

NO. 48058-1-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

Francisco Guillen, et al.,
Appellants,

v.

BENJAMIN PEARSON, et al.,
Respondents,

FILED
COURT OF APPEALS
DIVISION II
2016 JAN 22 AM 9:39
STATE OF WASHINGTON
BY _____
DEPUTY

RESPONSIVE BRIEF OF RESPONDENT,
MILESTONE AT WYNNSTONE, LLC
AND
CERTIFICATE OF MAILING

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ORIGINAL

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I. STATEMENT OF THE CASE

Milestone at Wynnstone, LLC was the owner of a parcel of property and the general contractor in charge of construction of apartment buildings that are the subject of this lawsuit. (CP 66). ABSI Builders, Inc. was hired as a subcontractor to do the framing of the apartment buildings. (CP 67). There were many other subcontractors on the job and Milestone at Wynnstone, LLC was the general contractor was in charge of all of the subcontractors. (CP 66, 67). It is undisputed that ABSI was not the agent of Milestone for any purpose. (CP 67). The contract between Milestone and ABSI states:

The subcontractor shall under no circumstances be considered as the agent of employee of builder and shall have no right or authority to in any manner obligate the builder to any other person or entity.

(CP 67, 68-70)

Plaintiffs were not licensed contractors. Plaintiffs claim that they were employees of ABSI acting as agents in the scope of their employment when they performed the services for which they have filed a lien under RCW 60.04. Plaintiffs allege that ABSI failed to pay them for work performed by them as employees of ABSI. Plaintiffs assert that even though they performed their services at issue in this case as employees of ABSI that they individually have lien rights as laborers against the property of Milestone at Wynnstone, LLC.

II. STATEMENT OF ISSUES

1. Is every subcontractor on every construction job the agent of the owner of the property for purpose of being able to enter into contracts with third parties that can create liens rights on the owner's under RCW 60.04?

2. Do employees of a corporation providing labor on a construction job have claims in their individual capacity against the property owner in addition to the claims of the corporation providing the labor?

III. ARGUMENT

LIEN STATUTE IS STRICTLY CONSTRUED IN DETERMINING WHETHER PLAINTIFFS ARE WITHIN CLASS AUTHORIZED TO HAVE A STATUTORY LIEN

Plaintiffs argue at Page 16 of their Opening Brief that the Lien Statute, and particularly RCW 60.04.011 through 60.04.226 are to be liberally construed to find that the Plaintiffs have a lien rights. That argument is directly contrary to clear Washington law that holds that the rule of strict construction must be employed in determining whether one is within a class authorized to have a statutory lien. *Dean v. McFarland Wrecking Co.*, 81 Wn.2d 215, 500 P.2d 1244 (1972). *Dean, supra*, held that where there is a question as to whether or not a party falls with the class of potential plaintiffs entitled to a lien, that the statute must be strictly construed. The Court said, at page 219 and 220:

A lien of the type involved here is a creature of statute and is in derogation of common law. As such, it must be strictly construed to determine whether a lien attaches. The statutory operation is not extended for the benefit of those who do not clearly come within the terms of the statute.

The Court went on at page 221 to make it clear that the issue in the case was whether or not the contractor was within the class authorized to have a lien when it said, at page 221:

In light of the rule of strict construction that must be employed, when determining whether one is within a class authorized to have a statutory lien, we must hold the words clearing, grading or filling do not clearly extend the class to one who hauls away debris from a building demolished by another.

Dean, supra, has never been questioned or overruled. The law is clear that when determining whether or not a party has lien rights, the statute is to be strictly construed.

The issues in this case are whether the Plaintiffs, who are not licensed as contractors but were employees of a subcontractor, have a right to file a lien at all, and if they do, their lien binds the owner. RCW 60.04 is to be strictly construed against the Plaintiffs in determining whether they are claimants with a right to a lien.

Plaintiffs cite *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 261 P.3d 109 (2011) as authority that the Court can apply liberal construction in determining whether or not the Plaintiffs fall within the scope of persons entitled to claim a lien. The case does not support Plaintiffs and it in fact supports the Defendant's

argument that Plaintiff's lien claims must be strictly construed. In *Williams, supra*, the issue before the Court was whether a lien that was executed and notarized but failed to contain language from the lien statute that it was executed freely and voluntarily, was sufficient to create a valid lien under RCW 60.04.091(2). The case discussed the "dueling cannons of construction" discussing whether RCW 60.04.091(2) should be interpreted liberally or strictly. The Court discussed the history of the two lines of authority and limited the strict construction rule to determining whether persons or services come within the statute's protection.

