

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

No. 70217-3-1

Bruce Johnson Contractor LLC

Appellant,

V.

Columbia State Bank

Respondent.

APPEALED FROM SKAGIT COUNTY SUPERIOR COURT
CAUSE NO: 12-2-01516-6

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Appellant Bruce Johnson Contractor, LLC (“Johnson”) was the completion contractor on a 26 lot residential plat located in Skagit County, Washington, known as “Saratoga Passage.” This Appeal asserts a claim against a Lien Release Bond that was posted by Respondent Columbia State Bank (“Columbia”) to release a Contractor’s Lien that Johnson had foreclosed against certain lots and parcels located within Saratoga Passage. After posting the Bond, Columbia proceeded to foreclose security interests it held in the property against the original developer / owner (Victor and Linda Benson, or “Benson”).

Columbia’s foreclosure affected 15 vacant development lots within Saratoga Passage, but did not include the three work area parcels within “Lot 26” where Johnson had performed its construction work. In the final foreclosure against Benson, Columbia did not claim a security interest in the work area parcels which continue to be owned in fee by Benson. Columbia’s Lien Release Bond was against all property liened by Johnson, and not limited to the 15 vacant development lots in which Columbia held security interests.

After Columbia’s foreclosure against the 15 development lots, the trial court on Columbia’s Motion released (or exonerated) the Lien Release Bond free of any claims by Johnson. Johnson’s

Motion to foreclose against the Bond based on the fact that Columbia did not foreclose against the three work area parcels within Lot 26 where Johnson had performed its construction work was effectively denied by the Court's complete release and exoneration of the Bond. The Court did not enter any findings to support the unlimited release.

Johnson does not dispute that Columbia's security interests in the 15 development lots were superior to Johnson's Lien Foreclosure Judgment against those lots. If the Lien Release Bond had been limited in scope to just those lots, which the Statute allows, exoneration after Columbia's foreclosure against Benson would be appropriate. However, the Bond as posted and recorded was unlimited, releasing all property in which Johnson held a Lien Foreclosure Judgment, including the work area properties where Columbia failed to establish any security interest and did not foreclose against.

Johnson asserts that the Lien Release Bond should not have been released insofar as the Bond released lands from Johnson's Lien Foreclosure Judgment that were later determined to not be subject to Columbia's security interests. Johnson requests that this Court reverse the Superior Court's ruling releasing the Lien Release Bond, and remand for further proceedings by Johnson against the Bond.

No trial was held in this matter. Two matters are involved. Cause No. 12-2-00397-4, Bruce Johnson Contractor, LLC vs. Victor Benson and Linda Benson, et al, was commenced by Johnson against Benson for Breach of Contract and Lien Foreclosure, and resulted in a Judgment by Confession against Benson and in a Lien Foreclosure against the properties liened by Johnson for his unpaid work. Cause No. 12-2-01516-6, Columbia State Bank vs. Bruce Johnson Contractor, LLC, was commenced by Columbia seeking a determination as to relative priorities between Johnson's Lien Foreclosure Judgment entered in Cause No. 12-2-00397-4 and Columbia's various security interests in the liened properties. Columbia then posted / recorded its Lien Release Bond in the second matter, followed by various motions. The evidence to be considered in this Appeal arises from the Declarations with supporting exhibits filed in Cause No. 12-2-01516-6, and the Appeal is taken from the Superior Court's Order dated March 27, 2013 releasing the Lien Release Bond.

B. ASSIGNMENTS OF ERROR

Assignments of Error

Appellant assigns error to the trial court's Order Releasing Bond In Lieu Of Claim Under RCW 60.04.161, dated March 27, 2013. The Order states as follows:

This matter having come on for hearing before this Court on the motion of Plaintiff Columbia State Bank ("Bank") to approve discharging a surety bond in lieu of claim posted pursuant to RCW 60.04.161, and it appearing to the Court that there is no longer need for such surety bond, it is therefore ORDERED that:

1. The Bank's Motion for release of Bond is GRANTED; and
2. The court clerk shall immediately discharge the surety bond posted by the Bank in the amount of \$134,801.00, a copy of which is attached as Exhibit A, and any and all obligations of bank or surety thereunder shall be immediately canceled.

