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No. 69225-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TOP LINE BUILDERS, INC., a Washington corporation,
Plaintiff/Respondent,

vs.

FREDERICK W. BOVENKAMP and SHARON M. BOVENKAMP,
husband and wife, and the marital community composed thereof, dba
BOVENKAMP FAMILY, LLC-SERIES 8466 CAMAS;

Defendants/Respondents

and

U.S. BANK, N.A.

Defendant/Appellant

and

FRED BOVENKAMP and SHARON BOVENKAMP, husband and wife,
dba BOVENKAMP FAMILY, LLC – SERIES 8466 CAMAS,

Third-Party Plaintiffs/Respondents,

vs.

OLD REPUBLIC SURETY COMPANY, Bond No. YLI264739,

Third-Party Defendant/Respondent

APPELLANT'S BRIEF IN REPLY,

AND IN RESPONSE TO CROSS APPEAL

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I. ARGUMENT IN RESPONSE TO TOP LINE’S CROSS APPEAL

A. Top Line’s Assertion that US Bank Lacked Standing to Defend is without Merit.

1. A Defendant is not Required to Demonstrate Standing to Defend.

The requirement that one must have standing to sue is a familiar one, and is supported by a well-developed body of case law. “The standing doctrine requires that a plaintiff must have a personal stake in the outcome of the case in order to bring suit,” Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 583, 5 P.3d 730 (2000).

Top Line raises the novel suggestion that USB, having been sued, lacked standing to assert its *defenses* to the Top Line’s lawsuit, and to participate in the trial.

Top Line has cited no case law, and USB’s research has located none, that supports the notion that a *defendant* must demonstrate ‘standing’ to assert its defenses to a plaintiff’s claims. Indeed, such a notion is contrary to the standing doctrine, and contrary to the basic due process requirement that a defendant shall be afforded an opportunity to be heard. At a bare minimum, procedural due process requires notice and an opportunity to be heard. Soundgarden v. Eikenberry, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994).

The standing requirement relates to a plaintiff or claimant asserting a claim, Sabey, Id., rather than to a defendant asserting defenses to a claim. More fundamentally, standing requires that a plaintiff have an actual stake in the outcome of the case in order to bring suit. Sabey, Id. An entity that has been sued necessarily has a stake in the outcome of the lawsuit.

The cases Top Line relies on do not support the notion that a defendant must establish standing to defend itself. In McDonald Construction Co. v. Murray, 5 Wn. App. 68, 485 P.2d 626 (1971), the issue was whether a prospective tenant had standing to sue a construction contractor for breach of the construction contract between the contractor and the property owner. McDonald, Id., is easily distinguishable from the present case. Unlike USB, the tenant in McDonald was the *plaintiff*, and was therefore required to demonstrate standing to sue just as any plaintiff must. The question of whether a defendant had standing to defend itself was not an issue in the case.

Also unlike USB in the present case, the tenant in McDonald had no privity with the construction contract he sued to enforce. Indeed, the issue in McDonald was whether the tenant had an available substitute for contract privity, specifically whether the contract between the construction contractor and property owner was a third beneficiary contract for the benefit of the tenant. The court ruled that the tenant was not a third party beneficiary of

the construction contract, and therefore had no standing to sue to enforce that contract.

There is no contention in the present case that USB was a third party beneficiary of the construction contract between Top Line and Bovenkamp. In fact, as demonstrated below, Bovenkamp assigned his contract rights to USB, so that USB was in direct privity with the construction contract itself, and could therefore defend against Top Line's claims brought pursuant to that contract just as Bovenkamp could.

Warner v. Design and Build Homes, Inc., 128 Wn. App. 34, 114 P.3d 346 (2008), on which Top Line also relies, also involved a claim of third party beneficiary status, and is also distinguishable. Warner entered into a residential construction contract with a general contractor from which Warner agreed to purchase the completed house. Warner sued both the general contractor and a subcontractor, alleging defects in the construction. There was no contention that Warner lacked standing to sue the general contractor, since Warner was a plaintiff in direct privity with the general contractor. The issue was whether Warner had standing to also sue the subcontractor. Warner was not a party to the contract between the contractor and subcontractor, and unlike the present case, there was no assignment of any contract rights to Warner. Instead, Warner claimed that he was the

beneficiary of a third party beneficiary contract between the general contractor and the subcontractor.

Warner is therefore also distinguishable from the present case. Unlike USB, Warner was a *plaintiff*, and was therefore properly required to demonstrate his standing to sue the subcontractor. Warner certainly had standing to sue the general contractor to enforce the contract they were both parties to. The court's holding was that Warner was not a third party beneficiary to the contract between the general contractor and subcontractor.

Thus, the issue in both McDonald and Warner was whether a *plaintiff* had standing to sue based on an alleged third party beneficiary contract. Neither case holds that a defendant must establish standing to defend itself, and Top Line has cited no cases so holding.

Also unlike McDonald and Warner, there is no claim in the present case that USB (or any other party) is a beneficiary of a third party beneficiary contract.

