

FILED

JUN 28 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 291049

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NEW CARE CONSTRUCTION, LLC,
a Washington limited liability
company,

Respondent,

vs.

MIKE HARVEY'S PLUMBING
SERVICES, INC., a Washington
corporation,

Appellant.

BRIEF OF APPELLANT

Michael E. de Grasse
Counsel for Appellant
WSBA #5593

P. O. Box 494
59 So. Palouse St.
Walla Walla, WA 99362
509.522.2004

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NEW CARE CONSTRUCTION,) No. 291049
LLC, a Washington limited)
liability company,)
)
Respondent,)
)
vs.) BRIEF OF APPELLANT
)
MIKE HARVEY'S PLUMBING)
SERVICES, INC., a Washington)
corporation,)
)
Appellant.)

INTRODUCTION

The appellant, Mike Harvey's Plumbing Services, Inc., was a subcontractor to the respondent, New Care Construction, LLC. (CP 50:2-6) After New Care failed and refused to pay Harvey for work it had done on a construction project in Walla Walla, Harvey recorded a claim of lien pursuant to RCW 60.04 seeking a principal amount of \$29,880.74. (CP 50:1-6; 53-55)

Asserting that the claim of lien was time-barred, New Care moved, pursuant to RCW

60.04.081, to have the lien released as frivolous and without reasonable cause.

(CP 1-4)

After issuing its letter opinion, the trial court entered an order and judgment releasing the Harvey lien and awarding New Care attorney fees and costs. (CP 78-80; 92-94) This appeal ensued.

Harvey seeks a decision of this Court reversing the trial court, reinstating the lien and awarding it attorney fees and costs.

ASSIGNMENTS OF ERROR, ISSUES
PERTAINING THERETO AND STANDARD OF REVIEW

Assignments of Error

1. The trial court erred by ordering that the appellant's claim of lien be released. (CP 92-94)

2. The trial court erred by awarding the respondent attorney fees and costs. (CP 92-94)

Issues Pertaining Thereto

1. Whether the trial court properly concluded that the mechanics' lien claim by the appellant was frivolous.

2. Whether the trial court properly ordered the mechanics' lien claim by the appellant released.

3. Whether the trial court properly awarded the respondent attorney fees and costs.

4. Whether the appellant should be awarded attorney fees and costs.

Standard of Review

The appellant (Harvey) seeks review of an order and judgment that released its mechanics' lien, and awarded the respondent (New Care) attorney fees and costs, pursuant to RCW 60.04.081. Well established authority requires de novo review.

New Care challenged Harvey's lien as frivolous and without reasonable cause. (CP 1-4)

Specifically, the respondent asserted that the appellant had recorded its claim of lien more than ninety days after it ceased work on the subject property. (CP 3:24--4:2) Therefore, in the respondent's view, the appellant failed to comply with RCW 60.04.091.

As stated by Judge Kurtz, whether a "lien complies with RCW 60.04.091 is a question of law which we review de novo." DKS Const. Management, Inc. v. Real Estate Improvement Company, LLC, 124 Wn. App. 532,535, 102 P. 3d 170 (2004). Compliance with RCW 60.04.091, and more particularly, whether a failure to comply, if proven, rendered a lien frivolous are the very questions presented here. These are matters of statutory interpretation.

"Statutory interpretation is a question of law which we review de novo." Intermountain Electric v. G-A-T Bros., 115 Wn. App. 384,390, 62 P. 3d 548 (2003). Therefore, review should be de novo.

The record before this Court presents

additional grounds for de novo review. While the trial court recognized proceedings under RCW 60.04.081 as "in the nature of a trial by affidavit," (CP 79) it made no findings of fact or conclusions of law. Indeed, the trial court's order and judgment contain no specific ruling that the appellant's lien claim was frivolous and without reasonable cause. Although the grounds for the trial court's decision are apparent from its letter opinion, the absence of findings of fact, the absence of conclusions of law as well as the absence of a specific ruling that the lien was frivolous and made without reasonable cause militate in favor of de novo review. See: W.R.P. Lake Union v. Exterior, 85 Wn. App. 744,750, 934 P. 2d 722 (1997).

