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No. 64432-7-I

Court of Appeals, Division I
Of the State of Washington

CHRISTOPHER GRAY and JULIE LASSONDE-GRAY,
Plaintiffs/Appellants

v.

BOURGETTE CONSTRUCTION, LLC,
Defendant/Respondent

BRIEF OF APPELLANTS

Tarl R. Oliason
WSBA No. 11923

McKisson Sargent & Oliason P.S.
1900 West Nickerson, #209
Seattle, WA 98119
(206) 285-4130

210 MAR 2015
COURT OF APPEALS
DIVISION I
SEATTLE, WA
TARL R. OLIASON
WSBA NO. 11923

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I. **Assignments of Error**

Assignments of Error

No. 1 The trial court erred in entering the order of October 13, 2009, denying the Appellants' request to release the materialmen's lien filed by Respondent against their property. **CP 10**

No. 2 Attendant to that error the trial court erred in awarding attorney's fees to the Respondent. **CP 10**

No. 3 The trial court erred by supporting its ruling with the stated basis:

"...it's inappropriate to apply [RCW] 60.04.081 with respect to [the petitioner/Gray's] argument that [respondent/Bourgette] failed to give a notice of claim of right to a lien in a case in which there this middleman agent..."
RP, pages 25-26.

Issues Pertaining to Assignments of Error

No. 1. Must a subcontractor, who is not hired by a property owner, a licensed contractor, or a common law agent, provide the property owner with a written Notice of Right to Claim a Lien as a statutory prerequisite to recording

a valid Claim of Lien against the real property being improved?

No. 2. When a property owner exercises its only option for affirmatively contesting a lien – RCW 60.04.081 – by filing an action to have the lien removed for the failure to comply with the statutory mandate, is the lien “frivolous and made without reasonable cause”?

II. **Statement of the Case**

The Appellants, Christopher Gray and Julie Lassonde-Gray, (hereinafter “the Grays”) are the owners of the property located at 4805 84th Avenue SE, Mercer Island, Washington. The property is a single family residence which the Grays owned in May, 2008. Around that time remodeling work began inside the house and it could not be occupied.

CP 3 and CP 4

The Grays hired Geoffrey W. James (hereinafter “James”) to perform remodeling work on the property. James is not a licensed contractor. **CP 14** However, James had no authority to act as their attorney in fact or as a general agent for any purpose. **CP 3 and CP 4** Apparently

James hired the Respondent, Bourgette Construction, LLC (hereinafter "Bourgette") to assist him with the remodeling project by supplying materials and labor.¹ James has already paid \$178,146.86 to Bourgette for the work performed. **CP 12** The Grays did not authorize James to contract with Bourgette to perform any work on the property: any contract between James and Bourgette was without the Grays' knowledge or consent. **CP 3 and CP 4**

The Grays never received notice of any kind from Bourgette that it had performed work on the property or that it had any right to claim a lien. **CP 3 and CP 4** Nor did the Grays personally authorize Bourgette to perform any work on the property. **CP 3 and CP 4**

Nevertheless, Bourgette filed with the King County Recorder a Claim of Lien against the Grays' property. The Claim of Lien alleges that Bourgette supplied materials and labor at this property site. The Claim of Lien was recorded on June 2, 2009 under recording number 20090602001177.

¹ Since this appeal concerns only the validity of a recorded lien (and not issues surrounding the work and materials which may or may not have been supplied), for the purposes of this appeal and ONLY for the purposes of this appeal, the Grays will assume that Bourgette did supply some materials and some labor for James at the property involved in this action.