In summary, the doctrine of standing requires that a plaintiff have a stake in the outcome of a lawsuit in order to pursue it. Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 583, 5 P.3d 730 (2000). USB is a defendant, and as such is not subject to a requirement that it demonstrate standing to defend itself. Top Line has cited no authority to the contrary. However, even if USB was required to demonstrate that it had a stake in the

outcome of this case, it is clear that USB has a stake in the outcome equal at least to the amount of the quantum meruit award of \$79,731.15, the amount by which the value of its security interest would be reduced if its appeal is not successful.

Furthermore, Bovenkamp's assignment of his contract rights to USB would also satisfy any such requirement of a stake in the outcome of the case.

2. Even if USB Must Demonstrate Standing to Defend Itself, the Assignment of Bovenkamp's Right Under the Construction Contract to USB would Satisfy any such Requirement.

Top Line asserts that there was no valid assignment of Bovenkamp's contract rights to USB, but that assertion is based on a misreading of the terms of the Residential Construction Loan Procedures, Assignment and Consent Agreement ("Assignment Agreement") (CP 107, D38). Top Line also ignores the distinction between the assignment of contract *rights* and the delegation and assumption of contractual *duties*. These are separate and distinct legal concepts, and they are treated differently by the terms of the Assignment Agreement.

An assignment is the transfer of a right. Restatement (Second) of Contracts § 317, 25 DeWolf & Allen, Washington Practice Series: Contract Law and Practice § 13:1 (2d ed.2007). "Unlike an assignment,

which involves a transfer of rights, a delegation involves the appointment of another to perform one's duties." *Id.* § 13:8. As Professors DeWolf and Allen point out, where only general language such as "I assign this contract to X" is used, there may arise a question of interpretation as to whether the intent was to also delegate contractual duties. The modern view is that there is a presumption that such language does reflect an intent to delegate duties as well, but that presumption can be overcome by evidence to the contrary. *Id.*, Calamari & Perillo, *Contracts*, § 18 – 27 at 725 (5th ed. 2003).

However, there is no need to resort to presumptions regarding the intent of the parties here, because they specifically addressed the assignment of rights and the delegation of duties in the Assignment Agreement separately, and differently. Pursuant to the terms of that agreement, the assignment is unconditional, while the delegation of duties is subject to certain specified conditions. Top Line would have this Court erroneously apply to the assignment of rights the conditions that apply only to a delegation of duties.

The agreement unconditionally assigns Bovenkamp's contract rights to USB. It states:

The Borrower(s) does hereby grant, assign, transfer and set over onto Lender all of **its right, title and interest** in and to

the construction contract between the Borrower(s) and the Contractor for the construction of the improvements . . .

(CP 107, D38, ¶ 18. Emphasis added).

The assignment of Bovenkamp's contract rights to USB is clearly not subject to the satisfaction of any conditions. The delegation of Bovenkamp's contractual duties is treated differently, and is made subject to specific conditions upon which certain specified contractual duties may be delegated to and assumed by USB. It states:

The Borrower(s) agrees that the Lender **does not assume any of the obligations or duties** of the Borrower(s) under or with respect to the construction contract unless and until the Lender shall have given the Contractor written notice that it has affirmatively exercised its rights to complete or cause the completion of construction of the improvements following the occurrence of a default by the Borrower(s).

(CP 107, D38, ¶ 18. Emphasis added).

It is therefore clear that the assignment of Bovenkamp's rights under the construction contract to USB is unconditional, but that the assumption by USB of Bovenkamp's obligations and duties under that contract is made subject to certain enumerated conditions.

Top Line ignores the distinction between the assignment of rights and the assumption of liabilities as outlined above, and instead argues that

“US Bank never notified Top Line, in writing or orally, that it was exercising its right to the assignment as set forth in the [Assignment] Agreement.” (Brief of Top Line, p. 21.) However, as the Assignment Agreement plainly states, those notice requirements relate solely to the assumption of obligations by USB rather than to the assignment of rights.

Simply stated, Bovenkamp’s rights under the construction contract were unconditionally assigned to USB. Top Line’s attempt to tie the assignment of rights to the conditions that relate solely to the assumption of Bovenkamp’s contractual obligations is without support in the record, and must therefore fail.

In summary, the trial court correctly concluded that USB was not precluded by the doctrine of standing from asserting its defenses and participating at trial.

II. US BANK’S ARGUMENT IN REPLY

A. Top Line has Not Responded to Several Assignments of Error that, Because they are Uncontested and Otherwise Meritorious, Entitle USB to a Reversal of the Trial Court’s Final Verdict.

USB identified in its opening brief several specific erroneous rulings by the trial court, any one of which requires a reversal of the trial court’s final verdict. Top Line elected not to challenge or otherwise address several of USB’s contentions regarding its assignments of error.

Those contentions, outlined below, are therefore uncontested and entitle USB to a reversal of the trial court's final verdict following reconsideration, and reinstatement of its initial, proper verdict.

