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DIVISION II

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STATE OF WASHINGTON
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II
BY _____
DEPUTY

CALPORTLAND COMPANY, a California corporation,

Appellant,

v.

LEVELONE CONCRETE, LLC, a Washington limited liability company;
DALTON BROOKS and YULIA BROOKS, and their marital community;
TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA, a
Connecticut corporation; and FERGUSON CONSTRUCTION, INC., a
Washington corporation,

Respondents.

REPLY OF APPELLANT

1102 Broadway Plaza, #403
Tacoma, Washington 98402
Tacoma: (253) 627-1091

SMITH ALLING, P.S.
Russell A. Knight, WSBA #40614
Michael McAleenan, WSBA #29426
Attorneys for Appellant

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I. ARGUMENT IN DIRECT REPLY

A. **CalPortland adequately assigned error to the trial court's decision granting summary judgment.**

Respondents' brief argues that CalPortland waived any argument regarding pleading "foreclosure and adjudication of the validity of its lien in its complaint." Respondent's Brief, p. 4. This argument fails for two reasons. First, as Respondents concede, CalPortland explicitly raised the issue in the Appellant's brief at pp. 13-16. Second, CalPortland agrees it must prove the validity of its lien claim and alleged the necessary facts to do so in its complaint. The dispute is whether the word "foreclosure" must be used in the complaint to prove the validity of the lien. As discussed in the Appellant's opening brief and below, CalPortland's complaint was properly pled given security for the lien in place at the time the complaint was filed.

CalPortland sufficiently identified each of the trial court's errors to meet the requirements imposed by RAP 10.3(g). Generally, the errors for which a reversal is sought should be specifically pointed out in the brief. *In re Whittier's Estate*, 26 Wn.2d 833, 843-44, 176 P.2d 281 (1947).

"Even though the rules call for an assignment of error, as a general rule, a formal assignment is unnecessary; and it is sufficient if the alleged errors

I. ARGUMENT IN DIRECT REPLY

A. **CalPortland adequately assigned error to the trial court's decision granting summary judgment.**

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are clearly stated under the head of points and authorities, or errors relied upon for reversal or through propositions.” *Id.*

Even if an assignment of error is not listed under a separate heading, “when a party leaves no uncertainty to the finding challenged, the Court will not waive those arguments for failure to strictly comply with RAP 10.3(g).” *In re Disciplinary Proceeding against Conteh*, 175 Wn.2d 134, 143-44, 284 P.3d 724 (2012); *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709-10, 592 P.2d 631 (1979). This complies with RAP 1.2(a), which requires liberal construction, and provides that technical violations of the rules will not ordinarily bar appellate review.

In the immediate case on appeal, CalPortland directly addressed what Travelers and Ferguson assert was waived at pp. 13-16 of CalPortland’s opening brief, including directly quoting the Court’s ruling which stated: “CalPortland must adjudicate the merits of the underlying lien, and must seek to foreclose on it. Suing on the bond itself is insufficient. They must first prove the validity of the underlying lien.” Appellant’s Brief pp. 13-15.

The second reason CalPortland adequately assigned error is that CalPortland *agrees* it must prove the validity of its lien and has never argued otherwise. To the extent Travelers argues the word “foreclosure”

must appear in the complaint, *Stonewood* makes clear it is appropriate to “execute” on a bond and the word “foreclosure” is not required. *Stonewood Design Inc. v. Heritage Homes Inc.*, 165 Wn. App. 720, 725, 269 P.3d 297 (2011). As argued in the opening brief, adjudicating the merits of the lien is separate from collecting the collateral if the case is reduced to judgment. While “foreclosure” is the appropriate term to obtain payment from equity in real property, this case concerns security in the form of a bond for which the “term foreclosure” is inappropriate.

B. CalPortland must prove the validity of its lien.

Travelers and Ferguson’s brief attempts to defeat an argument that CalPortland did not make at the trial court, and is not making now. Travelers and Ferguson contend, in part, that CalPortland failed to “adjudicate the validity or enforceability of its lien.” Respondent’s Brief, p. 8. This requirement is not in dispute. At trial, CalPortland must prove the validity of its lien and that it complied with the requirements of RCW 60.04 *et. seq.* The relief sought by CalPortland in this appeal is to remand this matter to the trial court to provide CalPortland with an opportunity to adjudicate its claim, which it was denied.

