

No. 39957-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MOUNTAIN WEST CONSTRUCTION, LLC,
a Washington limited liability company,

Respondent,

v.

JAMES ALAN, LLC, et al.

Appellants.

COURT OF APPEALS
STATE OF WASHINGTON
10 JAN 22 PM 12:10
FILED
BY
CLERK

OPENING BRIEF OF APPELLANT STERLING SAVINGS BANK

Ryan, Swanson & Cleveland, PLLC
Jerry Kindinger, WSBA #5231
Britenae Pierce, WSBA #34032
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
(206) 464-4224

Attorneys for Appellant
Sterling Savings Bank

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 21 PM 3:24

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR.....	1
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
IV. STATEMENT OF THE CASE.....	3
V. ARGUMENT	11
A. The standard of review for a motion for summary judgment is <i>de novo</i>	11
B. The trial court erred in making a finding in its initial order on Mountain West’s motion for summary judgment that Sterling’s lien is junior to Mountain West’s lien.....	11
1. The trial court erred in making a finding regarding priority because such finding exceeded the relief requested and the proof in Mountain West’s motion.	11
2. The trial court erred in making a finding regarding priority on summary judgment because genuine issues of material fact exist regarding the applicability of equitable subrogation, which affects priority.....	15
a. The November 14, 2008 stipulation is not a basis for making a finding regarding priority because Sterling’s claim for equitable subrogation is outside the meaning and scope of that stipulation.	15
b. Equitable subrogation applies or, at the very least, a genuine issue of material fact exists regarding Sterling’s claim of equitable subrogation.....	17
c. The trial court’s instruction for Sterling not to file a motion to amend while the summary judgment issues were pending denied Sterling the opportunity for its full day in court.....	19

	<u>Page</u>
3. While the trial court erred in making a determination of priority based on the record, its “finding” of priority in the summary judgment order is superfluous.	19
C. The post-reconsideration orders regarding lien priority and immediate foreclosure should be reversed because the orders exceeded the relief requested, exceeded the scope of reconsideration, and are without basis in the record.....	20
1. Orders on lien priority and foreclosure are beyond the proof, beyond the relief requested, and beyond the scope of reconsideration.....	21
2. To the extent the trial court relied on the finding in its prior partial summary judgment order when entering the order granting summary judgment, such reliance is error because the finding is irrelevant.	22
D. The trial court abused its discretion in denying Sterling’s motion to amend its answer.....	23
1. The standard of review for a motion to amend is abuse of discretion.....	23
2. Justice required leave to amend Sterling’s answer.	24
3. Amending the answer would not have prejudiced Mountain West.	26
4. The trial court’s decision was manifestly unreasonable, based on untenable grounds and for untenable reasons, thus is an abuse of discretion.	28
E. The trial court erred in entering a decree of immediate foreclosure because the decree was based on the prior erroneous orders.	29
VI. CONCLUSION.....	30

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Balmer v. Norton</i> , 82 Wn. App. 116, 915 P.2d 544 (1996)	15
<i>Bank of America, N.A. v. Prestance Corp.</i> , 160 Wn.2d 560, 160 P.3d 17 (2007).....	16, 17, 18
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	15
<i>Brouillet v. Cowles Publ'g Co.</i> , 114 Wn.2d 788, 791 P.2d 526 (1990).....	11
<i>Caruso v. Local Union No. 690</i> , 100 Wn.2d 343, 670 P.2d 240 (1983).....	24, 26
<i>Chelan County Deputy Sheriffs' Ass'n v. Chelan County</i> , 109 Wn.2d 282, 745 P.2d 1 (1987).....	11
<i>Cowlitz Stud Co. v. Clevenger</i> , 157 Wn.2d 569, 141 P.3d 1 (2006).....	11
<i>Estate of Randmel v. Pounds</i> , 38 Wn. App. 401, 685 P.2d 638 (1984).....	26
<i>Hamilton v. Huggins</i> , 70 Wn. App. 842, 855 P.2d 1216 (1993).....	19, 23
<i>Herron v. Tribune Publ'g Co.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987).....	24
<i>Hisle v. Todd Pacific Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004).....	11
<i>Leland v. Frogge</i> , 71 Wn.2d 197, 427 P.2d 724 (1967)	14
<i>Sedwick v. Gwinn</i> , 73 Wn. App. 879, 873 P.2d 58 (1994).....	12
<i>Thomas v. French</i> , 30 Wn. App. 811, 638 P.2d 613 (1981), <i>rev'd on other grounds</i> , 99 Wn.2d 95 (1983)	26

	<u>Page</u>
<i>Walla v. Johnson</i> , 50 Wn. App. 879, 751 P.2d 334 (1988).....	23, 24

Other Authorities

14A Washington Practice: Civil Procedure § 25.13 (2d ed. 2003)	14
16D C.J.S. Constitutional Law § 1793 (2009).....	14
Restatement (Third) of Property: Mortgages § 7.6 (1997)	18