1. Top Line has not Challenged or Otherwise Addressed the Application of RCW 60.04.091, which Requires the Reversal of the Trial Court's Final verdict.

In its second assignment of error, USB contends that the trial court erred in adding Top Line's quantum meruit recovery to the mechanic's lien under the terms of the Mechanic's Lien Statute. RCW 60.04.091 states in relevant part:

Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment.

(Emphasis added.)

The plain language of this provision is directly applicable. Top Line commenced an action to foreclose its mechanic's lien, and thereafter amended its lien claim to assert for the first time a quantum meruit basis for its lien. Prior to that amendment, Top Line's lien claim was based on a contract between Top Line and Bovenkamp that, depending on which conflicting version of Top Line's story one considers, was either a verbal cost-plus contract as alleged in Top Line's complaint, or the written fixed

price contract that supported Top Line's motion for partial summary judgment, which it subsequently repudiated at trial. Assuming, but certainly not conceding, that the court's quantum meruit award could be secured by Top Line's mechanic's lien under Washington law, this statute would operate to preclude the amendment from yielding such a result. This statute does not preclude the amendment altogether, but it does preclude the amendment from adversely affecting the interests of third parties such as USB.

Although USB took an assignment of Bovenkamp's rights to the construction contract, USB is nonetheless a third party for purposes of applying this statute. First, the assignment was limited to Bovenkamp's contract rights. USB did not assume any of Bovenkamp's contractual obligations.

Second, what the amendment added was a *non-contractual* basis for recovery, so the assignment of contract rights to USB does not eliminate USB's status as a third party for purposes of applying this statute.

Had the amendment of the lien claim resulted from an amendment to the construction contract, for example, then an argument could be made that USB was not a third party for purposes of applying this statute, because it had acquired rights (but had not assumed obligations) under the

contract. However, because Top Line amended its lien claim to assert a non-contract basis for recovery, the assignment of contract rights to USB is not relevant to the question of whether USB is a third party with respect to the amendment.

Thus, the lien claim was amended, but the construction contract was not. USB is a third party with respect to that amendment, and RCW60.04.091 protects USB from being adversely affected by the amendment.

The application of this statute to protect USB from being adversely affected by the amendment is entirely consistent with the verdict initially rendered by the court below. Specifically, the cost of work performed *in accordance with* the written contract but not paid for should be secured by the mechanic's lien. The cost of extra work performed *in breach of* the contract's requirement of signed change orders should be secured by a judgment against Bovenkamp, but not by a mechanic's lien, because USB's interests would otherwise be adversely affected as a result of the amendment.

In other words, the cost of work performed in accordance with the contract is secured by the mechanic's lien, the cost of work performed in breach of the contract is not.

Top Line did not dispute or otherwise address the applicability of this statute in its responsive brief, thereby conceding its applicability as well as the result urged by USB.

Accordingly, USB's assertion that this section of the mechanic's lien statute prohibits the amendment of the lien claim from adversely affecting USB's interests is uncontested, and because it is an otherwise proper application of this statute, the trial court's final verdict following reconsideration should be reversed and its initial verdict reinstated.

2. Top Line did not Challenge USB's Assignment of Error Regarding the Trial Court's Reversal of its Ruling in Equity Based on Terms of the Written Contract that are Applicable Only to Contract Claims.

The trial court entered two separate and distinct verdicts. First, it awarded Top Line \$25,544.43 in contract damages for Bovenkamp's breach of the fixed price construction contract, which the court found to be the true agreement between Top Line & Bovenkamp. It further ruled that the award of contract damages is secured by the mechanic's lien. (CP 160, conclusion of law 9). Neither party challenged this aspect of the court's verdict on appeal.

Second, the trial court awarded Top Line \$79,731.15 "in equity in quantum meruit" (CP 160, conclusion of law #12), which the court

specifically stated was awarded based on principles of equity rather than contract. (RP 3/2/12, p. 6. L. 25 - p. 7, l.2). Significantly, neither party contends on this appeal that the court below erred by basing this part of its verdict on the equitable doctrine of quantum meruit. Nor is there any contention that the trial court erred in concluding that its quantum meruit award is not based on, or governed by contract terms or principles.

On reconsideration, the court below reversed its decision regarding the effect of its equitable award in quantum meruit based on several new rulings (not part of the initial verdict) regarding specific terms of the *written contracts* in evidence. The trial court erred by doing so because the terms of the written contracts have no applicability to an award in equity in quantum meruit. (See USB's fifth assignment of error.)

First, the court below ruled that Top Line and Bovenkamp, but significantly not USB, waived the construction contract's change order requirement. (CP 160, conclusion of law #10, 11; USB's seventh Assignment of Error). Second, the court erroneously subjected the unambiguous construction contract and the unambiguous Assignment Agreement to its own interpretation regarding the purpose of the construction contract's change order requirement. (CP 160, conclusion of law 11, finding of fact #22; USB's sixth Assignment of Error). Third, based on its unwarranted interpretation of the purpose of an unambiguous

contract provision, the change order requirement, it concluded that although Top Line breached the contract's change order requirement, the purpose of this contract provision, as interpreted by the court, was such that its breach was not a material one. (CP 160, conclusion of law 11; USB's sixth assignment of error).

