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No. 65732-1-I

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

COASTAL COMMUNITY BANK,

Third-Party Defendants/Appellants,

vs.

MADI GROUP, INC.,

Third Party Plaintiff/Respondent.

RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

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Appellant, Coastal Community Bank (“Coastal”) attempts to use its supplemental briefing of *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, ___ Wn. App. ___ (2011), to raise contentions never presented to the trial court. Supplemental briefing does not give Coastal’s new counsel carte blanche to reinvent the case. Even if this Court entertains these new arguments, Appellant’s allegations are not supported by the evidence before this Court. Further, *Colorado Structures* is clearly distinguishable from this matter.

A. Appellant May Not Introduce New Issues, Theories, And Facts On Appeal.

An issue, theory, or argument not raised at trial cannot be raised, and will not be considered, on appeal. *See, e.g., Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978); *Peoples Nat'l Bank v. Peterson*, 82 Wn.2d 822, 829-30, 514 P.2d 159 (1973); RAP 2.5(a). Further, in reviewing a summary judgment order, “an appellant court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12; *see also Wash. Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Management*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993) (court will not consider “factual allegations at the appellate level that were not before a trial court in granting summary judgment”).

B. The Question Of Pacific Ventures' Ownership Of The Subject Property Was Never Raised To The Trial Court.

In its supplemental brief, Coastal unveils a completely new contention: Madi's claim of lien is "invalid on the grounds that the services it furnished to non-owner Pacific Ventures could not and did not give rise to a lien."¹ Also, Coastal now contends that Madi's lien is invalid for lack of a contract with the property owner.²

Pacific Ventures' ownership of the subject property was never an issue briefed or argued to the trial court. The record is void of any argument or evidence contesting Madi's lien based upon ownership of the property. It was a non-issue. For example, Coastal habitually paraphrased RCW 60.04.021 and purposefully omitted any reference to the "owner" requirement in its submissions to the trial court.³ There is also no proof regarding when Pacific Ventures took title to the property, i.e. the deed is not contained in the record. Thus Coastal never presented this as a contested issue before the trial court and should not be allowed to bring it up now.

¹ Supp. Brief at 5

² *Id.* While Coastal may have raised the issue of the *date* of Madi's contract with Pacific Ventures, Coastal has never before questioned the *validity* or *existence* of this contract. This is a new contention.

C. Madi Worked For The Property Owner.

Even if the question of ownership had been before the trial court, and thus could be considered on appeal, there is no question that Madi worked at the request of the property owner. Madi contracted with Pacific Ventures, the property owner.⁴ As Coastal admitted to the trial court, Madi commenced its work before Coastal recorded its deed of trust.⁵ At the moment Pacific Ventures became the property owner Madi was performing work at Pacific Ventures' request.⁶ Coastal knew of Madi's work and based their loan on the value of that work. Madi continued to do work for the property owner. Pacific Ventures as property owner then ratified Madi's work by continuing to pay Madi and

³ See, Coastal's M. for Summ. J. at CP 23 and Coastal's Resp. to Madi's M. for Summ. J at CP 254.

⁴ CP 264-271

⁵ Coastal's counsel admitted at oral argument that Coastal knew Madi was providing professional services and started providing professional services prior to Coastal recording its deed of trust: "We know based on the documents that we've obtained and provided to the Court that the date of January 23 is not accurate, but we do know that they did begin work prior to recording of Coastal's deed of trust." RP p.4.

⁶ The relevant deed is not contained the trial court records. However, it is evident that Pacific Ventures became the property owner before Coastal's Deed of Trust was recorded on May 7, 2007. See CP 38 "The following provisions relating to ownership of the Property are a part of this Deed of Trust: Title. Grantor warrants that: (a) Grantor holds good and marketable title of records to the Property in fee simple..."

by executing a promissory note acknowledging both the existence of the contract and amount owed for work performed.⁷

Coastal erroneously attempts to cast *Colorado Structures* as factually similar. But, *Colorado Structures* involved non-lienable work for a non-owner and before any contract had been executed. Madi worked for the actual owner, not a mere “potential suitor.” The contractor in *Colorado Structures* attempted to assert its lien based upon work for a potential buyer. Moreover, the contractor in *Colorado Structures* had no contract with the potential buyer when it dug test holes.⁸

Additionally, the policy rationale underlying *Colorado Structures* does not apply here and is contrary to RCW 60.04.031. There is no danger Coastal was unaware of Madi’s work. Coastal admitted in its responses to discovery that it was aware of Madi performing services. To allow a lender to assert priority under these circumstances is directly contrary to the provisions of RCW 60.04.031 that gives professional services providers priority where the lender has “notice” of the services.

⁷ Promissory Note, CP 154-155

⁸ CP 264-271

Such an interpretation would allow the lender to benefit from the work, but leave the unpaid professional without its lien rights.

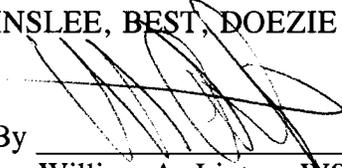
D. Coastal's Legal Counsel Abandoned Any Claims Regarding Madi's Contract Or Ownership.

When Coastal's counsel was informed of the trial court's ruling on summary judgment, Coastal's counsel admitted there were no additional issues for consideration by Judge Gonzalez: "Court: Are there other issues left to be decided today? . . . Mr. Adams: **We only raised the two on our motion**, which were waiver and *McAndrews*, so Court has dealt with those."⁹

Coastal's attempt to assert newly minted contentions into its discussion of *Colorado Structures* cannot be permitted. *Colorado Structures* is clearly distinguishable on its facts.

DATED this 14th of March, 2011.

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⁹ RP 32, ll. 19-23.

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I HEREBY CERTIFY under penalty of perjury under the laws of the State of Washington that on this 3rd day of March, 2011, I caused to be served a true and correct copy of the following document(s):

1. Response to Appellant's Supplemental Brief; and
2. Certificate of Service

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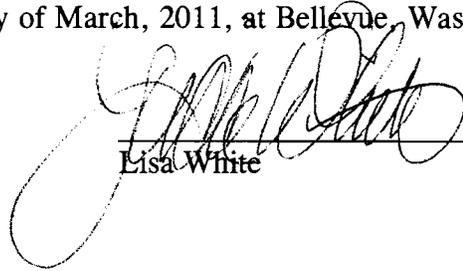
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