STATEMENT OF THE CASE

Nature of the Case

The respondent instituted special proceedings, pursuant to RCW 60.04.081, to challenge the appellant's claim of lien. (CP 1-4) The respondent contended that the

lien claim was frivolous and made without reasonable cause. (CP 1:15-20) The appellant resisted that contention. (CP 49-55)

Course of Proceedings

An order to show cause was issued below on the respondent's motion. (CP 39) That order required the appellant to show cause why its lien should not be released as frivolous and made without reasonable cause. (CP 39:20-26) The owner of the property against which the lien was claimed never appeared as a party in this case.

A hearing was held on the show cause order following which the trial court issued a letter opinion. (CP 78-80) On the basis of the letter opinion an order releasing the lien was entered. (CP 92-94)

Statement of Facts

The respondent asserted that the appellant's lien claim was untimely. While acknowledging an authentic dispute about the performance and

payment under the parties' contract, the respondent asserted that the lien claim was time-barred. (CP 5-6) Based on its assertion that the appellant had performed no work on the project within ninety days of recording its lien, the respondent argued that the lien should be released as frivolous and without reasonable cause.

The appellant (Harvey) recorded its lien claim in the amount of \$29,880.74 because the respondent (New Care) had failed and refused to pay it for work done pursuant to a subcontract to provide plumbing services. (CP 50:1-6)

As stated in Michael D. Harvey's declaration (CP 50:7--51:5):

A component of the work done by Mike Harvey's Plumbing Services, Inc. was the provision of "as built" drawings. As built drawings show how actual construction was accomplished. It is not unusual in the course of construction for the work that is actually done to diverge from that which is shown the the original plans. To aid maintenance and future construction, as built drawings are a frequently required component of a construction contract of the sort that my firm had with New Care Construction.

In the fall of 2009, a question arose

concerning the provision by my firm of as built drawings. I spoke with Les Wright the Park Manor Rehabilitation Center maintenance manager in November, 2009, concerning whether his employer had received a complete set of as built drawings. In an effort to complete my firm's work and fulfill its obligations under its subcontract with New Care, I visited the job site on November 25, 2009. There I met with Mr. Wright and examined several drawings and other documents concerning the construction project in which my firm was engaged. This effort took time and professional expertise. It was necessary to fulfill my firm's obligations. As a result of the work I performed in the course of my visit to the job site on November 25, 2009, it was determined that a complete set of as built drawings had been provided to Park Manor.

Thus, Harvey provided labor and professional services as part of its work on the property against which the lien was claimed on November 25, 2009. As the lien was recorded on January 25, 2010, fewer than ninety days had passed between the cessation of work and the recording of the lien claim.

Michael D. Harvey also described more recent work on the project. (CP 51:11-25):

Since the claim of lien was recorded on January 25, 2010,

my firm has provided additional labor and services as a component of its work in fulfillment of the subcontract with New Care.

In February, 2010, I received a call from Les Wright, maintenance manager of Park Manor. Mr. Wright described a problem with water temperature. The hot water was too tepid. This problem was directly connected to the plumbing systems that my firm had provided. To remedy this apparent defect, I visited the job site at 1710 Plaza Way on February 25 or 26, 2010. There I met with Mr. Wright and resolved a problem with a circulating pump. This provision of labor and services by my firm was in fulfillment of the original subcontract or an effort to remedy an apparent defect in the work done or materials furnished.

Based on the foregoing facts, Harvey resisted the assertion that its claim of lien was time-barred.

Disposition Below

In its letter opinion, the trial court concluded that the appellant's lien was frivolous because it was untimely:

Based upon the facts and above statutory and case law, the court finds that neither of these dates qualifies for the purpose of the 90-day

calculation. The lien is therefore frivolous, being untimely, and should be immediately released. (CP 80)

The trial court implicitly made findings of fact in its letter opinion:

As in Hopkins, the owner here did not ask MHP to come and provide any services on November 25, 2009. Mr. Harvey did this on his own initiative, perhaps as part of efforts to resolve a pending legal or factual dispute between the parties. And while after the lien filing the facility's maintenance manager called MHP to do some repair work in February, 2010, the fact that Mr. Harvey graciously regarded his repair work as within the warranty period does not make it so from a legal standpoint. As NCC points out, the one-year warranty had long since expired. The February work described by Mr. Harvey consisted of repairs to a circulating pump. There is no indication that the pump presented an ongoing problem or that it was improperly installed; it had apparently worked during the 22 or more months since MHP completed its work (April 23, 2008). (CP 80)

The trial court made no findings of fact or conclusions of law. The trial court entered an order and judgment that did not specifically conclude that the appellant's lien was frivolous and made without reasonable cause.

