No. 340228

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

INLAND EMPIRE DRY WALL SUPPLY, CO.

Appellant,

v.

WESTERN SURETY CO.

Respondent

APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
THE HONORABLE JOHN O. COONEY

APPELLANT INLAND EMPIRE DRY WALL SUPPLY CO.'S REPLY BRIEF

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I. REPLY ARGUMENT

A. Neither RCW 60.04.141 nor RCW 60.04.161 Require a Plaintiff to Serve the Principal of the Bond in a Lien Foreclosure Lawsuit.

Western argues Inland failed to follow the requirements of RCW 60.04.141 and .161 when it did not serve Fowler will process. (Resp. Br., pp. 10-30, 38-41). RCW 60.04.141 requires lien claimants to serve the "owner of the subject property" in the lawsuit. The key question is whether the legislature intended Fowler, as the bond principal, to be defined as the "owner of the subject property" when a release of lien bond has been posted.

Western bases its argument on its interpretation of the *CalPortland* case and two Virginia cases. First, the holding of the *CalPortland* decision was that service of process on the property owner was no longer necessary after a release of lien bond was recorded:

> Because a bond lien of claim had already been recorded, the plain measuring of the statutory language did not require *CalPortland* to serve Costco. We hold that the trial court erred in granting summary judgment on the basis of *CalPortland's* Failure to serve Costco.

CalPortland v. LevelOne Concrete, LLC, 180 Wn. App. 379, 391, 321 P.3d 1261, 1267 (2014). Contrary to Western's argument, the *CalPortland* court did not hold that a bond principal is an "owner of the

subject property" for the purpose of RCW 60.04.141. *Id.* All discussions in that case regarding that service on the principal and surety are "sufficient" are purely dicta. The *CalPortland* court simply was not faced with the same argument present in this case and discussing the merits of *CalPortland* any further do not answer the issues before this Court other than to reaffirm the fact that the *CalPortland* court distinguished the bond from the "subject property". *Id.* at 389-90, 321 P2d at 1266 (citing *DBM Consulting Eng'ns, Inc. v. U.S. First & Guar. Co.,* 12 Wn. App 35, 42, 170 P.3d 592 (2007) which held that the "lien bond releases the property from the lien, but the lien is then secured by the bond").

Turning then to the Virginia cases cited by Western, it becomes apparent that those do not help its argument either. In *Synchronized Constr. Servs. v. Prav Lodging, LLC*, 764 S.E.2d 61 (Va. 2014), the Virginia Supreme Court was confronted with an issue similar to this case, namely, who is a necessary party to a lien foreclosure lawsuit when a lien bond is filed. *Id.* at 63. Like Washington's statutory scheme, the applicable Virginia statute does not expressly state who must be served in the suit, only that all necessary parties must be joined. *Id.* at 65. As such, the court to looked at Virginia common law authority to determine whether the bond principal in that case was in fact a necessary party. *Id.*

at 65. Here, the trial court failed to conduct any necessary party analysis, which Inland contends was error. CP 118-120.

Similarly, in *George W. Kane, Inc. v. Nuscope, Inc.*, 416 S.E.2d 701 (Va. 1992). As in the *CalPortland* decision, the court ruled a property owner (and the trustees) are not necessary parties when a release of lien bond is filed. *Id.* at 710. However, and unlike this case and *CalPortland,* the *George W. Kane* court conducted a necessary party analysis to determine whether principal on the lien bond was a necessary party by applying the test required under Virginia law. Again, that analysis was lacking at the trial court in this case. CP 118-120.

In summary, none of the cases cited by Western stand for the proposition that as a matter of statutory interpretation, a bond principal is an "owner of the subject property" and thus required to be served in a lien foreclosure lawsuit where a release of lien bond has been filed.

Rather, to determine whether the legislature intended a release of lien bond to be defined as "the subject property" or a bond principal to be the "owner" this Court must look to the text of the questioned provision and "the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281, 283 (2005). When this analysis is

undertaken, it is clear that the bond and the "subject property" are different as are the bond principal and the "owner of the subject property."