Court Rules

Washington Civil Rule 15	27
Washington Civil Rule 15(a)	24
Washington Civil Rule 56(c)	12
Kitsap County Local Rule 59(e)	9

I. INTRODUCTION

This appeal involves a series of piecemeal orders entered by the trial court, each building on the next, the end result of which denied appellant Sterling Savings Bank (“Sterling”) the opportunity pursue its affirmative defense of equitable subrogation and created a windfall for plaintiff Mountain West Construction, LLC (“Mountain West”). Specifically, these orders granted summary judgment in favor of Mountain West finding Mountain West’s materialman’s lien superior to Sterling’s deed of trust, entitled Mountain West to foreclose on its lien immediately, and denied Sterling leave to amend its answer. These orders went beyond the pleadings, adjudicated Sterling’s rights on motions not directed to Sterling but directed to another defendant, were based on a prior stipulation between Sterling and Mountain West that contained questions of fact, and were entered without allowing Sterling its full day in court. By this appeal, Sterling seeks reversal of the trial court’s summary judgment orders regarding priority and foreclosure, and the trial court order denying Sterling’s motion to amend its answer to add its affirmative defense of equitable subrogation.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the Order Granting in Part and Denying Part [sic] Mountain West Construction’s Motion for

Summary Judgment finding Sterling's lien is junior to Mountain West's lien as a matter of law.

2. The trial court erred in entering its Order Granting Mountain West's Motion for Summary Judgment on reconsideration allowing Mountain West to immediately foreclose on its lien and ordering Mountain West's lien prior, superior, and paramount to Sterling's lien as a matter of law.

3. The trial court erred in denying Sterling's motion to amend its answer to add the affirmative defense of equitable subrogation.

4. The trial court erred in entering a decree of immediate foreclosure in its order supplementing/amending the summary judgment order.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred by entering summary judgment in Mountain West's favor when Sterling should have been able to pursue its affirmative defense of equitable subrogation, which affirmative defense precludes judgment for Mountain West as a matter of law? (Assignment of Error Nos. 1-4).

2. Whether genuine issues of material fact regarding lien priority precluded summary judgment? (Assignment of Error Nos. 1, 2, 4.)

3. Whether the trial court erred by entering summary judgment for Mountain West on lien priority and immediate foreclosure when Mountain West did not request such relief or prove such claims in its summary judgment motion or in its related motion for reconsideration? (Assignment of Error Nos. 1, 2, 4.)

4. Whether genuine issues of material fact preclude summary judgment regarding immediate foreclosure (Assignment of Error Nos. 2, 4).

5. Whether the trial court erred in denying Sterling leave to amend its answer to include the affirmative defense of equitable subrogation when justice required amendment and when Mountain West was not prejudiced by such amendment (Assignment of Error No. 3)?

6. Whether genuine issues of material fact and prior erroneous orders preclude entry of a decree of foreclosure (Assignment of Error No. 4)?

IV. STATEMENT OF THE CASE

Factual Background

David Alan Development, LLC (“DAD”) was the owner and developer of commercial, undeveloped, real property located at 1830 Finn Hill Road, Poulsbo, WA 98370 (the “Property”) prior to May 2007. CP 4, 16-17, 647. DAD is a closely held company whose only member and

manager is David Milne. CP 16, 329-30. Mr. Milne was also the member and manager of another closely held company called James Alan, LLC (“JA”). CP 16, 331-32. After May 2007, Milne directed DAD to transfer title to the Property to the related entity JA. CP 17.

In early 2007, Milne requested Sterling provide a loan of approximately \$7.5 million for his companies so that he could satisfy two prior deeds of trust held against the Property and to obtain a construction loan for the Property at the same time. CP 647. The face amounts of the prior two loans totaled \$6.58 million and approximately \$6.2 million was outstanding as of May 2007. CP 647, 650-54, 656-60.

Sterling agreed to loan Milne \$7.535 million to refinance the Property on two conditions: 1) that Sterling’s deed of trust securing the loan was in first position against all existing liens, other lenders, and any contractors; and 2) Milne or his entities JA and DAD contributed substantial additional funds to the project and guaranteed the loan. CP 647. Based on these conditions, Sterling approved the loan on May 9, 2007. *Id.* As of May 9, 2007, no construction or other work had been done on the Property and Sterling understood none would be done until after the loan closed. *Id.*

On May 10, 2007, the day after Sterling approved its loan to Milne, Milne on behalf of DAD entered into a Private Works Contract

with Mountain West. CP 17, 21-25. To ensure compliance with Sterling's condition of its deed of trust being in first lien position, and to allow Milne to control when Mountain West began work so as to comply with the Sterling loan requirements, Mountain West and Milne expressly provided in the agreement:

Work shall not commence until Mountain West Construction, LLC receive [sic] written confirmation of project funding from the fanatical [sic] institution.

CP 23.

Despite this provision in the Private Works Contract, Mountain West began performing site and development work at the Property on May 14, 2007. CP 4-5. The project had not yet been funded (CP 648) and there is no evidence Mountain West was authorized to perform any work.