Clerk's Papers ("CP") 512

Issues Pertaining to Assignments of Error

1. Whether or not the trial court misinterpreted RCW 60.04.161 in ordering the release of the Lien Release Bond even though Columbia's security interests and therefore foreclosure did not include all properties subject to Johnson's Lien Foreclosure Judgment.
2. Whether or not the trial court properly considered the undisputed evidence that Johnson's Lien Foreclosure

Judgment attached to properties not subject to security interests held by Columbia.

3. Whether or not the trial court has jurisdiction to release the Lien Release Bond once the bond has been recorded.

C. STATEMENT OF THE CASE

To understand the source of the dispute between Johnson and Columbia we need to first look at the nature of the Saratoga Passage development. Johnson was the contractor working to complete the Saratoga Passage development, a 26 Lot residential plat located south of Mt. Vernon on the western slope of Little Mountain. CP 176-180. Victor and Linda Benson were the owners, developers, and “Declarant” of the Saratoga Passage plat. Columbia’s predecessor in interest, Summit Bank, was the construction lender. CP 176. After conditional approval of the plat by Skagit County during 2009, Johnson was hired by Benson to complete and maintain plat improvements including the water system and storm water drainage and detention systems. CP 176, 179, 384, 385, 389. As the construction lender, with security in the unsold development lots, Summit continued to fund plat completion through August 2010. CP 176,177.

After August 2010, Summit Bank was placed under FDIC review, and later "taken over" by Columbia. The terms of that transaction are not known to Johnson, and are not directly relevant except that Columbia placed a hold on the ongoing project completion funding and initiated default proceedings against the Bensons. CP 179

Johnson has not been paid for project construction work since Sept, 2010. CP 177. On October 12, 2011, Johnson recorded a "Mechanic's" lien (construction lien) against plat properties owned by Bensons pursuant to RCW 60.04. CP 556. As work was ongoing, Johnson amended the Lien on January 19, 2012, and again on March 7, 2012. CP 557. Johnson commenced its Breach of Contract and Lien Foreclosure action during February, 2012, and later amended the Complaint before service to include claims for all work completed through February 28, 2012, as set forth in the March 7, 2012 Lien, Auditor's No. 201203070017. CP 557.

The Bensons did not dispute Johnson's billings, Lien, or Complaint for Lien Foreclosure. CP 583-593. After providing an Answer, Bensons Confessed to Judgment. CP 583-593.

Judgment was entered on June 28, 2012, as follows:

III. JUDGMENT

Based on the pleadings on file in this matter, and on the executed agreements and confessions of the Defendants, attached hereto and incorporated herein, and on the approval of counsel for entry,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

BREACH OF CONTRACT – BALANCE DUE

- 1) Judgment is entered in favor of BRUCE JOHNSON CONTRACTOR, LLC and against Defendants VICTOR BENSON and LINDA BENSON, husband and wife, for damages for contract balance due in the amount of \$63,397.00.
- 2) BRUCE JOHNSON CONTRACTOR, LLC is awarded attorney's fees totaling \$26,190.00.
- 3) BRUCE JOHNSON CONTRACTOR, LLC is awarded Costs totaling \$280.00
- 4) The total Judgment at entry in favor of BRUCE JOHNSON CONTRACTOR, LLC and against Defendants VICTOR BENSON and LINDA BENSON, husband and wife, is \$89,867.00.

LIEN FORECLOSURE

- 5) BRUCE JOHNSON CONTRACTOR, LLC's Second Amended Claim of Lien, recorded March 7, 2012, auditor's #201203070017, attached hereto as EXHIBIT "A", is foreclosed, in the principal amount of \$89,867.00. The priority date is September 21, 2010.
- 6) BRUCE JOHNSON CONTRACTOR, LLC's lien foreclosure interest in the properties described in the Second Amended Claim of Lien, recorded March 7, 2012, auditor's # 201203070017, attached hereto as EXHIBIT "A", is against and superior to any ownership interests or claims to ownership interests of Defendants VICTOR BENSON and LINDA BENSON, husband and wife, and Defendant SARATOGA PASSAGE VIEW ESTATES HOMEOWNERS ASSOCIATION, a Washington Nonprofit Corporation.

