

City of Bremerton

FILED
COURT OF APPEALS

06 APR -31 PM 12:59

NO. 33910-2-II
Kitsap County Superior Court Cause No. 03-2-02825-0

WASHINGTON STATE COURT OF APPEALS
DIVISION II

[Signature]
CITY OF BREMERTON

CHARLES C. HASELWOOD, ET UX., Respondent

v.

RV ASSOCIATES, INC., Petitioner

and

CITY OF BREMERTON, Respondent

BRIEF OF RESPONDENT CITY OF BREMERTON

DAVID P. HORTON
WSBA #27123
Law Office of
David P. Horton, Inc. P.S.
3212 NW Byron Street, Suite 104
Silverdale, WA 98383
(360) 692-9444; (360) 692-1257 Fax
Co-Counsel for Respondent City of
Bremerton

ROGER A. LUBOVICH
WSBA #8942
Bremerton City Attorney
345 6th Street, Suite 600
Bremerton, WA 98337
(360) 473-2345; (360) 473-5161 Fax
Co-Counsel for Respondent City of
Bremerton

pm 3-31-06

TABLE OF CONTENTS

I. STATEMENT OF THE ISSUES..... 1

II. STATEMENT OF THE CASE..... 2

III. ARGUMENT..... 3

A. STANDARD OF REVIEW..... 3

B. RV’S CLAIM THAT THEY ARE A THIRD-PARTY BENEFICIARY OF THE CONTRACT IS FUTILE..... 4

C. RV’s CLAIM THAT THE CITY IS LIABLE FOR A FAILURE TO COMPLY WITH RCW CHAPTER 60.28 IS BOTH FUTILE AND UNTIMELY. 6

1. Because it is undisputed that the Ice Arena was not constructed at public expense it is not a “public work.” 6

2. Even if it is a “public work” RV’s claim is too late. 7

IV. CONCLUSION 10

TABLE OF AUTHORITIES

Cases

<i>Donald B. Murphy Contractors, Inc. v. King County</i> , 112 Wash.App. 192, 49 P.3d 912 (2002)	4, 5, 9
<i>Elliot v. Barnes</i> , 32 Wash.App. 126, 639, P.2d 683 (1981).....	3
<i>Herron v. Tribune Publishing Co. Inc.</i> , 108 Wash.2d 162, 736 P.2d 249 (1987)	8
<i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wash. 2d. 103, 937 P.2d 154 (1997)	3, 4
<i>Postlewait Const. v. Great American Ins. Companies</i> , 106 Wash.2d 96, 720 P.2d 805 (1986)	5
<i>Postlewait Const. v. Great American Ins. Companies</i> , 41 Wash.App. 763, 706 P.2d 636 (1985)	5
<i>Supporters of the Center, Inc. v. Moore</i> , 119 Wash.App. 352, 80 P.3d 618 (2003)	6

Statutes

Superior Court Civil Rule 15	3, 8
RCW 34.04.110	6
RCW 60.28	3, 7

I. STATEMENT OF THE ISSUES

A. RV Associates, Inc. (“RV”) claims Bremerton should have required a retainage for this project because it was a “public work.” A “public work” is one that is constructed at public expense. But RV concedes that “[t]he Bremerton Ice Arena constructed and paid for the building.”¹ And they further concede that their contract was a “Private Works Contract.”² Did the trial court abuse its discretion by denying RV’s motion to amend to add this claim?

B. RV claims to be a third-party beneficiary of the Concession Agreement between the City and the Bremerton Ice Arena. A third-party beneficiary contract only exists when the parties intend to create one. The Concession Agreement states that “...this Agreement is solely for the benefit of the Parties hereto and gives no right to any other party....”³ Did the trial court abuse its discretion by denying RV’s motion to amend to add this claim?

¹ Brief of Petitioner at 12.

² Brief of Petitioner at 3; CP 138.

³ Brief of Petitioner at Exhibit A-2 at 21, CP 390. There is an express exception to this provision. (“...except as provided by Article 6 herein.”) As such, the Lender (Haselwood) has some limited rights under the agreement as expressed in Section 6.