Sterling's loan closed on June 11, 2007. CP 648. As of that closing date, Sterling had no knowledge that any lienable work had been performed on the Property. *Id.*

Sterling instructed the loan proceeds to be used to satisfy the underlying loans on the Property. *Id.* By satisfying the prior deeds of trust through the refinance, and conditioning its loan on being in first position against all others, Sterling intended and believed it would stand in the shoes of the two prior lienholders whose obligations it satisfied, which obligations had become effective in 2006. CP 648, 650, 656.

Procedural Background

In April 2008, Mountain West recorded a Claim of Lien for its work on the Property in the principal amount of \$833,344.48. CP 7-9. Thereafter, Mountain West filed a Lis Pendens and a Complaint for Foreclosure of Materialman's Lien and Sums Due against JA, DAD, Sterling, and other entities claiming a lien interest in the Property. CP 3-6, 307-312.

Mountain West moved for summary judgment against Sterling seeking a determination of lien priority, specifically claiming that Mountain West commenced work before Sterling recorded its deed of trust. CP 316-24. Sterling agreed that Mountain West began work at the Property before Sterling funded the loan and recorded its deed of trust, and acknowledged this fact in a stipulation which states "Sterling Savings hereby stipulates that the materialman's lien of Mountain West is superior to Sterling's Savings' deed of trust interest." CP 429-30. The stipulation did not address equitable subrogation or any other equitable claims. *Id.* The trial court entered an order based on the stipulation on November 14, 2008. *Id.*

Thereafter, Sterling filed a Second Amended Answer in which it raised its affirmative defense of equitable subrogation. CP 444.

Mountain West filed another summary judgment motion, this time

against JA only, to recover the principal amount of the materialman's lien, attorneys' fees, costs, and interest. CP 75. Nowhere in its motion did Mountain West seek relief against any party except JA. CP 75-93. Mountain West's order, however, sought broader relief, prompting Sterling to respond. CP 205.

Sterling objected to the portion of the proposed order which declared that Mountain West shall be entitled to immediately foreclose on its lien and declared that Mountain West's lien is superior to all other lienholders. CP 205, 229. Sterling asserted its affirmative defense of equitable subrogation, stating that it is entitled to be subrogated to the two loans Sterling refinanced. *Id.* Sterling also stated that the prior stipulation regarding lien priority did not address equitable subrogation and only addressed the dates Sterling's and Mountain West's loans originated. *Id.* The evidence submitted with Sterling's response showed Sterling's loan refinanced two prior liens on the Property. CP 214-15.

Between the time of Sterling's response brief and the hearing on the motion, Sterling substituted new counsel. CP 623. At the hearing on Mountain West's motion, Sterling requested leave to file a motion to amend its answer because prior counsel had filed the Second Amended Answer, containing the equitable subrogation affirmative defense, without first obtaining leave of court. *Id.* The trial court instructed Sterling not to

file any motion prior to determination of the pending summary judgment motion. *Id.*

On July 17, 2009, the trial court issued its first order in a series of orders on Mountain West's summary judgment motion: its Order Granting in Part and Denying Part [sic] Mountain West Construction's Motion for Summary Judgment. CP 238-39. The trial court made certain findings in its order, one of which was that a portion of Mountain West's lien was undisputed and the remaining portion disputed. CP 239. The trial court also found "that Defendant Sterling Savings Bank's lien is junior to that of Mountain West Construction, LLC." *Id.* Below the findings, the trial court's order stated in full: "Plaintiff's Motion for Summary Judgment is GRANTED in the amount of \$381,475.95. Summary judgment as to the remaining \$419,878.63 of the materialman's lien is DENIED." *Id.* The trial court did not order that Mountain West was entitled to foreclose on its lien. *Id.*

Mountain West moved for reconsideration of the order based solely on the amount of the award; it did not move for reconsideration of the trial court's failure to allow it immediate foreclosure. CP 240-44. The trial court granted Mountain West's motion for reconsideration without

receiving any responsive briefs.¹ CP 250-51. The trial court then entered its Order Granting Mountain West Construction's Motion for Summary Judgment, in which it awarded Mountain West the full amount requested in its summary judgment motion and motion for reconsideration, ordered that Mountain West was entitled to immediately foreclose its lien on the Property, and ordered "said lien is prior, superior, and paramount to all other lienholders and will be foreclosed against those interests." CP 252-54. Mountain West then moved for fees, costs, and interest, to certify the summary judgment as final, and for a decree of foreclosure. CP 255-62.

Sterling moved to amend its answer to add the claim of equitable subrogation at the same time as Mountain West's motion for fees, certification, and a decree of foreclosure. CP 603-14. With its motion, Sterling filed a declaration attesting to the facts which form the basis for Sterling's claim of equitable subrogation. CP 646-48. Sterling also filed a stipulation in which DAD, JA, and Milne all consented to Sterling filing its amended answer. CP 663-64.