The Court said, at page 696:

We agree with Hos that the appropriate way to view the competing cannons of strict and liberal construction is found in our early cases. The Strict Construction Rule, at its origin, was invoked to determine whether persons or services came within the statute's protection.

Because the case involved whether the form of the lien was appropriate and not whether the Plaintiffs were proper lien claimants, the Court applied the Liberal Construction Rule. It left unchanged the strict construction of the lien statute in deciding whether persons or services come within the statute's protection.

Shelcon Construction Group, LLC vs. Haymond, 187 Wn.App. 878, 351 P.3d 895 (2015) also cited by the Plaintiff does not change the Strict Construction Rule with respect to whether persons or services come within the statute's protection. That case

involved the effect of a partial release of a lien that had nothing to do with persons or services provided.

In the instant case the issue before the Court is whether Plaintiffs, who are not licensed contractors, who were employees of a subcontractor and who were not hired by either the statutory agent of the owner or the actual agent of the owner, had lien rights. The court is to strictly construe the lien statute against finding lien rights.

LIEN RIGHTS EXTEND ONLY TO PERSONS HIRED BY THE OWNER'S ACTUAL OR STATUTORY AGENT

The Plaintiffs admit they had no contractual privity with Milestone at Wynnstone, LLC, the owner at the time the construction was done. For a party who performs labor to have a right to a lien upon the property of the owner, the labor must have been furnished at the instance of the owner, the actual agent, or the construction agent of the owner. RCW 60.04.021. That statute states:

Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

The statute unequivocally provides that a person entitled to a lien is a person furnishing labor at the instance of the owner, the actual

agent or the construction agent of the owner. In the instant case, the Plaintiffs performed labor at the instance of ABSI Builders, Inc., not at the instance of the owner at the time construction was done, Milestone at Wynnstone, LLC. It is not disputed and Plaintiffs have not argued that ABSI Builders was the actual agent of the owner. The contract between Milestone and ABSI expressly provides that ABSI is not the agent of Milestone for any purpose.

The contract states:

The subcontractor shall under no circumstances be considered as the agent or employee of builder and shall have no right or authority to, in any manner, obligate the builder to any other person or entity. (CP 67).

The Declaration of Brandon Smith of October 2, 2015 (CP 67) also states:

ABSI was not the agent of Milestone for any purpose.

There is no factual dispute that ABSI was not the agent of Milestone. In order for it to have the authority to bind Milestone, the property owner to a lien under RCW 60.04.021, ABSI must have been the construction agent for the property owner, Milestone, at the time Plaintiffs performed their services.

The term "construction agent" is defined by RCW 60.04.011(1). The statute states:

"Construction agent" means any registered or licensed contractor, registered or licensed subcontractor, architect, engineer, or other person

having charge of any improvement to real property, who shall be deemed the agent of the owner for the limited purpose of establishing the lien created by this chapter.

Both case law and noted Washington Practice author Marjorie Rombauer are clear the person or party with control over the entire construction project is the statutory agent as defined by RCW 60.04.011(1). *Henifin Construction, LLC vs. Keystone Construction GW, Inc.*, 136 Wash.App. 268, 145 P.3d 402 (2006). 27 *Marjorie Dick Rombauer Washington Practice Creditors' Remedies-Debtors Relief*, §4.52 (September 2015). In *Henifin, supra*, McDonald's Corporation, the owner of the property on which the sub-contractor claimed a lien, hired Keystone Construction as a general contractor and placed that company in charge of constructing a restaurant on the property. Keystone Construction then hired the subcontractor who claimed a lien. The issue was whether Keystone Construction, the general contractor that McDonald's placed in charge of the construction of a building on the property could bind the owner's property to a lien by a subcontractor it hired. The Court held that since Keystone Construction was in charge of the construction of the McDonald's restaurant for the owner, it met the statutory requirement of "having charge of the improvement to real property" from RCW 60.04.011(1) and was the statutory agent with authority to bind the

owner's property to a lien. The Court cited the basis for his decision in the first paragraph of the case where it said:

Because McDonald's placed general contractor Keystone Construction *in charge of constructing its restaurant*, RCW 60.04.011 (1) deems Keystone to be McDonald's statutory construction agent for purposes of establishing subcontractor Henifin's construction lien on improvements it made to McDonald's property. (Emphasis added).