Ex. A to CP 7; and Appendix A-1 hereto. The Claim of Lien states in paragraph 3:

“NAME OF PERSON INDEBTED TO THE CLAIMANT: Geoffrey W. James, dba Wescott Development”

In the summer/fall of 2009, the Grays had a sale pending for their home. **CP 5** When their attorney, Dean R. Sargent, was informed of the lien filed by Bourgette, he wrote to Bourgette’s attorney (twice) requesting the basis for the lien and documents proving the elements of the lien. Bourgette refused the request **CP 5, and Ex. B, C and D to CP 7**

With a looming closing date for the sale of their property, the Grays filed an action contesting the Bourgette lien. **CP 5** Bourgette filed nothing with the King County Superior Court in response to the Gray’s motion until the time of the actual hearing, resulting in an award of sanctions against Bourgette. **CP 10 and RP, page 20.**

III. **Argument**

It is important to define the playing field as the context for this appeal:

(1) This case deals only with validity of Bourgette's lien. It is NOT about any materials supplied, work performed, or Bourgette's right to be paid therefor. Bourgette has full right to sue James and the Grays for payment of any sums owing, and in fact Bourgette has done so in a separate suit filed after this appeal was filed.²

(2) This case IS about the reasonableness of and basis for filing a construction lien. It is undisputed in this case that Bourgette, the subcontractor, did not provide a notice of right to claim a lien, as required by statute RCW 60.04.031(3)(b).

There is not much case law interpreting the frivolous lien statute. As stated in *W.R.P. Lake Union Limited Partnership v. Exterior Services, Inc.*, 85 Wn. App 744, 934

² See Bourgette Construction v. Gray et al, King County Cause No. 10-2-04476-1 SEA

P.2d 722 (1997), at that time no appellate decision had yet analyzed the procedures to be followed under RCW 60.04.081. [NOTE: In *W.R.P. Lake Union, supra*, the facts of the case were dissimilar to ours. In that case the subcontractor initially contracted directly with the owner of the building. During the term of the contract, the subcontractor incorporated, creating a new entity. The question before that court was whether this change in form of ownership would impose a notice requirement which did not initially exist.]

RCW 61.04 et seq. provides a fairly straight forward road map for subcontractors to follow if they wish to file a valid and enforceable lien. The statute, as many Washington decisions have held, is in derogation of common law and must be strictly construed. *Henifin Construction vs Keystone Construction*, 136 Wn. Ap. 268, 274, 145 P.2d 402 (2006).

RCW 60.04.031(1) states:

“Except as otherwise provided in this section, every person furnishing professional services, materials, or equipment for the improvement of real property shall give the owner or reputed owner notice in writing of the right to claim a lien.”

The statutory Notice To Owner, provided in RCA 60.04.031(4), requires the notice to state among other things:

“Under Washington law, those who furnish labor, professional services, materials, or equipment for the repair, remodel, or alteration of your owner-occupied principal residence and who are not paid have a right to enforce their claim for payment against your property. This claim is known as a construction lien.”

Continuing, RCW 60.04.031(6) reads:

“A lien authorized by this chapter ***shall not be enforced*** unless the lien claimant has complied with the applicable provisions of this section.” *Emphasis added*

The exception to the notice requirement is found in RCW 61.04.031 (3) (a), which excepts persons (i.e. subcontractors) who contract directly with the owner or their “common law” agent.

There is another type of agency which is also exempt from the notice requirement, that of the “construction agent.” RCW 60.04.011 (1) defines a construction agent in terms of registered and bonded contractors who are in control of the project.

The question before this court is whether or not

Bourgette as a sub-contractor must, by statute, provide the Grays with the statutory Notice to Owner of its right to claim a lien. And the answer to that question revolves around the status of James: was he the Grays' construction agent or common law agent?

By hiring a general contractor to manage a remodel, a property owner is essentially hiring a construction agent, with authority limited to the project at hand. A construction agent is not the same as a common law agent – the type of person who has broad authority to represent the principal.

The Grays hired James to remodel their home. Period. **CP 3 and 4** James makes no claim that he had any broad authority to act on behalf of the Grays: he was essentially hired as the general contractor for project, a fact he seems to admit in his declaration. **CP 14**. However, James falls short of the mark to qualify as a construction agent, let alone the more broadly defined authority of a common law agent. RCW 60.04.011 (1) establishes an essential requirement for “persons having charge of any improvement to real property, who shall be deemed the

agent of the owner for the limited purpose of establishing the lien created by this chapter.” And what is that requirement? The contractor must be registered or licensed. James admits that he is neither. **CP 14** Without meeting that requirement, James cannot, as the statute states, “be deemed the agent of the owner” for lien purposes.