The trial court heard both pending motions on the same day, hearing the motion to amend first. The trial court denied the motion to amend, entering an Order Denying Motion to Amend Answer "based on

¹ Kitsap County Local Civil Rule 59(e) allows responsive briefs only upon the court's request. Sterling's new counsel did not receive a request for a response and only learned

the Stipulated Order entered on November 14, 2008.” CP 773-75. Thereafter, and based on the earlier denial of Sterling’s motion to amend, the trial court granted Mountain West’s motion for fees, certification, and a decree of foreclosure in its entirety. CP 289-94.

In sum, from July through October 2009, the trial court entered a series of orders all related to Mountain West’s summary judgment motion against JA and Sterling’s efforts to claim equitable subrogation, which orders are: 1) Order Granting in Part and Denying Part [sic] Mountain West Construction’s Motion for Summary Judgment (July 17, 2009); 2) Order Granting Plaintiff’s Motion for Reconsideration on Summary Judgment (September 18, 2009); 3) Order Granting Mountain West Construction’s Motion for Summary Judgment (September 18, 2009); 4) Order Denying Sterling’s Motion to Amend Answer (October 9, 2009); and 5) Order Supplementing/Amending Summary Judgment and Certifying Judgment as Final and Decree of Foreclosure (October 9, 2009). Sterling appeals the trial court’s orders on summary judgment and on the motion to amend. CP 776-93.²

of such request during this appeal; the record shows the request was sent only to the other parties’ counsel and Sterling’s former counsel. CP 926-27.

² While JA also appealed, its appeal is limited to the Order Supplementing/Amending Summary Judgment and Certifying Judgment as Final and Decree of Foreclosure. CP 295-97.

V. ARGUMENT

A. The standard of review for a motion for summary judgment is *de novo*.

An appellate court reviewing an order on summary judgment engages in the same inquiry as the trial court, considering all matters *de novo*. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004). Both the law and the facts will be reconsidered by the appellate court. *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). Summary judgment is appropriate only “if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.” *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006) (quoting *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993)). Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper. *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 295, 745 P.2d 1 (1987).

B. The trial court erred in making a finding in its initial order on Mountain West's motion for summary judgment that Sterling's lien is junior to Mountain West's lien.

1. The trial court erred in making a finding regarding priority because such finding exceeded the relief requested and the proof in Mountain West's motion.

A party moving for summary judgment must argue and prove 1) that no genuine issues of material fact exist and 2) that it is entitled to

judgment as a matter of law. CR 56(c). In considering whether the moving party is entitled to judgment as a matter of law, the court must “view the evidence presented through the prism of the substantive evidentiary burden.” *Sedwick v. Gwinn*, 73 Wn. App. 879, 885, 873 P.2d 58 (1994) (quoting *Adams v. Allen*, 56 Wn. App. 383, 393, 783 P.2d 635 (1989)). In other words, the court must ask itself whether the moving party has met the burden of satisfying the substantive requirements of its claim.

Mountain West failed to prove it was entitled to summary judgment on the issue of priority over Sterling. Mountain West did not move for summary judgment against Sterling in its May 2009 summary judgment motion at all. CP 75-93. The relief Mountain West sought in its motion was “for an order of summary judgment against James Alan, LLC (‘JA’) for the principal amount of its materialmen’s lien (\$801,354.58), and its attorneys’ fees, costs, and interest.” CP 75. The only three issues presented by Mountain West on summary judgment were:

1. Whether Mountain West is entitled to summary judgment against JA for the amount it is owed under the Contract and change orders.
2. Whether JA’s counterclaim should be dismissed because Mountain West did not delay the Project, nor did it perform defective work.

3. Whether Mountain West is entitled to recover its attorneys' fees, costs, and interest under the Contract and/or the mechanic's lien statute.

CP 80. Every argument in its motion was directed to JA; not one argument was made as to Sterling regarding priority or immediate foreclosure to Sterling's detriment. CP 80-92.

Despite Mountain West's narrow grounds for summary judgment, and the material issues raised in Sterling's response, the trial court made a finding that Sterling's lien is junior to Mountain West's lien. This order was made in error because Mountain West did not present evidence of its entitlement to priority, thus could not have met its substantive evidentiary burden of priority.

When this Court asks itself whether Mountain West met its burden of satisfying the substantive requirements for its claim of priority, the answer must be "no" because Mountain West did not present any elements or proof of such claim in its summary judgment argument. Only when Sterling advised the court of that issue in response did Mountain West attempt to claim priority on reply. That is not enough. Because Mountain West did not meet its burden of proving with the evidence that it was entitled to priority, the order on summary judgment should not have included a finding regarding priority.

Not only did Mountain West fail to meet its burden of proving priority, granting an order beyond the relief requested in the motion is improper. A trial court's ability to grant summary judgment beyond the moving party's request for relief is limited. *See Leland v. Frogge*, 71 Wn.2d 197, 201, 427 P.2d 724 (1967) (finding a court may not grant summary judgment to a party when that party has not actually entered a counterclaim). Granting relief beyond that which is requested deprives the nonmoving party notice and opportunity to be heard. *See* 14A Washington Practice: Civil Procedure § 25.13 (2d ed. 2003) at 113; *see also* 16D C.J.S. Constitutional Law § 1793 (2009) ("due process requires that a party be given a reasonable opportunity to contest the [summary judgment] motion"). Sterling was not named as a subject of Mountain West's motion for summary judgment or mentioned in the relief requested, issues, or argument sections at all. CP 75-93. Any finding or judgment against Sterling is inappropriate because the failure to include relief against Sterling in Mountain West's "request for relief" deprived Sterling of adequate notice and opportunity to defend its priority as a matter of law.