Looking at the context of RCW 60.04.141, the legislature clearly intended the "owner" to be the person or entity who holds legal title to the real property:

> No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim of lien has been recorded unless an action is filed by the lien claimant within that time in the superior court in the county where the subject property is located to enforce the lien, and service is made upon the owner of the subject property within ninety days of the date of filing the action; or, if credit is given and the terms thereof are stated in the claim of lien, then eight calendar months after the expiration of such credit; and in case the action is not prosecuted to judgment within two years after the commencement thereof, the court, in its discretion, may dismiss the action for want of prosecution, and the dismissal of the action or a judgment rendered thereon that no lien exists shall constitute a cancellation of the lien. This is a period of limitation, which shall be tolled by the filing of any petition seeking protection under Title Eleven, United States Code by an owner of any property subject to the lien established by this chapter.

Nothing in the context of that provision leads one to believe that the legislature intended the term "owner" to mean the bond principal.

Looking at the statutory scheme as a whole confirms the legislature's intent that "owner" means the owner of record of the real property being liened. For example, RCW 60.04.011(9) defines "owner-occupied" as a single family residence occupied by the owner as his or her

residence." The legislature defined a "construction agent" as a "registered or licensed contractor [...] who shall be the agent of the owner for the limited purpose of establishing the lien..." RCW 60.04.011(1). As a construction agent/contractor is the bond principle, the legislature did not intend that the owner and bond principal be one in the same.

This division can be seen elsewhere in the mechanics lien statutes. RCW 60.04.151 discusses the rights of the owner of the real property, including the right of the owner to withhold sums of money due to the general contractor. RCW 60.04.171 states the owner of the real property is the only party that must be joined to a lien foreclosure action. RCW 60.04.091 requires a lien claimant to serve the "owner or reputed owner of the property" in the lien form if known and record the claim of lien in the county where the "subject property" is located.

There is no language anywhere in the mechanic's lien statutes that would lead one to believe that the term "subject property" becomes the release of lien bond when one is filed or that the bond principal is the same as the "owner." In fact, in the sole statutory provision dealing with the bond, neither the term "owner" nor "subject property" is found. RCW 60.04.161. Nor would one expect those terms to be found there. Under general suretyship law, the terms principle, obligor and surety are used, not owner of property.

The fact of the matter is that neither RCW 60.04.141 nor RCW 60.04.161 state that the bond is the same as the "subject property" or that the bond principal is the "owner of the subject property". The legislature did not expressly define the term "owner" or "subject property". *See* RCW 60.04.011. Failing any express direction from the legislature, the trial court should not have interpreted the lien statutes in such a manner that adds a requirement the legislature did not intend. Because it did so, it violated the statutory mandate to liberally construe them in Inland's favor. RCW 60.04.900. The trial court's granting Western's motion and denying Inland's were in error.

B. Fowler is not an Indispensable Party.

There is no language in the statutory scheme which supports Western's position that a bond principal must be served as a defendant to a lien foreclosure claim when a lien bond is filed. Unlike the states of Arizona, New York, Oklahoma and Nevada, Washington's legislature did not state who must be joined as a party to a lien foreclosure action when a lien bond is filed. *See* A.R.S. § 33-1004(C)-(D); NY Code § 37; Okl. St. 147.1; Nev. Rev. Stat. §108.2421. Furthermore, once the issue came up in a motion, the trial court should have recognized that following the *CalPortland* decision it is no longer necessary to serve the "owner of the subject property" once a release of lien bond is, as referenced in RCW

60.04.141. The trial court should have then, and following the lead of the two Virginia cases cited Western, conducted a necessary party analysis to determine whether Fowler was a necessary party. Instead, Western led the trial court to believe that despite the *CalPortland* holding, the lien claimant must still serve "the owner of the subject property" but that the "owner" is the bond principal and "subject property" was the bond. This was in error.