USB demonstrated in its opening brief that each of these three contract rulings was without supporting evidence in the record, and that analysis need not be repeated here. Additionally however, Top Line has offered no authority or rationale to explain why or how contract principles such as waiver, materiality and intent, *as applied to the construction contract and its change order requirement* can properly form the basis of the lower court's final quantum meruit verdict.

Indeed, if Top Line and Bovenkamp had actually waived rather than breached the change order requirement, then the cost of the extra work would be compensable under the contract itself, and there would be no proper basis upon which to award such costs in equity in quantum meruit rather than pursuant to the terms of the contract.

Likewise, if the change order requirement had actually been ambiguous and therefore subject to judicial interpretation, and further, if the purpose or intent of that provision actually had been, as Top Line *eventually* argued, something other than what it plainly states, then the

cost of the extra work would be compensable under the contract itself.¹ There would be no proper basis upon which to award such costs in equity in quantum meruit rather than per the terms of the contract.

However, the court did not rule that the cost of extra work was compensable under the contract or pursuant to contract principles. Rather, its verdict for the extra charges was in equity in quantum meruit, and not pursuant to the contract itself, which the court also stated did not apply. (CP 160, conclusion of law 12, RP 3/2/12, p. 6. L. 25 - p. 7, l.2).

In fact, the court could not have properly awarded damages for the costs of extra work under the written contract because the court also ruled that the Top Line breached the contract, specifically its change order requirement. True, the court ultimately (but not initially) ruled that this breach was not a material breach. But the ruling as to materiality was both incorrect and not relevant to the question of whether the court below could have properly compensated Top Line under the contract for extra work it performed in breach of the contract's requirement of signed change orders.

¹ At trial, Top Line testified that the only purpose of the written contract containing the change order requirement was to deceive USB into funding the project, which it would not have done in the absence of such a contract. (RP 11/1/11, p. 149 l. 13 – p. 154, l. 14).

USB demonstrated in its opening brief that Top Line's breach of the change order requirement was a material one. However, it is well settled that anything less than full performance of one's contractual obligation constitutes a breach. TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 209, 165 P.3d 1271 (2007), Restatement (Second) of Contracts § 235(2) (1981). A party in breach, as defined above, cannot enforce the contract against, or demand performance from the non-breaching party. Parsons Supply, Inc. v. Smith, 22 Wn. App. 520, 591 P.2d 821(1979). Thus, a party in breach may not enforce the contract against the non-breaching party, whether the breach is material or not.

“A ‘material breach’ is a breach that is serious enough to justify the other party in abandoning the contract. A “material breach” is one that substantially defeats the purpose of the contract, or relates to an essential element of the contract, and deprives the injured party of a benefit that he or she reasonably expected.” WPI 302.03. Park Avenue Condo. Owners Ass'n. v. Buchan Devel. L.L.C., 117 Wn. App. 369, 71 P.3d 692 (2003). Top Line's breach was indeed material, but the materiality of a contract breach is not relevant to a quantum meruit award.

Because the court ruled that Top Line breached the contract's change order requirement, it did not and not could award damages *under*

the contract for the cost of extra work performed in breach on the change order requirement. Such an award would instead have to be based on a source other than the contract, such as quantum meruit, to which the contract terms have no application.

Thus, not only did the trial court err by misapplying and misinterpreting the written contract's terms upon which it based its modification of the quantum meruit award, the court erred by applying them at all to the quantum meruit award. Top Line has neither contested this conclusion, nor has it provided any authority upon which to base a different conclusion.

3. Top Line has not Challenged or Otherwise Addressed USB's Assignment of Error that Neither the Construction Contract nor the Assignment Agreement is Ambiguous, and are Therefore not Subject to Judicial Interpretation.

USB appealed from only that portion of the verdict that is in equity in quantum meruit, and not from the court's verdict for contract damages. Accordingly, the purpose or intent of the contract's change order requirement is not relevant to the quantum meruit verdict because the contract itself is not relevant. However, even if the purpose or intent of the contract's change order requirement could somehow be deemed relevant to the quantum meruit award, that requirement would still not be

subject to judicial interpretation because it is not ambiguous. (USB's sixth Assignment of Error).

USB demonstrated in its opening brief that the change order requirement is not ambiguous, and therefore not subject to judicial interpretation. (USB's sixth Assignment of Error). Top Line has not demonstrated, nor does it even contend that it is ambiguous, and the trial court made no finding of ambiguity. An unambiguous contract term is not subject to judicial interpretation. Skansgaard v. Bank of America, N.A., 2011 WL 9169945, *4, W.D. Wn. --- F.Supp.2d ---- (2011), citing Lehrer v. State Dep't of Social & Health Servs., 101 Wn. App. 509, 515, 5 P.3d 722 (2000).