Because Mountain West failed to meet its burden of proof regarding priority, and because Mountain West did not seek an order regarding priority in its motion, the trial court erred in including a finding

of priority in its order on summary judgment. Therefore, the finding of priority on summary judgment should be reversed.

2. The trial court erred in making a finding regarding priority on summary judgment because genuine issues of material fact exist regarding the applicability of equitable subrogation, which affects priority.

a. The November 14, 2008 stipulation is not a basis for making a finding regarding priority because Sterling's claim for equitable subrogation is outside the meaning and scope of that stipulation.

Mountain West argued in its reply brief that the November 14, 2008 stipulation between the parties was the final word on priority of the two parties' liens and that any claim for equitable subrogation after that was improper. CP 235-36. This is wrong.

Courts interpret stipulations in the same manner as contracts. *Balmer v. Norton*, 82 Wn. App. 116, 121, 915 P.2d 544 (1996). The purpose of contract interpretation is to ascertain the parties' intentions. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). To determine the parties' intent, courts examine the circumstances surrounding the contract's formation as well as the written contract. *Id.* Here, the written language of the stipulation and the context surrounding its formation show that the parties did not intend it to foreclose an equitable subrogation argument. In fact, by settling the issue of record priority, the stipulation determined a threshold issue to applying the

doctrine of equitable subrogation.

By its express terms, the stipulation determines only a narrow issue of timing: that Mountain West commenced work before Sterling's deed of trust was recorded. It related only to a prior summary judgment filed by plaintiff to establish when Mountain West commenced work. Sterling's former counsel set forth the circumstances surrounding the stipulation:

The issue presented to the Court on the previous partial summary judgment against Sterling Savings was defined by Mountain West as "narrow and straightforward." Mountain West asserted merely that it commenced work prior to the time the Sterling Deed of Trust was filed, and Sterling Savings Bank agreed to this priority as to filing as a result of the Order that was entered.

CP 205. As such, the stipulation on its face settles only the parties' record interests. It does not account for equitable considerations relating to priority, such as subrogation. If the court applied subrogation, Sterling's interest would be senior in priority to Mountain West's despite the stipulated fact that it recorded after Mountain West began work. *See Bank of America, N.A. v. Prestance Corp.*, 160 Wn.2d 560, 565, 160 P.3d 17 (2007). The context surrounding the stipulation's formation confirms that it was not intended to foreclose an equitable subrogation argument. Because issues pertaining to equitable subrogation were not raised or discussed prior to the stipulation, Sterling could not have intended to limit

its ability to advance such an argument in the future.

The fact that Sterling previously stipulated that Mountain West commenced work before Sterling recorded its deed of trust does not end the inquiry; it is only the beginning. If the law were otherwise, the doctrine of equitable subrogation would not exist because all lien priority issues would turn solely upon chronologic events and disregard of contrary agreements, intent, or circumstances. Equitable subrogation is outside the meaning and scope of the November 14, 2008 stipulation, thus is no basis for a finding regarding priority. At the very least, a genuine issue of material fact exists regarding the meaning and scope of the November 14, 2008 stipulation, making it an improper basis for any finding of priority.

- b. Equitable subrogation applies or, at the very least, a genuine issue of material fact exists regarding Sterling's claim of equitable subrogation.

The doctrine of equitable subrogation exists to ensure "complete and perfect justice between the parties without regard to form, and its purpose and object is the prevention of injustice." *Bank of America, N.A.*; 160 Wn.2d at 565 (quoting *Cox v. Wooten Bros. Farms, Inc.*, 271 Ark. 735, 737-38, 610 S.W.2d 278, 280 (1981)). Equitable subrogation seeks to preserve the proper order of priorities and prevent junior lienholders from receiving an unearned windfall. *Id.* at 565. The Washington State

Supreme Court adopted the version of equitable subrogation expressed in the Restatement (Third) of Property: Mortgages § 7.6 (1997), embracing the doctrine's importance in this state's jurisprudence. *Bank of America, N.A.*, 160 Wn.2d at 582.

Sterling asserted its defense of equitable subrogation as an affirmative defense in its Second Amended Answer and also in reply to Mountain West's motion for summary judgment. CP 205, 444. Sterling was equitably subrogated into the two prior deed of trust lien positions when those loans were paid by the Sterling loan. By this payoff, Sterling intended to gain first priority interest in the Property. CP 647. But for the satisfaction of these loans by Sterling, the Mountain West lien would be junior. Mountain West's interests in the Property also were to have been junior to Sterling based on the conditions of Sterling's loan and on the provision in the Private Works Contract. CP 23, 647. These facts meet the necessary elements of equitable subrogation or, at least, create a genuine issue of material fact as to whether equitable subrogation applies. Therefore, a finding of priority in the face of Sterling's affirmative defense of equitable subrogation was in error.

