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No. 59823-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

WASHINGTON STATE MAJOR LEAGUE BASEBALL STADIUM PUBLIC FACILITIES DISTRICT and THE BASEBALL CLUB OF SEATTLE, L.P.,

Appellants,

v.

HUBER, HUNT & NICHOLS-KIEWIT CONSTRUCTION, a Washington joint venture; HUNT CONSTRUCTION GROUP, INC., a foreign corporation; and KIEWIT CONSTRUCTION COMPANY, a foreign corporation,

Respondents,

v.

HERRICK STEEL, INC., a California corporation,

Cross-Respondent.

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BRIEF OF CROSS-RESPONDENT HERRICK STEEL, INC.

Christopher A. Wright, WSBA# 26601
Stanislaw Ashbaugh, LLP
701 Fifth Avenue, Suite 4400
Seattle, WA 98104-7012
(206) 386-5900 / fax (206) 344-7400

Attorneys for Cross-Respondent

OD r. NL

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RCW 4.16.160..... 1, 6
RCW 4.16.326 (1)(g)..... 1, 2, 3, 4, 5

I. INTRODUCTION

On March 23, 2007 the Honorable Julie Spector entered an order dismissing the third party claims of Huber, Hunt & Nicols-Kiewit Construction ("HK") against Herrick Steel, Inc. ("Herrick"). CP 502-504. The order was entered because the claims of HK against Herrick are time barred by the six year statute of limitations contained in RCW 4.16.040. The trial court's decision was correct and should not be reversed under any circumstances.

RCW 4.16.160 provides in relevant part:

The following actions shall be commenced within six years:

(1) An action upon a contract in writing, or liability express or implied arising out of a written agreement.

RCW 4.16.040. The language of the statute is clear. A cause of action based upon a written contract that is not brought within six years from the date of accrual is time barred.

For construction contracts, the date of accrual is set by statute as the date of substantial completion. RCW 4.16.326 (1)(g) provides:

In contract actions the applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later.

RCW 4.16.326 (1)(g). The statute applies to all claims or causes of action arising out of construction projects. Further, HK's August 24, 2007 brief to this Court acknowledges at page 6 that even without RCW 4.13.326 (1)(g), pursuant to the governing contract terms the six year statute of limitations for claims arising out of the construction of the project commenced no later than the date of substantial completion.

It is undisputed that substantial completion for Safeco Field was achieved on July 1, 1999. CP 174-176. It is also undisputed that HK did not commence its action against Herrick until October 13, 2006: *more than seven years after the acknowledged date of substantial completion.* CP 9-15. In sum, HK cannot dispute that HK failed to timely commence its action against Herrick. As such, HK's claims against Herrick are time barred pursuant to RCW 4.16.040.

Most importantly, unlike the Mariners, HK has no basis to allege an exception to the requirements of RCW 4.16.040. Therefore, regardless of whether the Court grants the Mariners' appeal, the Court should deny HK's cross-appeal. In essence, the fact that the Mariners have an argument entitling the Mariners to an exemption to the application of RCW 4.16.040 does not mean that HK has the same or similar argument.

H. STATEMENT OF THE CASE

HK and the Public Facility District entered into a construction contract for Safeco Field on May 6, 1996. CP 45. Herrick was hired as a subcontractor to HK for the construction of Safeco Field. CP 13. Herrick's scope of work included providing the steel for the stadium. CP 13.

Substantial completion of Safeco Field was achieved on July 1, 1999. CP 174-176.

As acknowledged in HK's brief, the controlling contract documents for the construction of Safeco Field provide that the statute of limitations for claims begins to run no later than the date of Substantial Completion. CP 165. The contract provision is consistent with RCW 4.16.326 (1)(g), which essentially provides that all construction contract claims accrue and therefore the statute of limitations starts to run at the time of substantial completion. RCW 4.16.326 (1)(g) states in part:

In contract actions the applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later.

RCW 4.16.326 (1)(g) (emphasis added).

Six years from July 1, 1999 is July 1, 2005. HK failed to commence any action against Herrick related to Herrick's work on the Safeco Field Project until October 13, 2006. CP 9-15.

III. ISSUE ON APPEAL

Whether HK's claims against Herrick for construction defects at Safeco Field are time barred because HK failed to file suit within the six year statute of limitations contained in RCW 4.16.040?