II. STATEMENT OF THE CASE

The City of Bremerton owns the real property where the Bremerton Ice Arena was built.⁴ The City granted the Bremerton Ice Arena a concession to construct and operate an ice arena. At the termination of the agreement the improvements become the property of the City of Bremerton.⁵

The Concession Agreement provides:

8.1.2 *No Third Party Rights Created*

It is mutually understood and agreed that this Agreement is solely for the benefit of the Parties hereto and gives no right to any other party except as provided by Article 6 herein.⁶

The limited exception to this section provided for in Article 6 concerns rights of the lender, Haselwood, and not any contractor or subcontractor.⁷

The City did not contribute any funds to construct the improvements.⁸ RV's contract was a "Private Works" contract.⁹

Initially, the City had no interest in this litigation and was not a party.¹⁰ But on August 13, 2004, the City learned that RV sought to remove improvements from the property.¹¹ The City's Engineering Division reviewed RV's plan for removal. They determined that while some of the improvements were removable (and therefore the City had no

⁴ CP 365.

⁵ CP 366-408.

⁶ CP 390.

⁷ CP 382-386.

⁸ CP 381-382.

⁹ CP 138. *See also* Proposed Amended Answer, Exhibit B.

¹⁰ CP 1-7.

¹¹ CP 365.

objection to those parts of the plan), other improvements they sought to remove would harm the underlying real property. For example, the construction changed the topography making removal of the stormwater system problematic.¹² As such, the City moved to intervene so that it could have a say in RV's removal motion.¹³ The City's motion was granted.¹⁴ Eventually the Court declined to order removal of any improvements.

Then, after two years of litigation, RV sought to amend its pleadings to include two cross-claims against the City. First, they claim to be a third-party beneficiary of the Concession Agreement. Second, they assert that construction of the ice arena was a "public work" and thus required the City to comply with the provisions of RCW 60.28.

III. ARGUMENT

A. STANDARD OF REVIEW

RV Associates, Inc. must show that the trial court abused its discretion by denying the motion to amend. "Appellate courts apply an abuse of discretion standard to trial courts' decisions denying leave to amend...after the pleadings have closed."¹⁵

¹² CP 409-411.

¹³ CP 421.

¹⁴ CP 434.

¹⁵ *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 142, 937 P.2d 154, 176 (1997), citing CR 15(a); *Elliot v. Barnes*, 32 Wash.App. 126, 131, 639, P.2d 683 (1981).

B. RV'S CLAIM THAT THEY ARE A THIRD-PARTY BENEFICIARY OF THE CONTRACT IS FUTILE.

Courts may refuse to grant a motion to amend when the amendment is futile.¹⁶ Here, the trial court did not abuse its discretion in so finding. A contract will only create rights for a third-party if both parties to the contract intend for that to be the case. Here, there is no intent evidenced in the Concession Agreement – or anywhere in the record – that the Bremerton Ice Arena or the City of Bremerton intended subcontractors to be a beneficiary of the agreement.

*Donald B. Murphy Contractors, Inc. v. King County*¹⁷ is directly on point. There, a subcontractor sought recovery directly from the County when the general contractor would not pay for a loss they incurred. The contract between the County and the general contractor required the County to procure insurance for the project to protect the interests of subcontractors. The subcontractor asserted that this contract provision created third-party rights for subcontractors. But the Court disagreed for several reasons. First, the contract unambiguously placed the obligation to pay subcontractors claims on the general contractor. Second, the contract had an express provision disclaiming any third-party rights:

¹⁶ *Ino Ino, Inc.* at 142.

¹⁷ 112 Wash.App. 192, 49 P.3d 912 (2002).

[T]he parties must intend to create an obligation to a third party. *Postlewait*, 41 Wash.App. at 768, 706 P.2d 636. We decline to reconsider this holding. The contract provision for insurance including the interests of subcontractors shows the County desired to benefit Murphy, but a desire to benefit a third party is not the same as an intent to assume a direct obligation to that third party. *Postlewait*, 106 Wash.2d at 100, 720 P.2d 805. Because the contracting parties did not intend it, we conclude that Murphy is not a third-party beneficiary to the project contract between the County and Coluccio.¹⁸

Here, the facts are almost identical. The contract while mentioning liens, requires the Bremerton Ice Arena to pay all the costs of construction. It then has an express provision disclaiming third-party rights. So while the Concession Agreement provisions prohibiting liens will benefit subcontractors, it does not evidence an intent by the City to assume a direct obligation to subcontractors. Based on the unambiguous Concession Agreement, RV's claim is futile.

¹⁸ Id at 197.