However, even if Top Line had demonstrated some ambiguity, the trial court's interpretation is itself improper. The change order requirement states, "The change order will become an extra charge over and above the **Contract Amount.**" (CP 107, EX P-1, Article 3. Emphasis added.) The term 'Contract Amount' is defined by the contract to consist of the amount reflected in 'Estimate #130,' which is attached to and incorporated into the contract. The amount of that estimate is \$845,286.80, the fixed price of this fixed price contract. (CP 107, EX P-1, Article 2).

The court below in effect re-wrote this provision to read, 'The change order will become an extra charge over and above the ***'total loan amount of \$995,000.'***'

The parties to the construction contract could have defined the critical term 'Contract Amount' any way they chose to. Had they actually intended to define the amount above which signed change orders were required as 'the total loan amount,' they could easily have done so. Not only did they not do so, but Top Line itself furnished the written contract and all of its terms, with no language inserted at Bovenkamp's request. (RP 11/1/11. P. 148, l. 8 - 5). The basic rules of interpretation require that any ambiguous provision be construed *against* the author, Top Line. Skansgaard v. Bank of America, N.A., 2011 WL 9169945, *4, W.D. Wn. --- F.Supp.2d ---- (2011) (citing Lehrer v. State Dep't of Social & Health Servs., 101 Wn. App. 509, 515, 5 P.3d 722 (2000)).

Furthermore, Top Line did not introduce into evidence the actual loan agreement between Bovenkamp and USB. Instead, Top Line assumes (incorrectly) that the total \$995,000 loan amount was devoted solely to construction costs. Because Top Line failed to introduce evidence establishing how much of the total loan amount was actually devoted to construction costs, Top Line has produced no evidence to support its argument that change orders should have been required for

costs above some amount other than the 'Contract Amount' as defined by the contract.

The lower court's interpretation of the purpose or intent of the contract's change order provision is erroneous for an even more fundamental reason. The trial testimony of *none* of the parties or witnesses supports the trial court's interpretation. On the contrary, the party that drafted or at least produced the written contract and the change order provision it contained, Top Line, presented the testimony of its president, Travis Rohrer. He stated under oath exactly what his purpose or intent was in producing the fixed price contract requiring signed change orders to increase that otherwise fixed price. Its purpose, indeed its *only* purpose according to Mr. Rohrer, was to deceive USB into lending money for this project based on the false belief that the work would be governed by this fixed price contract requiring signed change orders to increase that otherwise fixed price, which USB insisted on. (RP 11/1/11, p. 149 l. 13 – p. 154, l. 14).

It is undisputed that Top Line never did furnish written change orders for any of the extra work, and Mr. Rohrer's only explanation for not doing so was that the written contract was not the actual agreement, and that the actual agreement was a verbal cost-plus contract, or 'open book' as he described it, that did not require change orders. *Id.*

Top Line *now* endorses the trial court's interpretation of the purpose of the construction contract's change order requirement, but when asked directly about it at trial, Mr. Rohrer testified that his true and only purpose for the written contract was to deceive UBS into believing the contract's price was fixed and could not be increased without signed change orders. *Id.*

In summary, the trial court erred in numerous respects regarding its interpretation of the purpose or intent of the contract's change order requirement:

- (a) The change order requirement is unambiguous and therefore not subject to the court's own interpretation;
- (b) The court interpreted the change order requirement incorrectly, in effect re-writing it to replace a specifically defined term, i.e. the 'Contract Amount' of \$845,286.80, which signed change orders are needed to increase, and replacing it with a different term, i.e. the 'total loan amount,' which the trial record does not quantify as \$995,000 or any other particular amount because there is no evidence of how much of the loan was actually devoted to construction costs;
- (c) The trial court failed to employ the rule of construction that a contract term, if found to be ambiguous, shall be construed against its author;
- (d) The court's interpretation is not supported by the trial testimony of any party or witness; and

- (e) The president of Top Line, who actually drafted or at least produced the contract language, testified that his purpose was not what the court interpreted it to be. Rather, its sole purpose was to deceive USB into believing a fixed price contract with a change order requirement was in place.
- 4. Despite having Invoked the Equity Jurisdiction of the Court, Top Line Chose not to Challenge or even Address USB's Assignment of Error Regarding the Inequitable Nature of Top Line's Conduct which Precludes it from Obtaining Equitable Relief as Against the Interests of USB.

It is rather telling that even though Top Line invoked the equity jurisdiction of the court below, it chose not to challenge or directly respond to USB's assertion that it acted dishonestly and inequitably in its dealings with USB and with the trial court.² (USB's Assignment of Error # 10.) Nor does Top Line contend that USB's actions were in any way inequitable.