See, Judgment, page 5, 6, dated June 28, 2012, CP 583-593.

As set forth in the Declaration of Bruce Johnson dated March 25, 2013, the March 7, 2012 Lien and the Lien Foreclosure Judgment, entered June 28, 2012, asserted claims against Saratoga Passage Lots 1, 2, 3, 5, 6, 8, 9, 10, 12, 13, 18, 19, 20, 25, and 26 (portions of 26). CP 384-390.

The physical locations of Johnson's work areas (water tank area, water system, pump house, drainage control areas, detention pond) are all located in Lot 26, the 550 plus acre "common area" lot. The remaining lots subject to Johnson's Lien Foreclosure Judgment, Lots 1, 2, 3, 5, 6, 8, 9, 10, 12, 13, 18, 19, 20, and 25, are all individual one acre development lots located within the outer boundary of Lot 26. CP 178, 381

After waiting 5 days from Entry of Judgment, Bruce Johnson recorded the Judgment in two documents on July 3, 2012. (Johnson 3/25/2012, paragraphs 29 – 34). Document No. 201207030064 identified Lots 2, 3, 5, 6, 8, 9, 10, 12, 13, 18, 19, 20, and 25, all vacant development Lots. Document No. 201207030063 identified Lot 1, a development Lot with an old house used by the Bensons, and Lot 26, listing "tax parcels" P95857, P130585, P16579, and P99837. CP 390-391.

It was within the Lot 26 identified parcel areas that Johnson had performed contract construction work, giving rise to the Liens

and Lien Foreclosure Judgment. CP 380, 390, 391. Lots 1, 2, 3, 5, 6, 8, 9, 10, 12, 13, 18, 19, 20, and 25 require a completed water system and storm water drainage system to be developable, and all benefited by the continuing construction work. See, Declaration of Bruce Johnson, dated October 22, 2012, CP 178-180. Johnson was aware that Summit / Columbia held security interests in the development Lots, and was threatening to proceed with non-judicial Foreclosure against the Bensons. CP 381,382. Johnson intended to proceed with a judicial foreclosure of the Lien Foreclosure Judgment against the identified areas of Lot 26. CP 391-392.

Columbia recorded a Notice of Foreclosure Sale on July 9, 2012, against the Benson interests in the Saratoga Passage properties, and commenced an action to intervene in Johnson's Lien Foreclosure action on July 10, 2012, asserting security interests prior to and superior to the Johnson Lien Foreclosure Judgment. CP 391. Intervention was not possible, as the Lien Foreclosure action was final. Columbia then commenced an original action for Declaratory Judgment against Johnson, Cause No. 12-2-01516-6. CP 159-163. In its Declaratory Judgment action, Columbia sought a determination as to the priority and superiority of its alleged security in Benson property as against the Lien Foreclosure Judgment entered in Johnson's favor. CP 159-163.

Before proceeding with any motions or other requests for any judicial determination concerning the scope, priority or superiority of Columbia's security vs. Johnson's Lien Foreclosure Judgment, Columbia availed itself of the statutory process set forth in RCW 60.04.161 to record a "Lien Release Bond".

CP 1-18, 19-21, 245-251.

RCW 60.04.161 provides:

"The effect of recording a bond shall be to release the real property described in the notice of claim of lien from the lien and any action brought to recover the amount claimed."

The statute requires the Bond to be in the amount of equal or greater than 150% of the amount to be released.

Columbia provided and recorded a Lien Release Bond on Sept. 17, 2012, with Columbia State Bank ("Columbia"), as principal, and with Fidelity and Deposit Company of Maryland, as surety; "Surety Bond In Lieu of Claim Pursuant to RCW 60.04.161; Bond No. 08935029", Auditor's No. 201209170119. See, Johnson 3/25/2013, paragraph 37, Exhibit G, CP 392.