Furthermore, RCW 60.04.041 guides sub-contractors in how to determine whether the person with whom they are dealing is the owner’s agent. This code section provides subcontractors a list of documents (licenses or registration certificates) on which they may rely to verify that the person with whom they are dealing does, in fact, have authority to act for the property owner.

By failing to file the Notice to Owner, the only way that Bourgette can assert the validity of its lien is to assert that pursuant to RCW 60.04.031(3)(a), James was actually the Grays’ “common law” agent. Bourgette attempted to salvage his lien in the trial court by making that argument: claiming that James had more, not less, authority than a licensed general contractor would have under the same circumstances. That is a strained construction, at best, and

certainly does not amount to a strict construction of the statute.

RCW 60.04.081 (4) provides that the prevailing party in an action to determine whether a lien is frivolous or not is entitled to an award of costs and reasonable attorney's fees. The Gray's are making such a request.

IV. Conclusion

The Grays hired Geoffrey James to remodel their home, not as their agent under any definition, but to actually do the remodel. James apparently had other subcontractors supplying labor and materials to fulfill his contract with the Grays, among them Bourgette.

Bourgette is not relieved of its obligation to comply with the statutory notice requirements to the owner by virtue of dealing through a middle man. We are not talking about an onerous burden: it was the simplest of tasks to notify the Gray's of their lien vulnerability, but Bourgette chose not to do so. The issue here is not a defective notice. There was no notice.

The notice requirement is mandated by the statute and must be strictly complied with. Bourgette's failure to do so makes the lien invalid by the very wording of the statute. As a statutorily unenforceable lien, the Claim of Lien recorded by Bourgette is frivolous and made without reasonable cause.

Voiding the lien in now way compromises Bourgette's ability to sue James and the Grays for any money owing to it. Bourgette has already done just that in a separate suit.

The court should reverse the decision of the trial court, and find that the Claim of Lien was frivolous and without reasonable cause. In addition, the court should award to the appellants their costs and attorney's fees incurred in the trial court and in this appeal.,

February 26, 2010

Respectfully submitted,

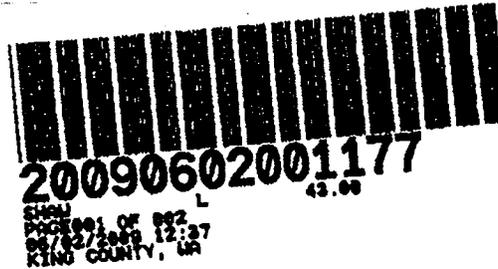


Tarl R. Oliason
Attorney for Appellants
WSBA No. 11923

APPENDIX
Claim of Lien filed by Bourgette
(Following 2 pages)

Prepared by, recording requested by and
return to:

Name: Bridget Shaw
Company: Shaw Law Group, P.L.L.C.
Address: 787 Maynard Avenue South
City: Seattle
State: WA Zip: 98104
Phone: (206) 623-1225
Fax: (206) 325-4007



-----Above this Line for Official Use Only-----

CLAIM OF LIEN

OWNER: Christopher Gray and Julie A. Lassond-Gray

CLAIMANT: Bourgette Construction, L.L.C.