On the basis of its order releasing the appellant's lien as frivolous, the trial court awarded the respondent attorney fees and costs.

ARGUMENT

I. BY CONFLATING INVALIDITY AND FRIVOLITY, THE TRIAL COURT RENDERED A JUDGMENT THAT IS ERRONEOUS IN LAW, LOGIC AND FACT.

The conceptual framework needed to resolve this case is found in the mechanics' lien statute, RCW 60.04. Though the statute is in derogation of common law, certain sections are to be construed liberally:

RCW 19.27.095, 60.04.230, and 60.04.011 through 60.04.226 and 60.04.261 are to be liberally construed to provide security for all parties intended to be protected by their provisions.
RCW 60.04.900

The section on which this case turns, RCW 60.04.091, is among the provisions of which

liberal construction is mandated.

The statutory provision invoked by New Care to secure release of Harvey's lien is clear: a lien claim must be released if it is shown to be "frivolous and made without reasonable cause." RCW 60.04.081. It is not enough to show that a lien claim is invalid or technically deficient. Moreover, the party seeking the lien's release "bears the burden of proving that the lien was frivolous and without reasonable cause." W.R.P. Lake Union v. Exterior, 85 Wn. App. 744,751, 934 P. 2d 722 (1997).

As noted by Judge Baker in W.R.P. Lake Union v. Exterior, 85 Wn. App. 744,749, 934 P. 2d 722 (1997), RCW 60.04.081 must be construed "according to its plain language." Thus, the inquiry must start and finish with the determination of whether a lien is "frivolous and made without reasonable cause." RCW 60.04.081.

Criteria for determining whether a legal

position is frivolous have been developed in the cases. Guidance in resolving the question whether Harvey's lien is frivolous is found in the analogous process of determining whether an appeal is frivolous. As articulated in Streater v. White, 26 Wn. App. 430,434-35, 613 P. 2d 187 (1980):

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

The trial court's letter opinion gives no indication that these criteria were considered. Indeed, it is clear that the trial court concluded that the Harvey lien was invalid because it was

untimely, and, ipso facto, frivolous:

The lien is therefore frivolous, being untimely, and should be immediately released. (CP 80)

The trial court's analysis missed the mark established by RCW 60.04.081 which does not allow invalidity as a proxy for frivolity.

The analytical error in the instant case echoes that seen in Intermountain Electric v. G-A-T Bros., 115 Wn. App. 384,394, 62 P. 3d 548 (2003):

Intermountain contends that the trial court misconstrued the statute and erroneously believed that any lien found to be invalid is ipso facto frivolous. We agree.

If a lien is determined to be frivolous, the court must release the lien and award attorney fees and costs to the prevailing party. RCW 60.04.081(4). To be frivolous, the lien must be improperly filed "beyond legitimate dispute." W.R.P., 85 Wn. App. a 752. But, even if a lien is ultimately found to be invalid, it is frivolous only if it presents no debatable issues and is so devoid of merit that it has no possibility of succeeding. RCW 60.04.081; W.R.P., 85 Wn. App. at 752. That is, every frivolous lien is invalid. But not every invalid lien is frivolous. This distinction is important.

Here, the trial court might have

found that the presence of the trailer did constitute equipment furnished in furtherance of the contract. Alternatively, the court might have been persuaded that abandonment should trigger the 90-day filing period and that the continued presence of the trailer demonstrated Intermountain's reliance on G-A-T Bros.' lack of intent to abandon the project. Or the court might have been persuaded that the liberal construction given to the lien statute in general applied also to the statute of limitations. The court might then have decided to overlook the four days by which Intermountain missed the filing deadline.

The court, correctly, did none of these. But this does not automatically render the contentions so utterly devoid of merit as to be frivolous. At a minimum they represent a good faith argument for a change in existing law and are supported by authority. As such they are not frivolous. Morehouse v. Goodnight Bros. Constr., 77 Wn. App. 568,574, 892 P. 2d 1112 (1995).

As a matter of logic, frivolous liens are a subset of invalid liens. Therefore, one cannot conclude that a lien is frivolous simply because it is invalid. This point of logic is also a point of law by virtue of Judge Sweeney's rationale in Intermountain Electric, supra. That case is dispositive. Accordingly, the

trial court should be reversed.