The Bond was in the amount of \$134,801.00, or 150% of Johnson's Lien Foreclosure Judgment entered June 28, 2012, and recorded July 3, 2012. CP 19-21. Columbia did not limit the scope of the "Surety Bond In Lieu of Claim". CP 19-21.

RCW 60.04.161 provides:

“If the claim of lien affects more than one parcel of real property and is segregated to each parcel, the bond may be segregated the same as in the claim of lien. A separate bond shall be required for each claim of lien made by separate claimants. However, a single bond may be used to guarantee payment of amounts claimed by more than one claim of lien by a single claimant so long as the amount of the bond meets the requirements of this section as applied to the aggregate sum of all claims by such claimant.”

The Bond under the plain language of the statute and under the language of the Bond itself released all of the real property subject to Johnson’s Lien Foreclosure Judgment, including Lot 26 without exception. CP 19-21. At the time that the Bond was recorded, Columbia was asserting as argument in its pleadings a security interest in all or parts of Lot 26, without excluding those areas specifically identified in the Johnson Liens and Lien Foreclosure Judgment. CP 38, 41, 42.

On Sept. 28, 2012, after Recording the Lien Release Bond, Columbia filed a Motion for Summary Judgment in Cause No. 12-2-01516-6, seeking a determination that its security interests in Benson property were superior to Johnson’s Lien(s) and Lien Foreclosure Judgment. CP 38, 41, 43, 192, 200. Without limitation, Columbia continued to assert that its security was superior to all of the real property subject to Johnson’s Lien(s) and Lien Foreclosure Judgment, including the Lot 26 areas.

Although Columbia in its motion pleadings argued that it held prior security in Lot 26, without limitation, the evidence submitted by

Columbia did not so claim. All that was claimed in the various declarations was that Columbia has a security interest “(I)n certain real property located in Skagit County, Washington.” CP 45.

On October 30, 2012, the trial court entered its Order in response to Columbia’s Motion. CP 220-221. In granting Columbia’s motion, finding that Columbia’s security interests were “prior and superior” to Johnson’s claims (never disputed by Johnson as to time), the Court ruled:

“5. Any nonjudicial foreclosure of the Deeds of Trust and Modifications conducted pursuant to RCW 61.24 *et seq.* shall extinguish any and all liens asserted by Johnson in the Claim of Lien *in accordance with the terms of that statute.*”

(Emphasis added) CP 221.

The Court’s ruling, correctly, requires foreclosure and defers to the Trustee and Trustee’s Deed for a determination as to the real property “foreclosed”. CP 221. Johnson has asserted since early 2012 that Summit’s (Columbia’s) security did not extend to the project work areas for water and drainage in Lot 26. CP 181, 390-393. Columbia had asserted that pre-plat approval Deeds of Trust (underlying security) were sufficient to create security in Lot 26 as against the interests of Johnson and his Lien claims. (CP 38, 41, 43).

Nonjudicial foreclosure of the Benson Deeds of Trust and Modifications conducted pursuant to RCW 61.24 occurred February

22, 2013. See, Johnson 3/25/2013, with attached Exhibits, CP 382, 396-416. The Trustee's Deed was recorded March 18, 2013.

The Declaration Of Bruce Johnson, dated March 25, 2013, provides a detailed analysis of the Trustee's Deed, as recorded March 18, 2013. CP 383, 387-388.

The Trustee's Deed does not transfer any interest, directly or indirectly, in any of the areas of Lot 26 where Johnson's work was performed that gave rise to his Liens and his Lien Foreclosure Judgment. CP 383.