- c. The trial court's instruction for Sterling not to file a motion to amend while the summary judgment issues were pending denied Sterling the opportunity for its full day in court.

Sterling substituted counsel after filing its response brief and prior to the hearing on Mountain West's summary judgment motion against JA. CP 623. At the summary judgment hearing, Sterling requested an opportunity to file a motion to amend its answer to cure any past procedural defects by not having sought leave of court prior to filing its Second Amended Answer in which it asserted its affirmative defense of equitable subrogation. *Id.* The trial court refused to allow Sterling the opportunity to cure the procedural error at that point; instead instructing Sterling to wait until the issues on summary judgment had been resolved. *Id.* Refusal to allow Sterling to correct a prior procedural error had the effect of denying Sterling its day in court by denying Sterling the opportunity to base its arguments for its affirmative defense of equitable subrogation on a properly filed amended answer.

3. While the trial court erred in making a determination of priority based on the record, its "finding" of priority in the summary judgment order is superfluous.

A trial court's factual findings on summary judgment are superfluous and entitled to no weight. *Hamilton v. Huggins*, 70 Wn. App. 842, 848-49, 855 P.2d 1216 (1993).

The function of a summary judgment proceeding is to determine whether a genuine issue of material fact exists. It is not, as appears to have happened here, to resolve issues of fact or to arrive at conclusions based thereon. *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 424-25, 367 P.2d 985 (1962). Consequently, the findings of fact and conclusions of law entered here are superfluous and may not be considered to the prejudice of the [nonmoving party]. *Washington Optometric Ass'n v. County of Pierce*, 73 Wn.2d 445, 438 P.2d 861 (1968)[.]

Id. at 849 (quoting *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978)) (emphasis omitted).

The partial summary judgment order contains a finding that “Defendant Sterling Savings Bank’s lien is junior to that of Mountain West Construction, LLC.” CP 239. As discussed above, this issue was not presented to the trial court in Mountain West’s motion. It was not part of the relief requested by plaintiff in its motion against JA for a liquidated dollar amount. CP 75. The trial court’s finding that Sterling’s lien is junior to Mountain West’s lien is a superfluous inclusion of a contested fact.

C. The post-reconsideration orders regarding lien priority and immediate foreclosure should be reversed because the orders exceeded the relief requested, exceeded the scope of reconsideration, and are without basis in the record.

Mountain West moved for reconsideration of the trial court’s order granting in part and denying in part Mountain West’s summary judgment motion on one basis only: the amount of the award. CP 240-44. The trial court granted the motion for reconsideration. CP 250-51. In its order on

reconsideration, the trial court concluded: “The Court concludes Mountain West’s specific contentions regarding the award of interest and retainage have merit, and the case can be fully adjudicated on the record to date.” CP 251. Despite the limited grounds on the motion for reconsideration and the limited conclusion in the order on reconsideration, the trial court then entered an order granting Mountain West’s motion for summary judgment, which order stated:

Mountain West shall be entitled to immediately foreclose its lien on the subject real property for the entire amount that it is owed, and said lien is prior, superior, and paramount to all other lienholders and will be foreclosed against those interests

CP 254. This portion of the order was entered in error and should be reversed.

1. Orders on lien priority and foreclosure are beyond the proof, beyond the relief requested, and beyond the scope of reconsideration.

The trial court added orders on two new issues into its order granting summary judgment, which issues were not addressed on reconsideration or in the original motion: immediate foreclosure and lien priority. No basis exists for these orders.

As discussed above in Section V.B.1, *supra*, Mountain West had the burden of proving its claims on summary judgment. Mountain West did not meet that burden. Mountain West failed to request relief of lien

priority and foreclosure, let alone to prove those claims in its motion. CP 75-93. It also failed to address those issues or to prove them on reconsideration. CP 240-44. Because Mountain West did not meet its burden of proof regarding lien priority and immediate foreclosure, entry of orders on these matters denied Sterling of due process, especially considering they were entered after a motion on reconsideration which did not address either matter. Therefore, and for all of reasons argued in Section V.B.1, *supra*, the trial court lacked any basis to enter orders on these two issues and this Court should reverse those orders.

2. To the extent the trial court relied on the finding in its prior partial summary judgment order when entering the order granting summary judgment, such reliance is error because the finding is irrelevant.

The trial court's post-reconsideration order on summary judgment did not explain why it included relief against Sterling when neither Mountain West's motion for summary judgment nor its motion for reconsideration requested such relief. CP 252-54. The order went beyond simply granting or denying the relief requested in the motions, yet nothing in the record explains why the trial court ordered Sterling's lien inferior and ordered immediate foreclosure. To the extent the trial court relied on its superfluous finding regarding priority in the July 2009 partial summary judgment order, such reliance is error.