That the Court interpreted RCW 60.04.011(1) just as Defendant Milestone has to require the general contractor to be placed in charge of the construction job in order for it to be defined as a statutory agent is clear from the case. It said, at page 275:

A statutory agent who may establish a lien under the statute is a limited one. There must be a principal, impliedly the owner, who must grant authority to one of the types of persons enumerated. Although contractors, subcontractors and architects have authority to incur an indebtedness which may result in the attachment of a lien on the owner's property, this authority may arise only where the owner has given it to them.

The Court's intent to limit the ability of any subcontractor to hire 3rd parties who have lien rights to be a statutory agent is clear from the holding of the case that a Keystone Construction was the statutory agent where the court said, at page 275:

... when McDonald's placed Keystone in charge of the construction project, the statutes deemed Keystone to be McDonald's construction agent for the purposes of establishing a lien. (Emphasis added).

The *Henifin* decision is clear that it was not the fact that Keystone was a general contractor who had a construction contract with the owner that made it the construction agent for McDonalds, it was the fact that Keystone was placed in charge of the construction of the building that made it the construction agent for the owner. All of that language in *Henifin, supra* about Keystone being in charge of the construction project would be superfluous if, as Plaintiffs argue, that every contractor or subcontractor hired on a job is the statutory agent of the owner for purposes of having the authority to bind the owner to lien rights.

In the instant case it is not disputed that the owner, Milestone at Wynnstone, LLC was the contractor in charge of the construction project at issue in this case, an apartment building. It hired all of the subcontractors and oversaw the work. The contract signed between Milestone and ABSI made it clear that ABSI was not the agent of Milestone and had no authority to bind Milestone or its property. ABSI was not in charge of constructing the apartment building and it had no ability to pass on lien rights to third parties below it.

27 *Marjorie Dick Rombauer Washington Practice Creditors' Remedies-Debtors Relief*, §4.52 (September 2015) is in accord. There, the author states:

A construction agent is the person having charge of the improvement to real property, including but not

limited to a registered or licensed contractor, subcontractor, architect, or an engineer and is deemed to the agent of the owner only for the purpose of establishing a construction lien.

Rombauer is clear that a construction agent as defined by the statute is the person or entity in charge of the construction project. Milestone at Wynnstone was the party in charge of the construction of the buildings at issue in this case. Only it had the ability to hire entities that would give lien rights against the real property. Since Milestone at Wynnstone, LLC was the construction agent, and since Plaintiffs did not contract with Milestone, Plaintiffs have no lien rights.

Plaintiffs argue that the rules of statutory construction require the court to interpret the statute to state that any subcontractor on a construction job is the construction agent for the owner no matter how many tiers of subcontractors the subcontractor is removed from the owner. No appellate court has ever agreed with that position. Adopting Plaintiffs' interpretation of the statute would mean that on a construction job of a large building where 10,000 different employees worked for various contractors and subcontractors that the owner would be required to get a lien release from each employee to protect against double payment. Such a requirement would make it impossible for a large construction job to proceed. The Court is to interpret ambiguous language to avoid an absurd result. *State v. Vela*, 100 Wash.2d 636,

641, 673 P.2d 185 (1983). It is inconceivable that the Legislature intended require each employee of a subcontractor on each construction job to execute a lien release for each monthly draw on a construction project.

The only authority interpreting the lien statute supporting plaintiff's position is from an attorney who wrote an article that is contrary to the holding of *Henifin*, the case cited as authority for his article. *Ahlers & Cressman Lien and Bond Manual* (2010). The article has never been cited by any Appellate Court. Interestingly however, the author of the article relied on by Plaintiff states in the article that the reason the Court found that the lien attached was that the contractor who hired the plaintiff was placed in charge of the project and, as a result, qualified as the construction agent of the owner. The article cited by Plaintiffs states, in the portion excised from Plaintiff's brief:

"Keystone in turn hired Henifin to perform earth work. Keystone was a licensed contractor *that the owner had placed in charge of the project*, so the court had no trouble in concluding that Keystone was the owner's construction agent. (Emphasis added).

Even the author relied on by Plaintiff, whose article does not even correctly spell *Henifin, supra*, admits that the reason Keystone was found to be the construction agent was because he was placed in charge of the project by McDonald's.