CalPortland’s complaint alleges the following facts and requests for relief:

- “CalPortland furnished ready mix concrete and related materials. . . for the improvement of the project” which remain unpaid. CP 9.
- “CalPortland caused a Claim of Lien to be recorded against the Project with the Clark County Recorder’s Office. . . within 90 days from the last date that CalPortland furnished materials for the improvement of the Project.” CP 9.
- “A release of lien bond was recorded pursuant to RCW 60.04.161 to release the aforementioned Project property from CalPortland’s Claim of Lien.” CP 9.
- CalPortland’s complaint was filed within eight (8) months of recording the claim of lien.
- CalPortland cites the lien foreclosure statute, RCW 60.04 *et. seq.* in both the cause of action and prayer for relief. CP 9-10.
- CalPortland then seeks a judgment against Ferguson and Travelers in the amount of “any sum *as CalPortland may recover as a result of its Claim of Lien*, together with the costs of suit.” (Emphasis added). CP 9.

CalPortland is not, as Travelers suggests, asking for disbursement of the total bond without proving the merits and validity of its underlying lien claim. The bond simply replaced the real property as security for payment of CalPortland’s claim of lien, if it is proven.

C. CalPortland is not required to sue for “foreclosure” where there is no real property to foreclose.

Travelers and Ferguson argue that to prove the validity of a lien, even where the property has been released, the word “foreclose” must appear in the complaint. Respondents concede in their brief that they are

not arguing a foreclosure of real property is required, but that “Travelers’ position that CalPortland was required to bring an action to foreclose its lien.” Respondent’s Brief, p. 8, footnote 4.

As noted above, there is no disagreement that the merit and validity of the lien must be adjudicated. The argument that the word “foreclose” is required to adjudicate the merits and validity of the lien is similar to the argument rejected in *Stonewood*. In *Stonewood*, the appellant argued, “while the court’s order provides that Stonewood is entitled to ‘execute’ on the bond, the order cannot obligate the surety because it does not specifically ‘foreclose’ the lien as required by *DBM*.” *Stonewood Design Inc. v. Heritage Homes Inc.*, 165 Wn. App. 720,725, 269 P.3d 297 (2011). The court rejected that argument, writing: “This argument elevates form over substance and misreads *DBM*, which requires that the validity of the mechanics’ lien be litigated before execution on the release of lien bond is appropriate.” *Id.*

The same analysis should apply in our case. There is no dispute that the validity of the mechanics lien must be established by CalPortland. It expressly sought to do so in its complaint. Because the action was no longer a foreclosure action, the word foreclosure was not used to prove the validity of the lien. A requirement that the word foreclosure be included

in the complaint elevates form over substance and would be contrary to the Court's holding in *DBM* and *Stonewood*.

CalPortland's position that the word "foreclosure" is not required is also supported by the specific language in the bond in lieu of claim statute. Nowhere in RCW 60.04.161 does it require a lienholder to "foreclose" upon the bond. Instead, it requires that the lienholder file "an action to *enforce* the lien." RCW 60.04.161 (emphasis added).

Similarly, RCW 60.04.141 does not specify the means by which a lienholder files its action, but simply requires that "an action" be filed. As argued in the Appellant's opening brief, once a bond in lieu of claim has been posted the action is against the bond, not the real property. and the term "foreclosure" would have been inappropriate and inaccurate. A party does not "foreclose" on a bond any more than a party can "garnish" real property.

The analysis in *Stonewood* is consistent with the language this Court used in *Olson Eng'g, Inc. v. KeyBank Nat. Ass'n*, 171 Wn. App. 57, 66, 286 P.3d 390 (2012), writing "the lien claimant... is entitled to the release of the lien bond proceeds if it establishes the validity and correctness of its lien." A separate cause of action for foreclosure of the real property that no longer acts as security is not required.

D. DBM requires the validity of the lien be adjudicated; it does not require the Plaintiff identify “foreclosure” as a cause of action.

Travelers and Ferguson quote significant portions of *DBM Consulting Engineers, Inc. v. U.S. Fidelity and Guar. Co.*, 142 Wn. App. 35, 170 P.3d 592 (2007). It is the primary case Travelers and Ferguson relied on in their motion for summary judgment and in their responsive brief on this appeal. However, Travelers and Ferguson misread the case, just as the surety in *Stonewood* misread DBM. The *Stonewood* Court rejected the same arguments being made here, which it characterized as a form over substance argument.