The three locations on which Johnson performed contract work for the Saratoga Passage development since Sept 2010, at the request of the Bensons, are identified in the plat documents and thru the plat approval process. All three areas are included in the overall area or "footprint" of Certified Lot 26, yet at the same time can be viewed as separate "Tracts" within the larger Lot 26. The three areas are as follows:

- a. "WT1": The water system and tank area has been defined as an approximately one acre site, with its own parcel number P130585. When complete, the area will be fully fenced.
- b. "PH2": The pump house and water system area was identified as "Tract "B"" in the approved plat documents. The area is approximately 0.31 acre in size, and has been assigned a separate parcel

number, P130357. When complete, the area will be fully fenced.

- c. "D3": The drainage and detention pond area was identified as "Tract "A"" in the approved plat documents. Tract "A" is approximately 3.87 acres in size, and is identified by the open space parcel number P99837. When complete, the detention pond area will be partially fenced.

Although areas "WT1", "PH2", and "D3" , as identified above, are all located within Lot 26, the boundaries of each area are identified in recorded documents. CP 381, 384, 385, 389, 390.

The "WT1" and "PH2" areas are improved with structures and equipment that was constructed and / or installed by Johnson and are subject to Johnson's Lien's. CP 389. However, Johnson's option of proceeding against the improvements and equipment was precluded by Columbia's recording of the Lien Release Bond, which released the property from such claims. CP 391-392.

This dispute is not simply an academic exercise. The water system improvements and equipment in which Johnson held a Lien Foreclosure Judgment were not subject to a security interest held by Columbia, notwithstanding Columbia's initial argument to overall security. CP 38, 41, 43. Yet, for the vacant development lots to have value the water system must be completed and a Bill of Sale free of all claims presented to the Public Utility District. CP 179. The recorded Lien Foreclosure Judgment created security for Johnson, which was released when the Lien Release Bond was posted and

recorded. The Court's order releasing the Lien Release Bond leaves Johnson empty handed.

D. ARGUMENT

1. Standard of Review

In reviewing a superior court's grant of summary judgment, this Court should view the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, P.3d 1124 (2000). Columbia was the moving party requesting release of the Lien Release Bond. CP 222-224. The Court's Order releasing Columbia's Lien Release Bond is error of law. Review is de novo.

2. RCW 60.04.161

RCW 60.04.161 provides in pertinent part:

Bond in lieu of claim.

Any owner of real property subject to a recorded claim of lien under this chapter, or contractor, subcontractor, lender, or lien claimant who disputes the correctness or validity of the claim of lien may record, either before or after the commencement of an action to enforce the lien, in the office of the county recorder or auditor in the county where the claim of lien was recorded, a bond issued by a surety company authorized to issue surety bonds in the state..... If the claim of lien affects more than one parcel of real property and is segregated to each parcel, the bond may be segregated the same as in the claim of lien.

The condition of the bond shall be to guarantee payment of any judgment upon the lien in favor of the lien claimant entered in any

action to recover the amount claimed in a claim of lien, or on the claim asserted in the claim of lien.

The effect of recording a bond shall be to release the real property described in the notice of claim of lien from the lien and any action brought to recover the amount claimed. Unless otherwise prohibited by law, if no action is commenced to recover on a lien within the time specified in RCW 60.04.141, the surety shall be discharged from liability under the bond. If an action is timely commenced, then on payment of any judgment entered in the action or on payment of the full amount of the bond to the holder of the judgment, whichever is less, the surety shall be discharged from liability under the bond.

Although the Statute has been in place since 1991, there are very few reported decisions that even reference the law. A current search of Washington Supreme Court decisions failed to locate a single case. However, Division II issued a decision on October 2, 2012, *Olsen Engineering Inc. v. KeyBank, NA*, 171 Wn.App. 57 (2012), that addresses a number of the issues in this matter.

It is worth noting that the *Olsen Engineering* decision was issued after Johnson received and recorded its Lien Foreclosure Judgment; after Columbia commenced its action and posted and recorded the Lien Release Bond; and just one day after Columbia filed its Motion for Summary Judgment against Johnson. CP 38-44.