IV. ARGUMENT

Under Washington law, HK's claims against Herrick are time barred. RCW 4.16.040 provides:

The following actions shall be commenced within six years:

(1) An action upon a contract in writing, or liability express or implied arising out of a written agreement.

RCW 4.16.326 (1)(g) provides:

In contract actions the applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later.

Pursuant to RCW 4.16.040 and .326 (1)(g), HK's claims against Herrick are time barred because HK failed to commence an action against Herrick within six years of the date of substantial completion of Safeco Field.

HK cannot dispute this fact. HK admits that the date of substantial completion for Safeco field was July 1, 1999. CP 174-176 and HK's brief at page 6. HK also admits that it did not bring a claim against Herrick until after the Mariners filed a complaint against HK. As stated at page 7 of HK's brief:

The Mariners waited until August 14, 2006 - more than 7 years after substantial completion - to file suit against Hunt Kiewit.

Because, HK's cross-claim against Herrick was not filed until after the Mariners filed suit against HK (CP 9-15), HK's brief admits that HK's action against Herrick was commenced after the applicable statute of limitations had run.

Despite HK's admission that HK's claims against Herrick were filed more than six years after substantial completion of Safeco Field, HK requests that the Court reverse Judge Spector's dismissal of HK's claims against Herrick if the Court grants the Mariners' appeal. However, HK makes no attempt to explain how HK's claims against Herrick are exempt from the applicable statute of limitations, RCW 4.16.040.

Instead, HK's only argument for a reversal of Judge Spector's order dismissing HK's third party claims against Herrick is:

However, if the Court rules that the Mariners claims are not time barred; then it follows that the third party claims should be reinstated as well¹

UK provides no explanation for why a decision by this Court that the Mariners' claims are not time barred-because of the ability of the Mariners to assert the statutory exemption contained in 4.16.160-equates to HK's claims against Herrick not being time barred.

Contrary to HK's one sentence argument, it does not follow that the ability of the Mariners to preserve its claim means that HK's claim against Herrick should also survive. Unlike the Mariners who have a colorable argument that the Mariners are able to assert the exemption contained in RCW 4.16.160, HK has no such argument. Unlike the Mariners, HK has no good faith basis to assert that HK is exempt from the applicable six year statute of limitations contained in RCW 4.16.040. As such, a reversal of Judge Spector's order as to the Mariners' claims against HK does not require a reversal of the portion of the order dismissing HK's claims against Herrick.

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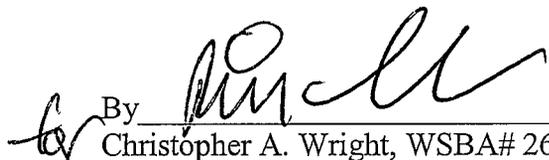
¹ See HK brief, p. 24.

V. CONCLUSION

For the foregoing reasons, Herrick respectfully requests that HK's cross-appeal be denied. The Court should uphold the dismissal of HK's claims against Herrick contained in Judge Spector's March 23, 2007 order.

DATED this 154-day of c _____, 2007.

STANISLAW ASHBAUGH, LLP

By 
Christopher A. Wright, WSBA# 26601
Attorneys for Cross-Respondent

IT IS HEREBY CERTIFIED that service of the foregoing document,
CROSS-RESPONDENT'S BRIEF, has been made this 21st day of
September, 2007, by sending copies thereof by legal messenger to the
following:

Office of Clerk
Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101

John Parnass
Stephen M. Rummage
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
Ph. 206/622-3150
Fx. 206/628-7699
Attorney for Appellants

Richard L. Martens
Martens & Associates P.S.
705 Fifth Avenue South, Suite 150
Seattle, WA 98104
Ph. 206/709-2999
Fx. 206/709-2722
Attorney for Long Painting, Inc.

David C. Groff
Michael P. Grace
Groff Murphy Trachtenberg & Everard PLLC
300 East Pine Street
Seattle, WA 98122
Ph. 206/628-9500
Fx. 206/628-9506
*Attorneys for Huber, Hunt & Nichols-Kiewit Construction
Company Joint Venture, Hunt Construction Group, Inc., and
Kiewit Construction Company*

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of September, 2007 at Seattle, Washington.


TERESA LAWRENCE