It is error for a trial court to rely on findings of fact entered in a partial summary judgment order when those findings are “beyond the pleadings and prayer for relief of the moving party.” *Hamilton*, 70 Wn. App. at 849. The finding that Mountain West’s lien has priority over Sterling’s lien was beyond Mountain West’s motion for summary judgment and its requested relief on summary judgment. Mountain West’s motion states that it “moves this Court for an order of summary judgment against James Alan, LLC (‘JA’)”. CP 75 (emphasis added). There is no finding against Sterling anywhere. Whether Sterling or Mountain West has priority is a separate issue from whether JA is liable to Mountain West (and Sterling does not object to a monetary judgment having been entered against JA). Therefore, under *Hamilton*, inclusion of a finding regarding priority is superfluous and to the extent the trial court relied on it in issuing its Order Granting Mountain West’s Motion for Summary Judgment, such reliance is erroneous and the order based upon such reliance should be reversed.

D. The trial court abused its discretion in denying Sterling’s motion to amend its answer.

1. The standard of review for a motion to amend is abuse of discretion.

Appellate courts review a trial court’s denial of a motion to amend an answer for abuse of discretion. *Walla v. Johnson*, 50 Wn. App. 879,

882, 751 P.2d 334 (1988). The trial court's discretion must not be "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Generally, it is an abuse of discretion to fail to give any reason for denying a motion to amend. *Id.* at 883, 885 (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962) ("outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion")). "The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party." *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 166, 736 P.2d 249 (1987).

2. Justice required leave to amend Sterling's answer.

Under CR 15(a), leave to amend a pleading "shall be freely given when justice so requires." This rule serves to facilitate a proper decision on the merits and to avoid formal impediments to litigation. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983).

Justice required the trial court to allow Sterling to assert and present an equitable subrogation affirmative defense. As discussed above, equitable subrogation should apply to the facts and circumstances in this case. *See supra* Sec. V.B.2.b. If the doctrine applies, it will avoid an undeserved windfall to Mountain West in excess of \$800,000 (the amount

of Mountain West's lien). If it does not apply, then Mountain West will be entitled to foreclose its lien to obtain these funds. Regardless, the trial court did not even need to decide the merits of equitable subrogation on Sterling's motion to amend. The trial court's failure to allow Sterling to argue equitable subrogation deprived Sterling of a significant entitlement without considering all the facts and law potentially applicable in this case.

At a minimum, considering the equitable considerations of the parties, the trial court abused its discretion in failing to allow Sterling to amend its answer. Equitable considerations the trial court ignored include: 1) Mountain West breaching its own contract with DAD by beginning construction before Sterling's funding was confirmed, possibly with the purpose of surreptitiously gaining priority; 2) Mountain West having had no colorable claim to priority but for the Sterling loan which satisfied substantial prior encumbrances; 3) Mountain West benefiting from Sterling's financing when it received payments for its work from draws on the Sterling loan; 4) Sterling raising its claim to rectify any procedural errors in its previously filed Second Amended Answer immediately upon obtaining new counsel (CP 623); 5) no trial date had been set; 6) discovery was ongoing; and 7) other parties in the lawsuit agreed to Sterling's amendment (CP 663-64). In light of these equitable concerns, the policy

of freely granting leave to amend in the interest of justice, and our courts' preference for deciding claims on the merits, justice required allowing Sterling to amend its answer.

3. Amending the answer would not have prejudiced Mountain West.

Because prejudice is the touchstone for the denial of a motion to amend, it is an abuse of discretion to deny such a motion when no prejudice to the opposing party would result. *Estate of Randmel v. Pounds*, 38 Wn. App. 401, 404, 685 P.2d 638 (1984). A showing of prejudice requires more than an inconvenience of responding to a new claim or defense. *Thomas v. French*, 30 Wn. App. 811, 817, 638 P.2d 613 (1981), *rev'd on other grounds*, 99 Wn.2d 95 (1983). In the absence of prejudice to the nonmoving party, mere delay does not justify denial of a motion for leave to amend a pleading. *Caruso*, 100 Wn.2d at 349-50.

Mountain West would not have been prejudiced by allowing Sterling leave to amend its answer, nor did it claim to be prejudiced. Even if Mountain West was prejudiced, the equitable benefits of allowing Sterling to amend its answer outweigh any prejudice caused to Mountain West.

First, as discussed above in section V.B.2.a, *supra*, the text of the stipulation and the parties' intent show that the stipulation was designed to

resolve only record priority, meaning the timing of Sterling's lien versus Mountain West's lien. The stipulation did not address equitable subrogation. CP 429-30.

Second, Mountain West still would have had the opportunity to contest the merits of equitable subrogation at trial even if the trial court granted Sterling's motion to amend. Sterling's motion did not ask the trial court to determine the merits of equitable subrogation, but simply requested the trial court to consider all relevant facts and legal doctrines before determining the parties' rights. CP 603-14. That is why CR 15 mandates that courts shall freely grant leave to amend. Full consideration of all relevant facts cannot prejudice Mountain West, only ensure a more thorough and informed result. Moreover, as discussed above, the priority finding was superfluous. Therefore, no prejudice would inure to Mountain West by permitting Sterling to amend its Answer.