Olsen Engineering presents a convoluted set of facts, many of which were in dispute. Olsen was a site contractor on a new residential development left unpaid when the owners faced financial problems, and KeyBank was the construction lender on the project. Just one day before KeyBank had scheduled the trustee's sale of

the property after KeyBank foreclosed on its Deeds of Trust, Olsen filed a Lien Foreclosure action on its construction liens and sought to restrain KeyBank from proceeding with the sale. Olsen asserted that its lien was superior to KeyBank's Deeds of Trust. KeyBank counterclaimed, requesting a declaratory judgment declaring its Deeds of Trust superior to Olsen's construction lien. Before a hearing or trial could be held, KeyBank availed itself of the procedures under RCW 60.04.161, and provided a Lien Release Bond. With the property released from Olsen's lien claims, the foreclosure sale proceeded.

Motions followed, and Olsen was able to convince the superior court that KeyBank could not dispute lien priorities after providing the lien release bond. The effect was that Olsen was able to enter a large judgment against the bond, similar to a default judgment, while KeyBank was denied any opportunity to challenge the lien claim or to challenge the validity or priority of the lien claim or process.

Understandably, Division Two overturned, with Judges Hunt, Armstrong and Penoyar agreeing unanimously to remand to the superior court to consider the parties relative lien and deeds of trust priorities. 171 Wn.App. 57, 81.

Appellant Johnson does not disagree with the core holding in *Olsen*. There is no dispute in Washington that the foreclosure of a

properly secured deed of trust that predates in time a contractor's "start" date will eliminate the contractor's lien.

The Olsen Court concluded as follows:

CONCLUSION

¶43 We affirm the superior court's ruling that Olson's single construction lien was valid and effective for all four Meriwether Properties. But we reverse the remainder of the superior court's summary judgment for Olson, its foreclosure of KeyBank's release-of-lien bond, its judgment of deficiency in Olson's favor and award of attorney fees to Olson, and its order preventing KeyBank from disputing its deeds of trust's priority over Olson's construction lien. We remand to the superior court (1) to reconsider the respective lien/deeds of trust amounts and priorities excluding, however, Olson's claim of lien for work performed at Juneau's direction before June 1, 2006; «28» and (2) to vacate that portion of its attorney fee award to Olson attributable to defending its lien for work performed before June 1, 2006.

«28» *On remand, KeyBank's release-of-lien bond proceeds may be used to satisfy any lien claim on which Olson proves its construction lien's priority over KeyBank's deeds of trust.*

PENOYAR, J., and ARMSTRONG, J. PRO TEM., concur.

(Emphasis added, footnote 28) 171 Wn.App. 57, 81.

Footnote 28 is directly on point in this matter. Johnson's construction lien and Lien Foreclosure Judgment against the work areas identified above (see, pg. 8), those being the water tank, pump house, and storm drainage facilities, have priority over Columbia, in that Columbia lacks or lacked any security in those areas. There is no better priority than when Columbia has no claim at all.

Columbia may attempt to argue, as it did in superior court, that its “intent” was to only provide a Lien Release Bond with respect to those properties or parcels subject to its deeds of trust. The Bond speaks for itself – Columbia did not restrict its scope to “deed of trust” property or parcels, but instead choose to release all lien property without limitation. CP 19-21. It cannot be denied that it was in Columbia’s interest to limit or prevent Johnson from proceeding against the structures, improvements, and / or equipment located on the properties in which Columbia did not hold any security interest yet those improvements contribute to the value of the development lots sold at trustee’s sale. CP 178, 381.

3. The Lien Release Bond Secures All Lien Claims Against The Liened Property, Not Just Claims Against Columbia.

In its pleadings Columbia has argued that the Lien Release Bond only secures debts or a Judgment owing to Johnson from Columbia, and not any debt or judgment owing to Johnson from Benson. This position ignores the plain language of RCW 60.04.161, which states as follows:

The condition of the bond shall be to guarantee payment of *any* judgment upon the lien in favor of the lien claimant entered in *any* action to recover the amount claimed in a claim of lien, or on the claim asserted in the claim of lien.