II. THE RECORD ON REVIEW SHOWS
NO BASIS FOR CONCLUDING THAT
THE APPELLANT'S LIEN WAS
FRIVOLOUS.

Reading the trial court's letter opinion (Appendix I; CP 78-80) and its order and judgment (Appendix II; CP 92-94) exposes flaws in law and logic that require reversal. At no point does the trial court set forth criteria that it used to conclude that the Harvey lien was frivolous. Nowhere is a sign that the trial court appreciated the distinction between an invalid lien and a frivolous lien required by logic. Actually, the trial court does nothing more than interpret certain facts that, in its view, show that the lien was untimely. Then, and without further analysis, the trial court concludes that:

The lien is therefore frivolous,
being untimely, and should be
immediately released. (CP 80)

An untimely lien may be an invalid lien, and

yet not a frivolous lien. The trial court's analysis and conclusion furnish no legal or logical support for releasing the lien as frivolous.

As shown by the trial court's letter opinion, there is no conclusion that the Harvey lien was "so devoid of merit that it has no possibility of succeeding." Intermountain Electric, 115 Wn. App. at 394. Nothing in the record below shows that "it is apparent beyond legitimate dispute that the lien was invalid when filed." Williams v. Athletic Field, Inc., 155 Wn. App. 434,446, 228 P. 3d 1297 (2010). All arguments for holding the lien to be timely and valid were reasonable. (CP 45-48) The lien should not have been released. The trial court should be reversed.

Not only did the trial court fail to deploy proper analytical criteria, it based its decision on implicit factual findings that are bereft of evidentiary support. Thus, from the trial court's letter opinion

1. "And while after the lien filing

the facility's maintenance manager called MHP to do some repair work in February, 2010, the fact that Mr. Harvey graciously regarded his repair work as within the warranty period does not make it so from a legal standpoint." (CP 80)

Where is the evidence that Mr. Harvey acted "graciously"? Where is the evidence of a warranty?

2. "As NCC points out, the one-year warranty had long since expired."
(CP 80)

Where is the evidence of a "one-year warranty"?
Where is the evidence that a warranty had "long since expired"?

3. "There is no indication that the pump presented an ongoing problem or that it was improperly installed; it had apparently

worked during the 22 or more months since MHP completed its work (April 23, 2008).

Where is the evidence that there was "no indication that the pump presented an ongoing problem or that it was improperly installed"? Where is the evidence that the pump "had apparently worked during the 22 or more months since MHP completed its work"?

The record does show that New Care contended that Harvey had not completed its work because it had failed to furnish as built drawings. (CP 64) The record also shows that Harvey worked on the project as late as February, 2010, "in fulfillment of the original sub-contract or an effort to remedy an apparent defect in the work done or materials furnished." (CP 51:22-25;CP 74:12-24) The record evidence demonstrates that the Harvey lien was, on the basis of reasonable argument, timely, and, therefore, valid. The record evidence, thus, shows that the lien was not frivolous.

Therefore, the trial court should be reversed.

III. THE TRIAL COURT SHOULD BE REVERSED, THE APPELLANT'S LIEN SHOULD BE REINSTATED AND THE CASE SHOULD BE REMANDED FOR DETERMINATION OF ATTORNEY FEES AND COSTS TO BE AWARDED THE APPELLANT.

The trial court should be reversed and the case remanded for further proceedings. Specifically, the trial court should vacate its judgment awarding attorney fees and expenses to the respondent and enter judgment in favor of the appellant for sums previously received by the respondent in satisfaction of that judgment. Additionally, the appellant should be awarded fees and costs for its work in the trial court. Finally, in accordance with RCW 60.04.081 and the holding in Intermountain Electric v. G-A-T Bros., 115 Wn. App. 384,395-396, 63 P. 3d 809 (2003), the appellant should be awarded its fees and costs for

prosecuting this appeal successfully.

The foregoing request for an award of attorney fees and costs is made pursuant to RAP 18.1.

In addition to an award of attorney fees and costs, the appellant's lien should be reinstated.

CONCLUSION

In accordance with the foregoing argument, the trial court judgment should be reversed. The mechanics' lien of the appellant should be reinstated, and this case should be remanded to the trial court for further proceedings. The appellant should be awarded its attorney fees and expenses.