For example, Top Line did not directly challenge or respond to USB's assertion that Top Line should be estopped from recovering in

² As to its dealings with the trial court, Top Line does not dispute (and the record clearly reflects) that it swore under oath and on the record in the court below that the project was governed by the written contract it produced and signed, *and* that it was not. (CP 2, ¶ 3.2, CP 24 ¶ 4).

equity on any claims as against USB for charges Top Line in effect represented would not be incurred in the absence of signed change orders. Likewise, Top Line offered no direct response to the assertion that it is inequitable for Top Line to profit from its admitted wrong-doing at the expense of its victim. Top Line has invoked the court's equity jurisdiction, yet it admittedly engaged in inequitable conduct regarding the critical issue in the case, which disqualifies it from obtaining the equitable relief the trial court ultimately awarded

Yet Top Line has the temerity to argue that the equities do not favor USB because it should have better protected itself from loss resulting from Top Line's dishonesty. (Top Line's Brief, p. #42). In support of this proposition Top Line relies on a single appellate case decided in 1929 that is no longer good law, Mutual Savings & Loan Assn. v. Johnson, 153 Wn. 41, 279 Pac. 108 (1929). More recently, but still months before Top Line cited Mutual Savings & Loan as authoritative, the court in Olson Engineering, Inc. v. KeyBank Nat. Ass'n, 171 Wn. App. 572 86 P.3d 390 (2012) held that because Mutual Savings & Loan was decided under a different statutory scheme that predates the one currently in effect, it is no longer authoritative on the specific point for which Top Line cites it as authoritative, i.e., that because the construction work had

already commenced before the loan was in place, the lender should have better protected itself.

Top Line emphasizes that one of the policies behind the mechanic's lien statute is to protect laborers and material suppliers who expend their resources on another's property. (Top Line's Brief p. 41). It should be remembered that Top Line obtained a judgment against Bovenkamp for the costs of the extra work Top Line furnished at his request, so that this policy can be fully realized without doing violence to the equally important principle that a court of equity should not permit a litigant to profit from its admitted deception at the expense of its victim.

In fact, by enacting RCW 60.04.091 as part of the mechanic's lien statute, the legislature also codified the policy that in a lien foreclosure action such as this, an amendment of the lien claim such as Top Line obtained here may not operate so as to adversely affect a third party such as USB. Thus, not only is the result urged by USB supported by principles of equity, it is also directly supported by the mechanic's lien statute itself.

5. The Construction Contract's Change Order Requirement Cannot be Nullified Based on any Collateral Agreement.

The trial court ruled initially on reconsideration that USB had no right to review or approve change orders had any been utilized. (RP

5/18/12, p.#9, l. 6). During the reconsideration process, USB pointed out to the court that the Assignment Agreement which provided that change orders indeed had to be submitted to USB for approval, and to correspondence between Bovenkamp & Top Line reflecting that this was their understanding as well. (CP 107, EX D-38, P-28, ¶ 18).

The court thereafter acknowledged that change orders did have to be submitted to USB for review and approval, but then ruled that, based on the language of the Assignment Agreement, the purpose of requiring that change orders be submitted to USB for approval was simply to assure that the total construction costs including the costs of changes did not exceed the entire loan amount. (CP 160, conclusion of law 11; USB's Assignment of Error # 8).

As noted above, there is no factual basis in the record to support such a conclusion because Top Line merely assumes, without any actual supporting evidence, that the total amount USB agreed to loan Bovenkamp was for construction costs only.

Furthermore, paragraph 16 of the Assignment Agreement specifically provides that the final draw against the loan proceeds may include amounts represented by change orders "if approved by Lender." (CP 107, EX D-38). That language is not ambiguous, the lower court did not make a finding that it was ambiguous, and Top Line does not contend

that it is ambiguous. An unambiguous contract term should be enforced as written, and not subjected to the court's own interpretation. Skansgaard v. Bank of America, N.A., 2011 WL 9169945, *4, W.D. Wn. --- F.Supp.2d - --- (2011, citing Lehrer v. State Dep't of Social & Health Servs., 101 Wn. App. 509, 515, 5 P.3d 722 (2000)). Had the parties to that contract wished to limit the change orders that required USB's approval to only those that exceeded a certain level, they could have easily done so.

Furthermore, Bovenkamp clearly had the right under the terms of the construction contract to request extra work, provided that he gave written authorization for Top Line to perform the requested work at Bovenkamp's expense in the form of a signed change orders. The contract did not require (or authorize) Top Line to perform any such written work at Bovenkamp's expense absent a signed change order.

Bovenkamp assigned his contract rights to USB, so that USB had the same right to authorize changes in the work that Bovenkamp had based on the construction contract, which of course is independent of and in addition to such authority provided by the Assignment Agreement.

B. Washington's Appellate Decisions do not Support Top Line's Claim that its Quantum Meruit Award is Secured by the Mechanic's Lien.

Top Line's assertion that two appellate decisions provide dispositive support for the proposition that the quantum meruit award is secured by its mechanic's lien is erroneous.

