Western Surety Company (“Western”) hereby respectfully submits this Reply to respondent Inland Empire Dry Wall Supply, Co.’s (“Inland”) Answer to Western’s Petition for Review (“Petition”) of the Washington State Court of Appeals Division III’s split-panel published decision in *Inland Empire Dry Wall Supply, Co. v. Western Surety Co.*, No. 34022-8-III, --- Wn. App. ---, 389 P.3d 717, 2017 WL 89138, filed on January 10, 2017 (“*Inland Empire*”).

Specifically, as provided and allowed under RAP 13.4(d), Western submits this Reply to address the following two issues that Inland attempts to raise in its Answer that were either not addressed by *Inland Empire’s* panel majority or not specifically raised and addressed in Western’s Petition:

- 1. Whether CR 19 “indispensable party” analysis can be properly applied when determining whether a lien claimant complied with RCW 60.04.141’s procedural requirements to enforce its lien against an RCW 60.04.161 release bond?**
- 2. Whether general suretyship law principles can be properly applied when determining whether a lien claimant complied with RCW 60.04.141’s procedural requirements to enforce its lien against an RCW 60.04.161 release bond?**

II. ARGUMENT ON THE ISSUES

- A. It is improper to apply CR 19 “indispensable party” analysis when determining whether a lien claimant complied with RCW 60.04.141’s procedural requirements to enforce its lien against an RCW 60.04.161 release bond, but even if CR 19 might potentially apply, a named principal under a release bond would still be a necessary and indispensable party to a lien enforcement action.**

Though the issue of whether CR 19 “indispensable party” analysis can be properly applied when determining whether a lien claimant complied with RCW 60.04.141’s procedural requirements to enforce its lien against an RCW 60.04.161 release bond was raised by Inland as an issue to the Court of Appeals, the *Inland Empire* panel majority did not directly address or decide that issue as part of its decision. *See Inland Empire, supra*, 2017 WL at ¶ 24.

Inland now attempts to raise the issue again before this Court by citing and discussing CR 19 in its Answer though, as Inland also failed to do in its Court of Appeals briefing, Inland cites no relevant/controlling caselaw authority involving CR 19 to support its claim that a named bond principal is not a necessary/indispensable party to a lien enforcement action against an RCW 60.04.161 release bond. *See Respondent’s Answer* at p. 7; *Appellant’s Brief* at p. 22; and *Respondent’s Brief* at p. 42.

Even more significantly, Inland’s reliance on CR 19 is precluded by CR 81¹ because lien foreclosure actions under RCW Chapter 61.04 are “special proceedings” in which Washington’s Superior Court Civil Rules cannot be applied and relied on by a lien claimant to circumvent RCW 60.04’s procedural requirements. *See CalPortland Co. v. LevelOne Concrete, LLC*, 180 Wn. App. 379, 394-395, f.n.2, 321 P.3d 1261 (2014) (lien enforcement actions are “special proceedings” under CR 81); *Bob Pearson Const., Inc. v. First Community Bank of Washington*, 111 Wn. App. 174, 178-179, 43 P.3d 1261 (2002) (because “lien foreclosures are ‘special proceedings’ under CR 81, not subject to the Rules of Civil Procedure,” the “civil rules cannot be used to reach a result inconsistent with the lien foreclosure statute”); and *Schumacher Painting Co. v. First Union Management, Inc.*, 69 Wn. App. 693, 700-701, 850 P.2d 1361, *rev. den’d.*, 122 Wn.2d 1013, 863 P.2d 73 (1993).

Thus, under CR 81 and the above Washington decisions addressing that rule in lien foreclosure cases, it is improper for a court to engage in standard CR 19 “indispensable party” analysis to determine whether a named principal under an RCW 60.04.161 release bond is a necessary party

¹ CR 81(a) provides in relevant part that: “**Except where inconsistent with rules or statutes applicable to special proceedings**, these [standard general civil] rules shall govern all civil proceedings (bold and underline emphasis added).”

to a lien enforcement action against the bond for purposes of RCW 60.04.141's procedural requirements.

As established in Western's Petition, a lien claimant seeking to enforce a lien against an RCW 60.04.161 release bond must commence such action in compliance with RCW 60.04.141's procedural requirements and, under Division II's *CalPortland* decision addressing the nexus and interplay of those statutes, compliance with RCW 60.04.141's procedural requirements requires a lien claimant to timely sue and serve both the named principal and surety under the bond. *See* Petition at 7-12. Accordingly, CR 19 has no proper application in determining whether a lien claimant needs to timely sue and serve both the named principal and surety under an RCW 60.04.161 release bond in order to comply with RCW 60.04.141's procedural requirements.