Dated this 25TH day of June, 2010.

Respectfully submitted,


Michael E. de Grasse WSBA #5593
Counsel for Appellant

Appendix I
Order and Judgment

SCANNED

LEED
MARTIN
CLERK

10-2-2010 2:35
COUNTY
WALLA WALLA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

NEW CARE CONSTRUCTION, LLC, a
Washington limited liability company,

Plaintiff,

vs.

MIKE HARVEY'S PLUMBING SERVICES,
INC., a Washington corporation,

Defendant.

NO. 10-2-00181-7

ORDER AND JUDGMENT

JUDGMENT # 10 9 00430 7

JUDGMENT SUMMARY

1. Judgment Creditor: New Care Construction, LLC
2. Judgment Debtor: Mike Harvey's Plumbing Services, Inc.
3. Attorney Fees: \$4,722.50
4. Costs: \$ 835.09
5. Other Recovery Amounts: \$ - 0 -
6. *Principal Judgment Amount Shall Bear Interest at 12% Per Annum.*
7. *Attorney Fees, Costs and Other Recovery Amounts Shall Bear Interest at 12% Per Annum.*
8. Attorney for Judgment Creditor: Jason M. Whalen
Eisenhower & Carlson, PLLC
1201 Pacific Avenue, Suite 1200
Tacoma, WA 98402

ORDER AND JUDGMENT - 1

1 **THIS MATTER** having come before the court on Plaintiff New Care Construction,
2 LLC's Motion for Order to Show Cause Re: Frivolous Lien, and the Court, having reviewed the
3 Declarations of Granville A. Brinkman and Victor Nelson in Support of Motion for Order to
4 Show Cause; issued its Order to Show Cause on March 2, 2010, setting this matter for a show
5 cause hearing on Monday, March 22, 2010 at 9:30 a.m.

6 The Court, having reviewed the records and files pertaining to this matter, including the
7 following:

- 8 1. Plaintiff's Motion for Order to Show Cause;
- 9 2. Declaration of Granville A. Brinkman in Support of Motion for Order to Show
10 Cause;
- 11 3. Declaration of Victor Nelson in Support of Motion for Order to Show Cause;
- 12 4. Memorandum in Response to Order to Show Cause Re: Frivolous Lien;
- 13 5. Declaration of Michael D. Harvey in Response to Order to Show Cause Re:
14 Frivolous Lien;
- 15 6. Supplemental Declaration of Granville A. Brinkman; and
- 16 7. Declaration of Les Wright;

17 and the Court having heard oral argument from Jason M. Whalen, counsel for the Plaintiff, and
18 from Michael E. de Grasse, counsel for Defendant, and having issued the Court's letter ruling,
19 dated April 6, 2010; now, therefore, it is hereby

20 **ORDERED, ADJUDGED AND DECREED** that the Claim of Lien recorded on
21 January 29, 2010 under Walla Walla County Recording No. 2010-00925 be immediately
22 released of record. It is further

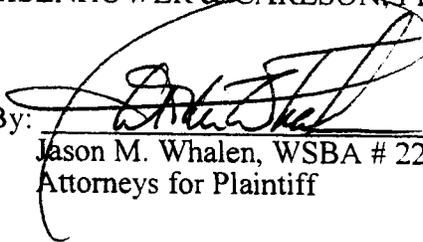
23 **ORDERED, ADJUDGED AND DECREED** that Plaintiff is awarded its attorney's fees
24 and costs in the amount of \$5,557.59 against Defendant Mike Harvey's Plumbing, Inc. pursuant
25 to RCW 60.04.081(4).
26

1 DONE IN OPEN COURT this 29th day of April, 2010.

2
3
4 
JUDGE/COURT COMMISSIONER

5 Presented by:

6 EISENHOWER & CARLSON, PLLC

7
8 
9 By: _____
Jason M. Whalen, WSBA # 22195
10 Attorneys for Plaintiff

11 Approved as to form;
12 Notice of presentation waived.

13
14 By: _____
Michael E. de Grasse, WSBA # 5593
15 Attorneys for Defendant

gh
62

Appendix II
Letter Opinion

SCANNED

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF WALLA WALLA

P.O. Box 836

JUDGE JOHN W. LOHRMANN
DEPARTMENT NO. 1

WALLA WALLA, WASHINGTON 99362

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CLERK
TELEPHONE (509) 524-2790
FAX (509) 524-2777