Top Line relies on Modern Builders, Inc. v. Manke, 27 Wn. App. 86, 615 P.2d 1332 (1980) for the proposition that the costs of extra work not contemplated by the parties may be awarded in quantum meruit and secured by a mechanic's lien. However, Modern Builders, Id. is readily distinguishable from the present case. Unlike the parties to the construction contract in the present case, the parties in Modern Builders made no provision in their agreement for the possibility of any additional work, nor did they agree upon a pricing mechanism for any such unanticipated additional work, as Bovenkamp and Top Line did.

Where the contracting parties do not provide for the possibility of additional work and do not agree on any pricing mechanism for such additional work, the mechanic's lien statute provides that the 'contract price' may be increased by the "usual and customary charges" for such extra work. Pursuant to RCW 60.04.011(2), "'contract price' means the amount agreed upon by the contracting parties, *or if no amount is agreed upon*, then the customary and reasonable charge therefor." (Emphasis added.)

Thus, under the facts in Modern Builders, *Id.*, the customary and reasonable charges for extra work may, in accordance with the mechanic's lien statute, be added to the 'contract price' for purposes of applying the statute, but only because the parties did not agree on a pricing mechanism for any extra work.

Unlike the parties in Modern Builders, *Id.*, Top Line and Bovenkamp addressed in their contract the possibility of extra work and agreed on a mechanism for authorizing and pricing it. Pursuant to Article 3 of the contract titled "Changes in work," the parties agreed that any extra work will be priced either on a "fixed price quote basis," or else on a time and materials basis with labor provided at \$50 per hour, and charges for materials and subcontractors at the invoiced amounts plus 15%. (CP 107, EX P-1).

The decision in Modern Builders, *Id.* is therefore distinguishable and provides no authority for increasing the statutorily defined 'contract price' in the absence of signed change orders.

Top Line did not address the factor that distinguishes Modern Builders, *Id.*, i.e., the failure of the parties in that case to address in their agreement the means of authorizing and pricing additional work. Nor has Top Line cited any cases holding that a quantum meruit award can be secured by a mechanic's lien where, as here, the contracting parties

established a mechanism for adding and pricing extra work that was not followed.

CKP v. GRS, 63 Wn. App. 601, 821 P.2d 63 (1992), is also distinguishable. It holds that charges for extra construction work furnished in the absence of agreed-upon change orders are not 'liquidated' for purposes of determining whether pre-judgment interest accrues on such charges. The contract in CKP contained a written change order requirement, which the court ruled the parties waived. In dicta, the court noted that because the parties waived the contract's change order requirement, the extra work was compensable *under the contract*, and could therefore be properly secured by the mechanic's lien.

In the present case, by contrast, the trial court ruled that the extra work was not compensable under the written contract, but rather in equity in quantum meruit. (CP 160, conclusion of law 11). That ruling has not been challenged by either party on this appeal.

In summary, neither Modern Builders nor CKP supports the notion that where the contracting parties agree on a mechanism by which extra work can be authorized and priced, but do not adhere to it, a quantum meruit award for the cost of extra work furnished in the absence of the agreed-upon signed change orders is secured by the mechanic's lien. Indeed, Top Line cannot cite any appellate decision that supports such a

notion, because the mechanic's lien statute dictates a contrary result. Simply stated, if the contracting parties agree on a mechanism by which to authorize and price extra work, such extra costs are secured by the mechanic's lien *if* the parties comply with their agreement regarding such extra work.

However, because the contracting parties did not adhere to their agreement regarding extra work, the costs of the extra work were awarded in quantum meruit rather than pursuant to the contract. The quantum meruit award for such costs does not fit within the statutorily defined 'contract price,' and is therefore not secured by Top Line's mechanic's lien. The quantum meruit award is properly secured by a junior judgment lien against Bovenkamp only.

C. The Change Order Requirement was Not Satisfied.

Top Line does not claim that the signed change order requirement was actually complied with. Rather, it argues that it was as good as satisfied because at the end of the project, Top Line submitted a list of changes and invoicing from which it could be discerned through analysis that extra work had been performed which increased the project costs.

However, the contract requires that signed change orders be furnished by the end of each month when such extra costs were incurred. (CR 107, EX P-1, Article 3). Submitting a list of the project's changes and

invoicing at the end of the project is not what the parties agreed to, and provides no means by which USB could exercise its right of approval before the costs are actually incurred.

Finally, whether the contract's change order requirement was as good as satisfied is of no significance, because the trial court awarded Top Line the costs of the extra work in equity in quantum meruit rather than pursuant to the terms of the written contract.

D. USB is a Bona Fide Encumbrancer.

Top Line's claim that USB was not a bona fide encumbrancer is based on the fact that USB knew the construction was already underway when it approved the loan to Bovenkamp. Top Line asserts that changes in the work had already been made, and that although there were no signed change orders reflecting the costs of extra work as the contract requires, USB should have been able to piece together the amount of extra costs by analyzing the invoices.