Even assuming, arguendo, that CR 19 might potentially apply, the named principal under an RCW 60.04.161 release bond would nevertheless still be a necessary and indispensable party to lien enforcement action against the bond for the following reasons:

1. It is the principal – not the surety -- who is provided the right under RCW 60.04.161 to seek and pay for a release bond based on the principal's – not the surety's – belief that there are grounds to dispute the lien's correctness or validity

if/when the lien claimant properly pursues action in compliance with RCW 60.04.141's procedural requirements to enforce the lien against the bond.

2. It is the principal – not the surety -- who is the ultimate financial stakeholder under the bond who must ultimately indemnify the surety for any amounts paid from the bond.
3. The surety assumes no duty/obligation under RCW 60.04.161 and/or a release bond issued thereunder to advance and protect the principal's interests via actively engaging in disputed litigation with the lien claimant over the lien's correctness or validity, but rather the provisions of RCW 60.04.161 and the bond only impose a secondary duty/obligation upon the surety to guarantee payment of an unsatisfied judgment against the principal following necessary and indispensable litigation directly between the lien claimant and the principal to adjudicate and establish the lien's disputed correctness and validity.

See Petition at pp. 13-19 and Respondent's Brief at pp. 30-35.

Accordingly, even under an unnecessary and improper CR 19 analysis, the principal under an RCW 60.04.161 release bond statutorily obtains and holds an interest and valuable rights in the bond, and incurs

financial liability risks under the bond, that are unique and exclusive to the principal alone, and which both practically and necessarily require a lien claimant to sue and serve the principal with a lien enforcement action in compliance with RCW 60.04.141's procedural requirements in order for the claimant and the principal to directly litigate between themselves over the lien's disputed correctness or validity as a necessary and indispensable condition precedent to the claimant resorting to action to obtain payment from the bond. *See* CR 19(a)(2)(A) (a person is a necessary and indispensable party if the "person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest...") and Respondent's Brief at pp. 30-35.

B. It is improper to apply general suretyship law principles when determining whether a lien claimant complied with RCW 60.04.141's procedural requirements to enforce its lien against an RCW 60.04.161 release bond because the statutory necessary party joinder and service-of-process requirements supersede and control over general suretyship law principles.

Both Inland and the *Inland Empire* panel majority erroneously rely on common law general suretyship principles to excuse Inland's affirmative election and failure to not sue and serve Fowler General Construction, Inc. ("Fowler") as named principal under the subject RCW 60.04.161 release bond, which reliance is based on the general notion that a claimant against

a bond is able to sue and seek relief solely against the surety because the surety is entitled to assert defenses that its principal could assert. *See Inland Empire* at ¶¶ 19-20 and Respondent's Answer at pp. 7-11.

However, general suretyship law principles can be superseded and rendered inapplicable by contrary statutory requirements. For example, under Washington's Contractor Registration Act, RCW 18.27.040 provides and requires in relevant part as follows:

* * *

(3) Any person, firm, or corporation having a claim against the contractor for any of the items referred to in this section **may bring suit against the contractor and the bond** . . . in the superior court of the county in which the work was done or of any county in which jurisdiction of the contractor may be had. **The surety issuing the bond shall be named as a party to any suit upon the bond.** Action upon the bond . . . brought by a residential homeowner for breach of contract by a party to the construction contract shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court within two years from the date the claimed contract work was substantially completed or abandoned, whichever occurred first. Action upon the bond . . . by any other authorized party shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court within one year from the date the claimed labor was performed and benefits accrued, taxes and contributions owing the state of Washington became due, materials and equipment were furnished, or the claimed contract work was substantially completed or abandoned, whichever occurred first. Service of process in an action filed under this chapter **against the contractor and the contractor's bond** . . . shall be exclusively by service upon the department. . . . The service shall constitute service and confer personal jurisdiction **on the contractor and the surety** for suit on claimant's claim **against the contractor**

and the bond . . . and the department shall transmit the summons and complaint or a copy thereof **to the contractor** at the address listed in the contractor's application **and to the surety** within two days after it shall have been received [bold and underline emphasis added].

* * *

Thus, a claimant against a Washington contractor's registration bond is required to timely bring suit against both the contractor and the contractor's bond surety, and the general suretyship law principle that a bond claimant may sue and seek relief solely against the surety could not be properly applied to excuse a claimant's failure to timely sue both the contractor and its registration bond surety.