C. RV's CLAIM THAT THE CITY IS LIABLE FOR A FAILURE TO COMPLY WITH RCW CHAPTER 60.28 IS BOTH FUTILE AND UNTIMELY.

1. Because it is undisputed that the Ice Arena was not constructed at public expense it is not a "public work."

In order for a project to be a "public work" the project must be executed at the cost of the public entity.¹⁹ The entire cost of the project does not have to be borne by a public entity, but the fact that some of the improvement has been paid by a public entity is a significant factor.²⁰

The City of Bremerton did not contribute any funds from any source to the construction of the improvements.²¹ RV concedes this point.²² RV's pleadings and contract correctly identify the nature of their work for Bremerton Ice Arena, Inc. as a private contract, not a public works contract. Their contract, on their letterhead, identifies it as a "Private Works Contract."²³

But RV seems to argue that because the City is landlord and has a future interest in the improvements it is a "public work." But just because a municipality leases property to a tenant it does not make the

¹⁹ RCW 34.04.110; *Supporters of the Center, Inc. v. Moore*, 119 Wash.App. 352, 80 P.3d 618 (2003).

²⁰ *Id.*

²¹ CP 381-382.

²² Brief of Petitioner at 12.

²³ CP 138; RV's proposed Amended Answer, Counterclaim and Cross-Claim.

improvements constructed by the tenant a “public work.” The best arguments that this was not a “public work” are made by RV. The claim is futile.

2. Even if it is a “public work” RV’s claim is too late.

On August 7, 2003 the City received a copy of RV’s lien claim. The lien was attached to a letter that referenced a meeting between representatives of RV, the Bremerton Ice Arena, and the City of Bremerton.²⁴

So, at that time – over two years before they sought to amend their pleadings – RV knew of the potential for an action against the City of Bremerton. But they waited two full years to bring their claim based on the theory that the Ice Arena was a “public work” and therefore subject to the requirement that the City violated the Retainage Statute. RV made a choice. They chose to pursue their lien against Bremerton Ice Arena and to remove the improvements. Those efforts failed. Now they are moving to “Plan B,” to the prejudice of the City.

There is a strong public policy that claims against public entities on these grounds be brought promptly. RCW 60.28.030 requires that an

²⁴ CP _____. (City of Bremerton’s Supplemental Designation of Clerk’s Papers; Declaration of David P. Horton, Exhibit A attached as Appendix A.

action of a claim against the reserve fund be brought within four months of filing the claim. Here, RV has waited over two years.

And even though leave to amend is to be “freely given,”²⁵ the denial of a motion to amend has been upheld in a similar situation:

The trial judge was concerned with unfair surprise and prejudice to the defendants, for in denying the plaintiffs' motion, the judge noted that the lawsuit had "***been pending for a substantial period of time.***" He also observed that granting the motion would "in effect ... broaden the issues". The original complaint, although raising over a half dozen counts of defamation, "involved one episode over a relatively limited period of time." ***If the motion had been granted, the defendants would have had to contact an entire new set of witnesses and begun new efforts to secure evidence. Thus, we see no abuse of discretion in the trial court's decision.***²⁶

(Emphasis added).

Up to this point, the City was merely an interested party, not subject to any liability. The City's narrow focus was on the scope of any potential removal of improvements. If the trial court allowed the amendment the City would need to start from scratch because it has only been tangentially involved in the litigation. It was not involved in the

²⁵ CR 15

²⁶ *Herron v. Tribune Publishing Co. Inc.*, 108 Wn.2d 162, 168, 736 P.2d 249 (1987).

details of the construction or its costs or the litigation surrounding those issues. And now – several years later – they will have to evaluate RV’s claims for compensation.

If the amendment were to take place the City would need to prepare for the new claims. Additional discovery (that would probably be duplicative of discovery that has already occurred) would be required.

In *Donald B. Murphy Contractors, Inc. v. King County*²⁷ the Court of Appeals affirmed a trial court’s denial of a motion to amend on less egregious facts than we have here. In that case the plaintiff had sued in August 1999 and moved to amend more than a year later. “[T]he proposed amendment [is] dilatory”²⁸ and the City will suffer prejudice as a result.

²⁷ 112 Wash.App. 192, 49 P.3d 912 (2002).

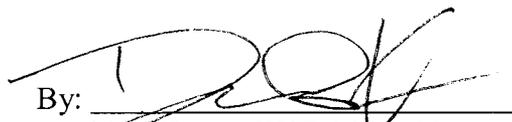
²⁸ *Id.*

IV. CONCLUSION

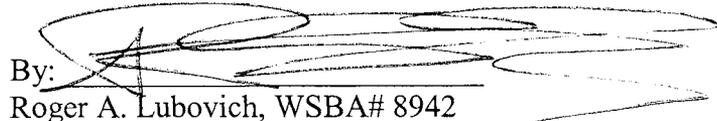
RV Associates, Inc.'s new claims against the City are futile and too late. The trial court's order was not an abuse of discretion and should be affirmed.