LEGAL DESCRIPTION (abbreviated): Floods Acre Gardens Add, Ptn Lot 7

ASSESSOR'S PROPERTY TAX PARCEL NO. 257730-0030

Notice is hereby given that the person named below claims a lien pursuant to
RCW 60.04. In support of this lien the following information is submitted:

1. NAME OF LIEN CLAIMANT: Bourgette Construction, L.L.C.
TELEPHONE NUMBER: (206) 779-4542
ADDRESS: 13721 39th Ave. NE, Seattle, WA 98125
2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR,
PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR
EQUIPMENT OR THE DATE ON WHICH EMPLOYEE BENEFIT
CONTRIBUTIONS BECAME DUE WAS THE 1st DAY OF APRIL, 2008.
3. NAME OF PERSON INDEBTED TO THE CLAIMANT:
Geoffrey W. James dba Wescott Development
4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS
CLAIMED:

Beginning at the NE corner of Section 24, Township 24 North, Range 4 East,
W.M., in King County, Washington; thence North 00 01'59" West along the
Easterly line thereof, 96.00 feet; thence North 89 33'45" West 230 feet; thence
North 00 01'59" East parallel with the easterly line of said Section, a distance of
96.00 feet; thence South 89 33'45" East 230.00 feet to the point of beginning;
EXCEPT the Easterly 30.00 feet thereof conveyed to King County, Washington,
for road purposes by Deed recorded under Recording No. 2593727; (also known
as a portion of Lot 7, Floods Acre Gardens, according to the plat thereof recorded

in Volume 7 of Plats, page 26, records of King County, Washington, Tax Parcel No. 257730-0030

Commonly known as: 4805 84th Avenue SE, Mercer Island, WA 98040

- 5. NAME OF THE OWNER OR REPUTED OWNER (If not known state Q "unknown"): Christopher Gray and Julie A. Lassond-Gray
- 6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE; OR MATERIAL, OR EQUIPMENT WAS FURNISHED WAS THE 15th DAY OF MARCH, 2009.
- 7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS: \$114,263
- 8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM, SO STATE HERE: N/A.

DATED: June 2, 2009

SHAW LAW GROUP, P.L.L.C.

By: [Signature]

Bridget Bourgette Shaw
Attorney for Claimant

SHAW LAW GROUP, P.L.L.C.
787 Maynard Avenue South
Seattle, WA 98104
Telephone: (206) 623-1225

STATE OF WASHINGTON
COUNTY OF King, ss.

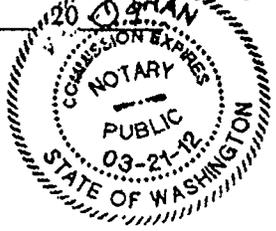
Bridget Bourgette Shaw, being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

[Signature]

Bridget Bourgette Shaw, Attorney for Claimant

Subscribed and sworn to before me by Bridget Bourgette Shaw this 2nd day of

June



[Signature]
Notary Public residing at [Address]
Printed Name: Kelly T. TRAN
My Commission Expires: 3/21/2012

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COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

Christopher J.D. Gray, et. al.,
Appellants
v.
Bourgette Construction, LLC,
Respondent

Case #66432-7-1

DECLARATION OF SERVICE

I declare, under penalty of perjury, that I have personal knowledge of the following statements and that they are true and accurate to the best of my knowledge: I am employed at the firm of McKisson Sargent & Oliason P.S., attorneys for Christopher J. D. Gray et. al. the above captioned Appellant. On the 1st day of March, 2010, I sent via ABC Legal Messengers for service on this date the Appellants' Brief and copies, as follows:

One copy to:

Bridget Bourgette Shaw
Of Shaw Law Group
787Maynard Ave S Ste B
Seattle, WA 98104-2987

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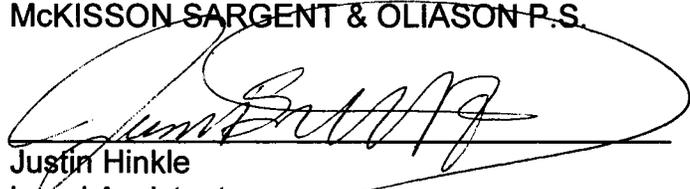
An original, and one copy to:

Clerk of the Court of Appeals, Division 1
600 University
Seattle, WA 98101

DATED this 1st day of March, 2010.

McKISSON SARGENT & OLIASON P.S.

By:


Justin Hinkle
Legal Assistant