DBM brought a complaint against Soos Creek alleging breach of contract, unjust enrichment, and foreclosure of its mechanic’s lien. *Id.* at 37. After the complaint was filed, an RCW 60.04.161 Bond in Lieu of Claim was filed releasing the property. DBM’s lawsuit went to a jury trial ***on the breach of contract claim alone***. DBM did not adjudicate the merits of its lien claim or whether it had complied with the lien statute. *Id.* at 38. The jury found in favor of DBM on the breach of contract claim and DBM then attempted to collect the judgment from the surety (which was Travelers, the successor in interest to U.S. Fidelity and Guar. Co. and the same party as the present case). *Id.*

Travelers refused to pay the judgment and DBM brought an action against Travelers. The Court held that an RCW 60.04.161 bond “transfer[s] the lien from the property to the bond to permit alienation of the property [but] it is not a concession that the lien is valid and correct. *Id.* at 41. The Court noted that “DBM could and should have obtained a judgment upon the lien from the trial court in its action against Soos Creek, proving that the services provided were professional services that resulted in an improvement to the property as required by the mechanic's lien statute.” *Id.* at 41.

In the present case, CalPortland was never afforded the opportunity to prove the validity of its lien. Importantly, CalPortland’s complaint sufficiently alleges the necessary facts to obtain a judgment upon the lien and prove that CalPortland provided materials or labor that resulted in an improvement to the property as required by the mechanic's lien statute. In other words, CalPortland’s complaint was sufficiently pled to do exactly what the *DBM* court advised was required.

If CalPortland proves the facts it alleges in its complaint at trial, it will be able to obtain findings of fact and a judgment with language identical to the language of the judgment in *Stonewood*. The judgment in *Stonewood* provided that the plaintiff “proved the facts necessary to execute upon the release of lien bond.” *Stonewood Design, Inc. v.*

Heritage Homes, Inc., 165 Wn. App. 720, 722, 269 P.3d 297, 298 (2011)
(citing Clerk's Papers).

The same language of the *Stonewood* judgment, which was sufficient to entitle the Plaintiff to the bond proceeds, may be obtained in our case even though the word "foreclose" is not used in the complaint. DBM simply requires the "validity of the lien be adjudicated" and found valid. *DBM* at 40. It does not, as Travelers suggests in its brief, require a cause of action for foreclosure or the word "foreclosure" appear in the complaint.

E. The Legislature's intent in passing the Bond In Lieu of Claim Statute is relevant.

Travelers and Ferguson contend that the canons of statutory construction are only applicable where the statute is ambiguous, but offers an interpretation of RCW 60.04.161, completely different from that offered by CalPortland. CalPortland contends that where a Bond in Lieu of Claim has been posted, the real property is released from the action and the bond serves as security. Travelers, on the other hand, argues that the property has not been released and that the owner of the property must still be a defendant in the action.

If RCW 60.04.161 is ambiguous, the Court may attempt to discern the Legislature's intent. In doing so, specific provisions control over

general ones, and later provisions within a chapter control over earlier ones. *State v. J.P.*, 149 Wn.2d 444, 453-54, 69 P.3d 318 (2003). These principles instruct analyzing this case under RCW 60.04.161. The only action that could have been brought was an action against the “bond in lieu of claim.” Upon determining that RCW 60.04.161 governs this action, the question of whether service on the owner of the real property no longer securing the lien is resolved. There was no requirement in this case to serve the real property owner because the property had been released prior to the time the lawsuit was filed.

Alternatively, if the two statutes conflict in their procedural requirements, the court “consider[s] and harmonize[s] statutory provisions in relation to each other and interpret a statute to give effect to all statutory language. [The Court avoids] construing a statute in a manner that results in ‘unlikely, absurd, or strained consequences.’ When statutes conflict, specific statutes control over general ones.” *Mason v. Georgia-Pac. Corp.*, 166 Wn. App. 859, 870, 271 P.3d 381, *review denied*, 174 Wn.2d 1015, 281 P.3d 687 (2012) (internal citations omitted). Travelers’ argument that statutory interpretation is misplaced is an attempt to lift form over substance, and ignore the intent of the legislature in enacting the bond in lieu of claim statute.