Respectfully submitted this 30th day of March 2006.

LAW OFFICE OF
DAVID P. HORTON, INC. P.S.

By: 
David P. Horton WSBA#27123
Co- Counsel for City of Bremerton

ROGER A. LUBOVICH
City Attorney

By: 
Roger A. Lubovich, WSBA# 8942
Co-Counsel for City of Bremerton

APPENDIX A

RECEIVED FOR FILING
KITSAP COUNTY CLERK

AUG 17 2005

DAVID W. PETERSON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR
KITSAP COUNTY, WASHINGTON

CHARLES C. HASELWOOD and JOANNE
L. HASELWOOD, husband and wife,
Plaintiffs,

vs.

BREMERTON ICE ARENA, a Washington
corporation; GREGORY S. MEAKIN and
DEBORAH A. MEAKIN, husband and wife;
RV ASSOCIATES, INC. a Washington
corporation; MALLORY ENTERPRISES,
INC. dba ABBEY CARPETS, a Washington
corporation; ROBISON MECHANICAL,
INC., a Washington corporation; JPL
HABITABILITY, INC., a Washington
corporation; CONSOLIDATED
ELECTRICAL DISTRIBUTORS, INC. dba
STUSSER ELECTRIC CO./EAGLE
ELECTRIC, a Washington corporation;
ALASKA CASCADE FINANCIAL
SERVICES, INC. assignee for Sound Glass
Sales, Inc., a Washington corporation;
SULLIVAN HEATING & COOLING, INC.
a Washington corporation; STIRNCO
STEEL STRUCTURES, INC., a Washington
corporation; EAGLE ELECTRIC, INC., a
Washington corporation; HANSON SIGN
COMPANY, INC. a Washington
corporation; STRIPE RITE, INC. a
Washington corporation,
Defendants,

Case No.: 03-2-02825-0

DECLARATION OF DAVID P.
HORTON IN SUPPORT OF THE
CITY OF BREMERTON'S
RESPONSE TO RV ASSOCIATES
MOTION FOR LEAVE TO FILE
AMENDED ANSWER AND
COUNTERCLAIM AND CROSS-
CLAIM

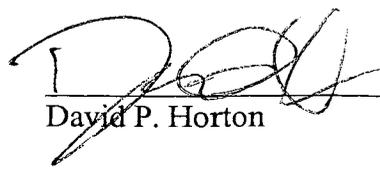
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

David P. Horton declares:

1. I am the attorney for the City of Bremerton.
2. Attached hereto as Exhibit A is a true and correct copy of correspondence from William H. Broughton dated August 5, 2003 and the claim of lien recorded by RV Associates, Inc. against the Bremerton Ice Arena, Inc. on July 16, 2003.

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

Dated this 16th day of August, 2005, at Bremerton, Washington.



David P. Horton

BROUGHTON & ASSOCIATES, INC., P.S.

ATTORNEYS AT LAW

9057 WASHINGTON AVENUE N.W.
SILVERDALE, WASHINGTON 98383
(360) 692-4888 • FAX (360) 692-4987
INTERNET ADDRESS: bbroughtonlaw.com

William H. Broughton

Martin E. McQuaid
Of Counsel

August 5, 2003

Mr. Gary T. Chrey
SHIERS CHREY COX
DIGIOVANNI & ZAK, LLP
600 Kitsap Street, Suite 202
Port Orchard WA 98366

Re: Hazelwoods-Bremerton Ice Arena

Dear Gary:

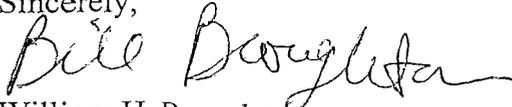
Enclosed please find a Notice of Claim of Lien that has been filed by my client RV Associates on the Bremerton Ice Arena property. You will note that RV Associates is owed \$101,905.30 plus interest and attorneys fees. You will also note that the Claim of Lien predates the two Deeds of Trust recorded on the property by your clients, Charles and JoAnne Haselwood.

This letter serves to let you know that a meeting has been scheduled for Friday, August 8 at City Hall in the Mayor's office to discuss this issue. Mr. Meakin will be present along with his attorney Jim Ryan. City Attorney Roger Lubovich will be present along with Parks Director Jim Spencer. My client Steve Davis and I will be there representing the interests of RV Associates. Obviously, we are interested in hearing from you and/or your clients on these issues.

If the meeting fails to produce any resolution of the outstanding indebtedness to RV Associates, my client has instructed me to commence proceedings to foreclose on the lien. This would also extinguish the interest of Mr. and Mrs. Haselwood.