(Emphasis added) The purpose of the Lien Release Bond is to *free the lien property*, not to secure payment from any one party to another. Johnson has no claim directly against Columbia. No one requested or required Columbia to post and record the Lien Release Bond, but Columbia did so fully aware that Johnson held and had recorded a final Lien Foreclosure Judgment against properties owned by Benson. Columbia was not required to post a Bond to pursue a declaratory ruling concerning priorities as between Columbia's deeds of trust and Johnson's Lien Foreclosure Judgment. CP 159-163.

Nothing in the plain language of RCW 60.04.161 provides for a party to first post and record a Lien Release Bond, stripping a lien claimant of the ability to proceed against lien property interests, and then allowing for the withdrawal and release of that Bond. Posting the Bond, a voluntary procedure to remove claims against property, replaces real property security with alternate security, "to guarantee payment of *any* judgment..."

Although argument does not create evidence nor provide a basis for factual findings, Columbia's evolving position underlies the superior court's error in this matter. In its October 1, 2012 Motion pleading, Columbia asserts as follows:

“Its (Columbia’s) deed of trust interests in Saratoga Passage View Plat Lots 1, 2,.....25, **and 26** (“the Property”) **are prior and superior to defendant’s lien...**”.

(Emphasis added) CP 38.

That claim by Columbia covers all of the properties itemized in Johnson's Lien and Judgment.

In Columbia's last pleading filed in this matter, dated April 5, 2013, objecting to Johnson's motion to foreclose against the Lien Release Bond, Columbia asserts a more modest claim. On page two of Columbia's argument, counsel explains:

“The Bank posted the surety bond to ensure payment in the event the Court found that Johnson’s lien was prior to the Bank’s Deeds of Trust **in any of the real estate which is covered by the Bank’s Deeds of Trust.**”

(Emphasis added) CP 534.

The Lien Release Bond was not so conditioned. The Lien Release Bond released Johnson's Lien Foreclosure Judgment in its entirety, without limitation, and was not limited to “**real estate which is covered by the Bank’s Deeds of Trust.**”

Figuratively and literally, the result of the superior court's order releasing the Lien Release Bond is to leave Johnson holding an empty bag.

4. Johnson's Single Lien Against Multiple Properties Was Appropriate

As described above, Johnson recorded a single lien against multiple properties, making claim against both the construction work site locations located within Lot 26, Saratoga Passage, and against 15 development lots owned by Benson. Columbia held security interests in the 15 development lots, but not in the work site properties / parcels.

A similar situation occurred in *Olson Engineering Inc. v. KeyBank, NA*, 171 Wn.App. 57 (2012). Olson Engineering, a site contractor like Johnson, recorded a single lien against four plat parcels, even though its physical construction work was located on only one or two of the four parcels. Olson argued that the work benefited all of the parcels, justifying the common lien. KeyBank argued that the common lien was invalid, and that four separate liens with segregated costs were required under RCW 60.04. *Olson*, at 58, 59. Olson provided evidence that all of the work claimed under the lien benefited all properties.

The similarity to Johnson's lien claim is telling. All of the work for which Johnson liened the Saratoga Passage properties was for common use utility improvements, necessary for each development lot to have value. CP 178, 381. The physical work locations, however, were all located on separate defined tracts or parcels

within Lot 26, Saratoga Passage. There was no trickery involved in Johnson's claims – Mr. Johnson even went to the trouble to record the Lien Foreclosure Judgment against the individual development lots and against the Lot 26 work area parcels in separate “Judgment Lien” documents. CP 390.

The Olson Court, issuing its opinion nearly a year after Johnson's first lien, approved of Johnson's approach, as follows:

CONCLUSION

¶43 We affirm the superior court's ruling that Olson's single construction lien was valid and effective for all four Meriwether Properties.

PENOYAR, J., and ARMSTRONG, J. PRO TEM., concur.

171 Wn.App. 57, 81.

If it was Columbia's intent to record a Lien Release Bond that only released the Saratoga Passage development lots in which it held security interests, the outline and documents to do so had already been provided by Johnson. CP 390. Instead, the scope of the Lien Release Bond was unlimited.