Indeed, several other states have lien release bond statutes that likewise override and render that general suretyship law principle fully inapplicable. *See e.g.*, A.R.S. § 33-1004(C) and (D) (Arizona statute requiring that both principal and surety under release bond be named as necessary parties to action seeking to foreclose lien against bond); NY Code § 37(7) (New York statute requiring that both principal and surety under release bond be joined as parties to action seeking to foreclose lien against release bond); 42 Okl. St. § 147.1 (Oklahoma statute requiring that both principal and surety under release bond be named as necessary parties to action seeking to foreclose lien against release bond); and Nev. Rev. Stat. 108.2421(2)(b) (Nevada statute requiring that both principal and surety

under release bond be named as necessary parties to action seeking to foreclose lien against release bond). *See* Respondent’s Brief at p. 19, f.n. 1.

In similar recognition that bond claim statutes can render the above-discussed general suretyship law principle inapplicable, the *CalPortland* decision and *Inland Empire’s* dissenting Chief Judge Fearing recognized that construing and harmoniously applying RCW 60.04.161, .141, and .171 together as an integrated statutory scheme intended to address the enforcement of a lien regardless of whether enforcement is pursued against real property or a release bond results in the following:

- An RCW 60.04.161 bond that releases and replaces real property as security for a lien becomes the “**subject property**” for purposes of a lien enforcement action and application of RCW 60.04.141’s procedural requirements,
- RCW 60.04.141’s procedural requirements require a lien claimant seeking to enforce a lien against a release bond to timely sue and serve the “**owner**” of the “**subject property**” (i.e., the owner of the bond),
- The named principal and surety under a release bond each have an interest in the bond such that they are the “**owner**” of the “**subject property**” (i.e., the bond) for purposes of RCW 60.04.141’s procedural requirements, and

- RCW 60.04.141's procedural requirements **require a lien claimant to timely sue and serve both the named principal and surety** in a lien enforcement action against a release bond.

See Inland Empire, supra at ¶¶ 24-69 and *CalPortland, supra*, 180 Wn. App. at 386-390.

In clear and direct conflict with *CalPortland*, however, the panel majority in *Inland Empire* erroneously determined RCW 60.04.161 to be a stand-alone and self-effectuating statute, that RCW 60.04.141's procedural provisions requiring timely suit and service of process against the "owner of the subject property" are superfluous and meaningless for purposes of lien enforcement against a release bond, and that general suretyship law principles (instead of RCW 60.04.141's procedural requirements) apply to allow a lien claimant to sue and seek relief solely against the release bond surety. *See Inland Empire, supra* at ¶¶ 12-21.

Petitioner Western therefore respectfully urges the Washington Supreme Court to accept review under Western's Petition to address and resolve the analytical and result conflicts that arise from *CalPortland* and *Inland Empire* in favor of *CalPortland's* analyses and determination that all of RCW 60.04.141's procedural requirements still apply in a lien

enforcement action against a release bond and require a lien claimant to timely sue and serve both the named principal and surety under the bond.

As Chief Judge Fearing aptly noted in his thorough and very persuasive dissenting opinion in *Inland Empire, CalPortland* answered the question of who is the “owner of the subject property” for purposes of RCW 60.04.141’s procedural requirements when a release bond is recorded prior to a lien enforcement action and that “[d]emanding that the bond claimant join the bond principal [along with the surety in a lien enforcement action against the bond] imposes minimal burden on the claimant compared to the harm that could result without the presence of the principal in the lawsuit.” *See Inland Empire, supra* at ¶¶ 59 and 68.

III. SUMMARY AND CONCLUSION

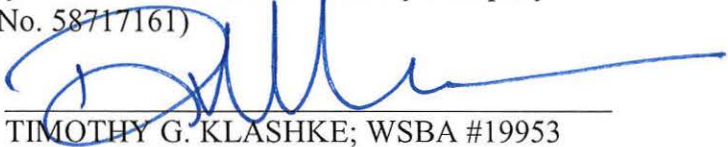
In summary and conclusion, the foregoing establishes that:

1. It is improper to apply CR 19 “indispensable party” analysis when determining whether a lien claimant complied with RCW 60.04.141’s procedural requirements to enforce its lien against an RCW 60.04.161 release bond, but even if CR 19 might potentially apply, a named principal under a release bond would still be a necessary and indispensable party to a lien enforcement action.
2. It is improper to apply general suretyship law principles when determining whether a lien claimant complied with RCW 60.04.141’s

procedural requirements to enforce its lien against an RCW 60.04.161 release bond because the statutory necessary party joinder and service-of-process requirements supersede and control over general suretyship law principles.

RESPECTFULLY SUBMITTED this 27th day of March, 2017.

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