I look forward to hearing from you as to whether or not you will be able to participate in this discussion.

Sincerely,


William H. Broughton

WHB:nn
Enclosure
cc/w/enc:

Client
Roger Lubovich
Jim Ryan

EXHIBIT A

*RV ASSOCIATES, INC.
1333 LLOYD PARKWAY
PORT ORCHARD, WA. 98366*



STEPHEN DAVIS

LIEN \$20.00

200307160120

Page 1 of 2

07/16/2003 11:23A

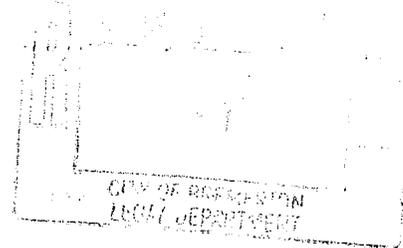
Kitsap Co, WA

CLAIM OF LIEN

Claimant: RV Associates, Inc.
1333 Lloyd Parkway
Port Orchard, WA. 98366

Vs.

Debtor: Bremerton Ice Arena, Inc.
P.O. Box 1044
Bremerton, WA. 98337



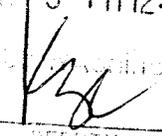
Notice is hereby given that the company named as Claimant claims a lien pursuant to chapter 60.04 RCW. In support of this lien the following information is submitted:

1. Name of Claimant: **RV Associates, Inc.**
2. Date on which the Claimant began to perform labor, provides services, supply material or equipment or the date on which employee benefit contributions became due: **September 2002**
3. Name of person or company indebted to the claimant:
**Bremerton Ice Arena, Inc.
P.O. Box 1044
Bremerton, WA. 98337**
4. Description of the property against which a lien is claimed:
**Bremerton Ice Arena, Inc.
SE SW 12-24N - 01E**
PARCEL # N/A
5. Name of the Owner or reputed Owner of property: **Unknown**
6. The last date on which labor was performed, services provided, contributions to an employee benefit plan were due, or material, or equipment was furnished: **May 27, 2003**

FILED
COURT OF APPEALS

06 APR 13 PM 12:59

STATE OF WASHINGTON

BY  DEPUTY

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

CHARLES C. HASELWOOD, ET UX.,
Respondent

CAUSE NO. 33159-4-II

v.

SUPERIOR COURT NO. 03-2-02825-0

RV ASSOCIATES, INC.,
Petitioner

DECLARATION OF SERVICE

and

CITY OF BREMERTON,
Respondent.

I am the Paralegal for the Bremerton City Attorney's Office. On the 31st day of March 2006, and in the manner indicated below, I caused a copy of the City of Bremerton's Brief of Respondent, Supplemental Designation of Clerk's Papers and this Declaration of Service, to be served on the following individuals:

David R. Riley
Weinstein & Riley, P.S.
2101 4th Avenue, Suite 900
Seattle, WA 98121-2339
Attorneys for Frontier Bank

Jeffrey L. Tolman
PO Box 851
Poulsbo, WA 98370
Attorney for Receiver

Kenneth Kambich
Shiers Chrey Cox Digiovanni Zak
& Kambich LLP
600 Kitsap Street, Suite 202
Port Orchard, WA 98366
Co-Counsel for Haselwoods

Charles M. Granoski, JR.
2626 N. Pearl
Tacoma, WA 98407
Attorney for Stirnco

1 Kenneth W. Masters
2 241 Madison Avenue N
3 Bainbridge Island, WA 98110
4 Co-Counsel for Haselwoods

William H. Broughton
Broughton & Singleton, Inc. P.S.
9057 Washington Avenue NW
Silverdale, WA 98383
Attorneys for RV Associates

- 5 [x] By United States Mail
6 [] By Legal Messenger
7 [] By Personal Service
8 [] By Facsimile
9 [] By UPS Next Day Air

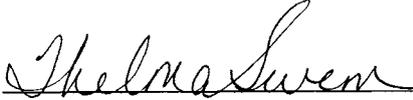
10 I further caused the original Respondent City of Bremerton's Supplemental Designation
11 of Clerk's Papers to be served on:

12 Clerk of the Kitsap County Superior Court
13 614 Division Street
14 Port Orchard, WA 98366

- 15 [X] By United States Mail
16 [] By Legal Messenger
17 [] By Personal Service
18 [] By Facsimile
19 [] By Federal Express/Express Mail

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

22 Executed at Bremerton, Washington this 31st day of March 2006.

23 
24 Thelma Swem, Paralegal