Columbia presented no evidence for the record in this matter than it held a recorded interest in Johnson's specifically identified Lot 26 work areas. However, as set forth above, in its October 1, 2012 Motion papers and argument, Columbia generally asserts that “Its deed of trust interests in Saratoga Passage View Plat Lots 1, 2,25, and 26 (“the Property”) are prior and superior to defendant's lien...”. CP 38. It is unknown if Columbia was simply mistaken at

that time as to the extent of its security, or was intentionally attempting to mislead the Court, but the statement demonstrates that Columbia's Lien Release Bond was not limited in scope to just the development lots in Saratoga Passage liened by Johnson in which Columbia held security interests.

E. CONCLUSION

In summary, Columbia voluntarily posted and recorded a Statutory Lien Release Bond, for the purpose of releasing properties then subject to a final Lien Foreclosure Judgment in Johnson's favor. Columbia did so for its own benefit, to facilitate foreclosure of its security interests in the property. Initially, but incorrectly, Columbia asserted and argued that its security interests attached to all properties subject to Johnson's lien and Lien Foreclosure Judgment. The Bond was not conditioned as only applying to properties in which Columbia was later determined to hold security interests, and pursuant to statute and under the language on the face of the Bond upon recording released Johnson's lien claims and recorded Lien Foreclosure Judgment.

Columbia's security interests in Saratoga Passage properties included the 15 development lots liened by Johnson, but did not extend to the parcels within Lot 26 where Johnson was performing construction work. Johnson's lien claim and Lien

Foreclosure Judgment specifically identified the work area parcels, which were also delineated on the face of the plat documents. Columbia's Lien Release Bond released Johnson's claims against the 15 development lots, *and* released Johnson's claims against the Lot 26 work areas.

Columbia then pursued foreclosure against plat owner Benson, and held a Trustee's sale on February 22, 2013. The Trustee's Deed conveyed the 15 development lots free of claim by Johnson, but did not convey the Lot 26 work area parcels also liened by Johnson but previously released from Johnson's claims by Columbia's Lien Release Bond. The scope of the Trustee's deed confirmed the evidence submitted by Johnson to the trial court – i.e. - Columbia's security interests did not extend to the work area parcels in Lot 26 subject to Johnson's lien and Judgment. CP 383.

With the Trustee's sale final, Columbia moved for final release of the Lien Release Bond, and Johnson moved to foreclose against the Bond as payment for the Lien Foreclosure Judgment that had been removed from the Lot 26 work area parcels under the terms of the Lien Release Bond. In error, the superior court released the Bond, on the simple statement "(A)nd it appearing to the Court that there is no longer need for such surety bond." CP 512.

For the reasons set forth above, Johnson requests that this Court reverse the Superior Court's ruling releasing the Lien Release Bond, and remand for further proceedings by Johnson against the Bond.

F. ATTORNEYS FEES

Pursuant to RAP 18.1 and RCW 60.04.181, Appellant Johnson requests an award of attorney's fees on appeal. RCW 60.04.181(3) provides as follows:

Attorney's fees

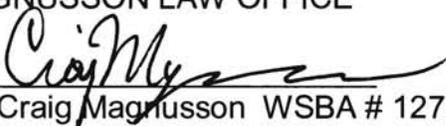
(3) The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.

Johnson prevailed on its lien claim in the trial court, and was awarded a Judgment for fees in the amount of \$26,190, for a total Lien Foreclosure Judgment of \$89,867. Columbia's Lien Release Bond was for 150% of that amount, and was posted "to guarantee payment of any judgment...". The Judgment remains unsatisfied today; Johnson's Lien Foreclosure Judgment against the Lot 26 work area parcels was released by Columbia's Lien Release Bond; and now Johnson must pursue this Appeal to protect a claim

against the Bond which was incorrectly released by the superior court on Columbia's motion. An award of fees to Johnson is requested.

RESPECTFULLY SUBMITTED this 5th day of March, 2014

MAGNUSSON LAW OFFICE

By: 
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Attorney for Appellant Johnson