As part of its argument that *Henifin, supra* is not controlling, Plaintiffs make an argument that under the RCW 60.04.011 (5) party can be in charge of a portion of a job without being in charge of a job. The argument misreads the applicable statute. As applicable here, RCW 60.04.011(5) states:

"Improvement" means: (a) Constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the same;

That language speaks of an improvement as the finished product. Nothing in the language suggests that portions of an improvement constitute an improvement under the statutory definition. In this case finished apartment buildings were being constructed. To suggest that a subcontractor who does nothing but framing is in charge of the entire project when the statute must be strictly construed in determining the scope of lien rights is meritless. Plaintiffs have no lien claims.

In this case, unlike *Henifin, supra*, the subcontractor Plaintiffs worked for is not in charge of the entire construction job and the contract between Milestone at Wynnestone and ABSI prohibits ABSI from obligating the owner to any other person or entity. Plaintiff's lien claim fails. *Henifin* and the Rombauer Washington Practice article are clear. To meet the definition of

statutory agent under RCW 60.04.011(1) a party must be the party placed in charge of the construction project directly by the owner.

Milestone at Wynnstone has presented unrebutted evidence that it, as owner was the party in charge of the construction project at issue in this case. The Plaintiffs have no evidence to contest that ABSI Builders was not placed in charge of the construction project by the owner of the property, Milestone at Wynnstone. ABSI Builders was one of many subcontractors on the job that worked at the direction of the party in charge of the construction, Milestone at Wynnstone. ABSI Builders was not in charge of the job site or the construction project. The Court has to construe the lien statute strictly against finding lien rights. The lien claims should be dismissed.

PLAINTIFFS ARE NOT ENTITLED TO LIEN RIGHTS

The Plaintiffs in this cause are not licensed contractors. None of them can bring a claim as a contractor in his individual capacities. RCW 18.27.080. The Plaintiffs have brought suit in this case in their own names, apparently claiming claims that they provided labor on the project at issue in this case in their personal capacity and not as agents for their employer. The law is clear that they did not. The contract for work to be done in this case was between the owner, Milestone at Wynnstone, LLC and ABSI Builders, Inc. It is Plaintiffs' position that both ABSI and the

employees of ABSI have separate lien rights for work done under that contract. Plaintiffs' claim fails because the labor on the construction job in this case was done by ABSI Construction, Inc. Plaintiffs, as employees of ABSI were agents of ABSI and did not perform the services on the project in their individual capacities but as agents of ABSI. *Restatement of Agency*, §707 (2006). Plaintiffs admit they were employed by ABSI and were working as ABSI's agents on the job at issue in this case. The *Restatement of Agency* is clear that as agents, the Plaintiffs do not have any rights of the principal, ABSI under the contract that ABSI entered with Milestone at Wynnstone. *Restatement 2nd of Agency*, §372 states:

An agent does not have such an interest in a contract as to entitle him to maintain at law upon it in its own name merely because he is entitled to a portion of the proceeds as compensation for making it or because he is liable for its breach.

Similarly, *Restatement 3rd of Agency*, §601 (2006) makes it clear that an agent is not a party to a contract unless the agent and third party otherwise agree even if the agent signed the contract. ABSI provided the labor at issue in this case. Plaintiffs' actions on the work site were as agents of ABSI, and not in their individual capacity. Plaintiffs have no lien rights in their individual capacity. Their lien claim should be dismissed.

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IV. CONCLUSION

The Trial Court properly dismissed the Plaintiffs' lien claims and this Court should affirm the Trial Court's decision.

RESPECTFULLY SUBMITTED this 21 day of
January, 2016.



BART L. ADAMS, WSBA 11297
Attorney for Appellant

CERTIFICATE OF MAILING

STATE OF WASHINGTON)

) ss.

County of Pierce)

The undersigned, being first duly sworn on oath, deposes and states:

That I am a citizen of the United States; over legal age; not a party to this proceeding; competent to be a witness herein; that on the 21 day of January, 2016, I mailed a true and correct copy of Respondent's Brief, which is identical to the original thereof, which are on file with the Clerk of this Court addressed to:

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2016 JAN 22 AM 9:39
STATE OF WASHINGTON
BY DEPUTY

That the same was deposited into the United States mail in a sealed envelope, with correct postage affixed, by first class mail.

Jeanne Gleim

Jeanne Gleim

SUBSCRIBED AND SWORN to before me this 21 day of January, 2016.

NOTARY PUBLIC in and for the State of Washington,
Residing at FOX 15
My Commission Expires: 11-15-14