However, Top Line ignores the fact that the contract contained an agreed-upon mechanism for providing notice of changes in the work, i.e., signed change orders. It is undisputed that no change orders were furnished, including any changes that had occurred before the loan was approved.

It is respectfully submitted that where the contracting parties agreed on a means of authorizing the costs of extra work, USB was entitled to rely

on the agreement's terms, and in particular on the absence of any change orders reflecting that changes had already occurred. Indeed, Top Line's president testified that it was his intent that USB rely on the fixed price contract and its change order requirement, and that it provide the funding for the project on that basis. (RP 11/1/11, p. 149 l. 13 – p. 154, l. 14).

E. Top Line's Argument that USB did not follow its Own Procedures is without Merit.

Top Line argues that USB did not follow its own procedures because the Assignment Agreement states that construction cannot commence before USB's security interest has been perfected. All parties knew that the construction work had commenced before the loan was approved, so that the provision in the Assignment Agreement that construction must not commence before the loan was approved and the Deed of Trust recorded is simply inapplicable, and was therefore waived.

A waiver may be established by direct evidence or inferred from the parties' conduct. Jones v. Best, 134 Wn. 2d 232, 950 P.2d 1(1998). Because all parties knew that the construction commenced prior to the loan's approval, it is reasonable to infer a waiver of the clearly

inapplicable contract term that construction must not commence before USB's secured position can be perfected.³

Interestingly, Top Line does not contend that any particular consequences flow from the fact that construction began before USB's security position was perfected. Nor does Top Line cite any authority bearing on this issue.

In summary, the Assignment Agreement contained a provision regarding commencement of the work that all parties knew to be inapplicable, and they all therefore ignored and waived it. Top Line has provided no authority to support any other conclusion.

F. USB is Entitled to a Reinstatement of the Trial Court's Initial Award of Attorney's fees in its favor.

In its initial verdict, the trial court awarded attorney's fees to USB as the prevailing party pursuant to the Mechanic's Lien Statute, RCW 60.04.181. Following its reconsideration, the court below initially left the attorney's fee award in favor of USB intact, reasoning that although USB

³ By contrast, a non-waiver of the change order requirement is established by the record. The trial court ruled that USB did not waive that requirement, and that ruling has not been appealed from. Furthermore, Top Line's repudiation of the written contract and its change order requirement precludes a finding of waiver, i.e., a voluntary relinquishment of a known right.

did not prevail entirely following reconsideration, it nonetheless succeeded in establishing that the agreement controlling the project was not a verbal cost-plus contract as Top Line contended at trial, but rather was the written fixed price contract. (RP 5/18/12, p. # 10, l. 1 – 12).

However, without taking any further evidence, argument or briefing on the attorney's fee issue, the court below reversed its two previous rulings awarding fees to USB, and instead awarded fees to Top Line and none to USB.

Should this Court rule in favor of USB on appeal, USB will be the substantially prevailing party as the lower court initially ruled. USB should be entitled to a reinstatement of the fee award initially entered in favor of USB pursuant to RCW 60.04.181, as well as those fees incurred in connection with this appeal pursuant to RAP 18.1.

III. CONCLUSION

The trial court correctly ruled that US Bank was not precluded by the doctrine of standing from asserting its defenses to Top Line's amended complaint, or from fully participating at trial. Accordingly, Top Line's cross-appeal should be denied.

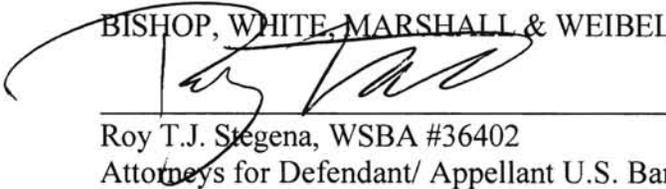
The trial court's initial, correct verdict was that the award in equity in quantum meruit was not secured by Top Line's mechanic's lien. The

court below erred by reversing that ruling on reconsideration, and by concluding instead that the quantum meruit award should be secured by the mechanic's lien. Accordingly, the trial court's ruling on reconsideration should be reversed, and its initial verdict reinstated.

Dated this 6th day of March, 2013.

Respectfully submitted,

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.



Roy T.J. Stegena, WSBA #36402

Attorneys for Defendant/ Appellant U.S. Bank

CERTIFICATE OF SERVICE

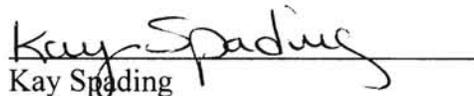
I, Kay Spading, certify that on the 6th day of March, 2013, I caused the foregoing document, Designation of Clerk's Papers, to be delivered to the following parties in the manner indicated below:

Gregory E. Thulin [X] By First Class Mail
Law Offices of Gregory E. Thulin [] By FedEx Overnight
119 N. Commercial Street, Ste 660 [] By Email
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Defendants Pro Se

Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 6th day of March, 2013, at Seattle, Washington.


Kay Spading