100 APR 7 3:56
WALLA WALLA COUNTY
WASHINGTON
[Signature]

April 6, 2010

Mr. Michael deGrasse
Attorney at Law
P.O. Box 494
Walla Walla, WA 99362

Mr. Jason Whalen
Eisenhower & Carlson
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402

Re: New Care Construction, LLC vs. Mike Harvey's
Plumbing Services, Inc.
Walla Walla County Cause No. 10-2-00181-7

Dear Counsel:

15
A general contractor, New Care Construction, LLC (NCC), commenced this proceeding under RCW 60.04.081, and obtained an order requiring Mike Harvey's Plumbing Services, Inc. (MHP), to appear and show cause why its lien filed against property owned by Manor Park Healthcare, LLC, d/b/a Park Manor Rehabilitation Center, on January 29, 2010, should not be declared frivolous.

Case law clarifies the scope of these summary proceedings. Andries v. Covey, 128 Wn. App. 546, 113 P.3d 483 (2005), instructs that the issues in a proceeding brought under RCW 60.04.081 are determined as a matter of law, the

Mr. Michael deGrosse
Mr. Jason Whalen
April 6, 2010
Page 2 of 3

proceedings being in the nature of a trial by affidavit.
Id. at 550-53.

Washington's lien statute states:

. . . [A]ny person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

RCW 60.04.021. In turn, RCW 60.04.091 sets forth the requirement that the claim of lien must be recorded not later than 90 days after the furnishing of labor, professional services, materials, or equipment.

The declarations filed by NCC indicate that MHP's active role on the project ended April 23, 2008. This is not really contested by MHP; instead, it contends that Mr. Harvey's work at the property on November 25, 2009--when he reviewed the "as-built" diagrams left at the facility to assure their completeness--involved his professional services in furtherance of the contract and should serve as the date from which the 90-day period for filing liens may be calculated. Additionally, MHP argues that it returned one more time in February, 2010, at the request of Les Wright, Park Manor's maintenance manager, "to resolve a problem with a circulating pump" which was producing tepid water instead of hot. Mr. Harvey--who was of course aware of the legal issues pending between his company and NCC--indicated to Mr. Wright that there would be no charge because he regarded the work as within the construction/installation warranty.

Some guidance on the timeliness issue has been provided by our appellate courts. First, separate contracts may not be tacked together for purposes of extending time. Anderson v. Taylor, 55 Wn.2d 215, 347

Mr. Michael deGasse
Mr. Jason Whalen
April 6, 2010
Page 3 of 3

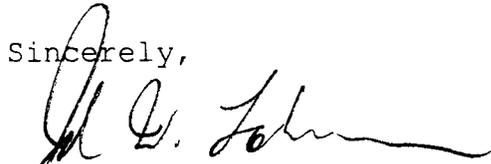
P.2d 536 (1959); King Equipment Co. v. R. N. & L. Corp., 1 Wn. App. 487, 462 P.2d 973 (1969).

Second, the later work must in fact be done as part of the project and not be done gratuitously or as a mere pretext to justify an otherwise late lien filing. Hopkins v. Smith, 45 Wn.2d 548, 276 P.2d 732 (1954).

As in Hopkins, the owner here did not ask MHP to come and provide any services on November 25, 2009. Mr. Harvey did this on his own initiative, perhaps as part of efforts to resolve a pending legal or factual dispute between the parties. And while after the lien filing the facility's maintenance manager called MHP to do some repair work in February, 2010, the fact that Mr. Harvey graciously regarded his repair work as within the warranty period does not make it so from a legal standpoint. As NCC points out, the one-year warranty had long since expired. The February work described by Mr. Harvey consisted of repairs to a circulating pump. There is no indication that the pump presented an ongoing problem or that it was improperly installed; it had apparently worked during the 22 or more months since MHP completed its work (April 23, 2008).

Based upon the facts and the above statutory and case law, the Court finds that neither of these dates qualifies for purposes of the 90-day calculation. The lien is therefore frivolous, being untimely, and should be immediately released. Attorney fees will be awarded to New Care pursuant to RCW 60.04.081(4).

Sincerely,



JOHN W. LOHRMANN
SUPERIOR COURT JUDGE

JWL/11