Third, no undue delay would result from the amendment. No trial date had been set at the time of the hearing on Sterling's motion to amend nor had any discovery deadlines been set. Discovery relevant to the equitable subrogation claim is limited and Sterling had already produced documents related to that affirmative defense as part of its pleadings. Moreover, Mountain West's lien would have continued to accrue interest during any delay.

In sum, there was no prejudice to Mountain West in allowing Sterling to amend its answer to add a formal defense of equitable subrogation. Justice required leave to amend and it was manifestly unreasonable for the trial court to deny Sterling's motion. Therefore, this Court should reverse such denial.

4. The trial court's decision was manifestly unreasonable, based on untenable grounds and for untenable reasons, thus is an abuse of discretion.

The sole reason given by the trial court for denying Sterling's motion to amend was the November 14, 2008 stipulation. CP 773-75. But, as discussed above, the November 14, 2008 stipulation is not a sufficient basis for denying Sterling's motion to amend. Questions remain regarding the very scope and meaning of the stipulation. *See* section V.B.2.a, *supra*. The date when work commenced in relation to the date of recording Sterling's deed of trust securing the loan for the payment of the work, while relevant, is not the sole determinant of priority, particularly if such activities were contrary to express agreements of the parties to the construction contract and contrary to the intent and instructions of the lender. Judicial examination of these circumstances is a prerequisite to a correct legal and equitable result and ignoring them is a manifest abuse of discretion. Denying Sterling's motion to amend based on the questionable stipulation, alone, is not enough. This is especially so considering the

facts in evidence regarding Sterling's claim of equitable subrogation and the lack of prejudice to Mountain West. Because the trial court manifestly abused its discretion and based its decision on untenable grounds, this Court should reverse the trial court's decision to deny Sterling's motion to amend.

E. The trial court erred in entering a decree of immediate foreclosure because the decree was based on the prior erroneous orders.

The final order in the series of erroneous orders entered by the trial court in this matter was its Order Supplementing/Amending Summary Judgment and Certifying Judgment as Final and Decree of Foreclosure, in which the trial court awarded Mountain West a decree of foreclosure to foreclose against JA and lienholders' interests in the Property, including Sterling. CP 791. The trial court entered this decree of foreclosure after having abused its discretion in denying Sterling's motion to amend and after its prior erroneous summary judgment orders (in which it first did not award immediate foreclosure, then after reconsideration on a different issue, ordered that Mountain West was entitled to immediately foreclose). Entry of a decree of foreclosure in favor of Mountain West effectively ended the case without any trial and full consideration of the facts. Such result is inequitable considering the outstanding issues regarding Sterling's

claim for equitable subrogation. Therefore, this Court should reverse the trial court's entry of a decree of foreclosure.

VI. CONCLUSION

For the reasons stated above, this Court should: 1) reverse and remand the finding regarding lien priority in the Order Granting in Part and Denying Part [sic] Mountain West's Motion for Summary Judgment; 2) reverse and remand the Order Granting Mountain West's Motion for Summary Judgment as to the orders on priority and immediate foreclosure; 3) reverse the Order Denying Sterling's Motion to Amend Answer; and 4) reverse and remand the decree of foreclosure in the Order Supplementing/Amending Summary Judgment and Certifying Judgment as Final and Decree of Foreclosure.

DATED this 21st day of January, 2010.

RYAN, SWANSON & CLEVELAND, PLLC

By  _____
Jerry Kindinger, WSBA #5231
Brittenae Pierce, WSBA #34032
Attorneys for Appellant Sterling Savings
Bank

DECLARATION OF SERVICE

I declare that on the 21st day of January, 2010, I caused to be served the foregoing document on counsel, as noted, at the following addresses:

VIA MESSENGER

Andrew R. Chisholm Esq.
Montgomery Purdue Blankinship
& Austin PLLC
701 Fifth Avenue, Suite 5500
Seattle, WA 98104-7096

VIA EMAIL & U.S. MAIL

Richard B. Shattuck Esq.
Law Office of Richard B.
Shattuck
4102 NW Anderson Hill Road
Silverdale, WA 98383

VIA MESSENGER

Stephan E. Todd Esq.
Law Office of Stephan E. Todd
14319 15th Drive SE
Mill Creek, WA 98012

VIA EMAIL & U.S. MAIL

Brian L. Parker Esq.
25845 164th Avenue SE
Covington, WA 98042-8248

VIA EMAIL & U.S. MAIL

Laurin S. Schweet, Esq.
Law Offices of Laurin S.
Schweet
2955 80th Avenue SE, Suite 102
Mercer Island, WA 98040

FILED
COURT OF APPEALS
DIVISION I
10 JAN 22 PM 12:10
STATE OF WASHINGTON
BY _____



Brittenae Pierce

Dated: January 21, 2010

Place: Seattle, WA

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 21 PM 3:24