F. Public policy is served by upholding the intent of the bond in lieu of claim statute and alienating the property.

Travelers and Ferguson argue there is a public policy reason to require a lawsuit against the owner of real property despite the fact it has been released because the owner might be liable under a different theory of liability.

Travelers and Ferguson cite *Irwin Concrete, Inc. v. Sun Coast Properties, Inc.*, 33 Wn. App. 190, 194, 653 P.2d 1331 (1982), in which the Court found the lien by a subcontractor to be invalid, but found for the subcontractor on an unjust enrichment theory of liability. Importantly, the *Irwin* case did not concern an RCW 60.04.161 bond in lieu of claim and there was no bond or surety defending in the action. *Id.*

In our case, CalPortland made an election of remedies not to pursue Costco on an unjust enrichment theory of liability in large part because Costco had been released by the bond. CalPortland determined that the bond itself was sufficient to satisfy CalPortland's lien claims, including attorney fees, if it were to prevail. Moreover, Costco did not receive a benefit for which it did not pay because it paid Ferguson in full on the contract to improve Costco's real property. If CalPortland brought an action against Costco alleging either a lien claim or an unjust enrichment claim, Costco would likely prevail on a motion to dismiss

potentially subjecting CalPortland for a judgment in favor of Costco for attorney's fees incurred in the action.

It is important to note that if the bond is insufficient to fully pay CalPortland's lien claim once it is proven, CalPortland will be precluded from making a claim against Costco because Costco was not named as a defendant in the complaint. In short, CalPortland's election to pursue the bond, rather than the owner of the real property in keeping with the intent of the statute, does limit CalPortland's ability to collect from Costco, but does not preclude CalPortland from collecting from the bond if the lien is proven.

Travelers and Ferguson's argument that there is a reason to maintain a claim against the property owner is also internally inconsistent with other portions of its brief. Without citing any authority, Travelers and Ferguson assert:

[I]n asserting claims against lien release bonds, for years experienced Washington construction lawyers have made a practice of complying with the letter of RCW 60.04.141 and 161 and joining and serving property owners, and then stipulating to dismissing them in exchange for the principal and surety's agreement not to base any defense to the bond claim on that dismissal.

Respondents' Brief, p. 19.

If there was actually a reason to require a real property owner to defend in a lawsuit after the real property had been released and a bond posted in its place, it is difficult to understand why Travelers suggests stipulating to the dismissal of the property owner.

The intent of an RCW 60.04.161 statute is to alienate the property. This allows the property to be sold free of the encumbrance. When the property is sold to a new owner, Travelers and Ferguson's argument that the owner of the real property continues to be liable is even more strained. Under Travelers and Ferguson's logic, a buyer who became the new owner would be subject to a potential deficiency judgment despite having no relationship with the parties who improved the property.

For these reasons, public policy is served by enforcing the letter and intent of RCW 60.04.161, and avoiding unnecessary litigation in releasing property owners from the obligation once a bond has been posted.

G. Costco was not a necessary defendant because its real property was released before the complaint was filed.

Travelers and Ferguson do not respond to CalPortland's argument that Costco need not be served with a summons and complaint because it was released before the lawsuit was filed.

The order of events is critically important and different from that of *DBM, Stonewood* and *Olson*. In each of these cases the Plaintiff named the owner of the real property as a defendant because the lawsuit was filed before the RCW 60.04.161 bond was posted releasing the real property. In our case, the lawsuit was filed after Costco's real property was released as security from the obligation through the posting of a bond in lieu of lien. In other words, the security for the lien at the time the lawsuit was filed was the bond, not the real property. The bond and bondholder were properly and timely served with a summons and complaint.

II. CONCLUSION

For the foregoing reasons, CalPortland respectfully requests this matter be remanded to the trial court to adjudicate the merits of the claims. Pursuant to RCW 60.04.181 and RAP 18.1, CalPortland also requests an award of attorney fees on appeal.

RESPECTFULLY SUBMITTED this 13th day of March, 2013.

SMITH ALLING, P.S.

By



Russell A. Knight, WSBA #40614
Michael E. McAleenan, WSBA #29426
Attorneys for Appellant