Western argues, CR 19 is not the appropriate method to determine who is an indispensable party in a lien foreclosure case due to CR 81(a). That court rule states, in pertinent part, "Except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings [...]." CR 81(a). The two cases relied upon by Western in support of its argument are distinguishable. In *Schumacher Painting Co. v. First Union Management,* 69 Wn. App. 693, 850 P.2d 1361 (1993), the court was not addressing CR 19, but CR 15. The court determined that CR 15 was inconsistent with RCW 60.04.141 when a plaintiff attempted to relate an amended complaint back against a new real property owner not named in the original complaint. The amended complaint was served after the 90 day requirement in RCW 60.04.141. *Id.* at 697, 850 P.2d at 1363. In *Bob Pearson Constr. v. First Cmty. Bank,* 111 Wn. App. 174, 43, P.3d 1261 (2002), the lien claimant attempted to

join a party after the 90 day period and enforce the lien against that party. *Id.* at 117, 43 P.3d at 1262. The court held that because the lien foreclosure process is a special proceeding under CR 81, *the civil rules cannot be used to reach a result inconsistent with the lien foreclosure statute. Id.* at 179, 43 P.3d at 1263 (emphasis added). Here, Inland is neither trying to relate a pleading back nor is attempting to add a party to the lawsuit. Furthermore, a CR 19 indispensable party analysis to determine whether Fowler should have been served with process when faced with the issue in a motion for summary judgment is not inconsistent with RCW 60.04.141.

Western does not, and indeed cannot, dispute the fact that RCW 60.04 *et seq.* does not identify the "necessary parties" to a lien foreclosure action when a release of lien bond is filed. The only instruction the statutory scheme provides is that the "owner of the real property" must be served as a defendant. *See* RCW 60.04.141. Under *CalPortland*, that requirement is no longer necessary in release of lien bond cases. *CalPortland*, at 391, 321 P.2d at 1261.

As a result, conducting a CR 19 analysis is not inconsistent with RCW 60.04. *et seq.* Had the Washington legislature specified who were necessary parties, like Arizona, New York, Oklahoma and Nevada chose to do, then Western's argument would be correct (*i.e.,* CR 81 bars the

application of CR 19). It did not and this situation is more analogous to that found in Western's Virginia cases where the statute does not define the necessary parties, so the necessary party analysis must be undertaken.[1]

In determining who is a necessary party under Washington law, the test is whether a person claims an interest relating to the subject of the lawsuit and is so situated that the disposition of the lawsuit in the person's absence may, *as a practical matter, impair or impede the person's ability to protect that interest. See* CR 19(a)(2)(A) (emphasis added).

Western's argument that Fowler is a necessary party is based on its assertion that it is under no *obligation* to defend Fowler. However, whether Western had an obligation to defend Fowler is not the question. The question is whether Fowler's ability to defend itself was impaired or impeded in some meaningful way. Western offered no facts under this analysis in its response. Instead when one asks "what would Fowler have done differently to defend itself?" The answer is nothing.

Initially, it should be pointed out that Fowler was not prevented from permissively joining this lawsuit under CR 20 if it felt it needed to

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[1] However, the legal test in Virginia is vastly different than in Washington. Under Virginia law, a necessary party is found "where an individual is in the actual enjoyment of the subject matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claim, in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit." *George W. Kane, Inc.,* 416 S.E.2d at 705 (internal citations omitted).

be a party in order to adequately defend itself. Secondly, there is ample evidence in the record that Western was zealously defending Fowler's rights. (*See* Op. Br. pp. 27-29). Additionally, Western asserts, vis a vie a Declaration by Jeff Durfee, Fowler's Vice-President, (CP 43-50), that Fowler had paid Eastern Washington Drywall & Paint ("EWD&P") $154,684.20, with "the disclosed and intended purpose of EWD&P then paying $83,892.90 to Inland for drywall materials supplied to the Project through July 30, 2014." Mr. Durfee's statement comports with Western's fifth affirmative defense: "Plaintiff's claims are barred/precluded by the doctrine(s) of payment, discharge, release, waiver and/or estoppel." (CP 9).

Western also asserts, as its sixth affirmative defense, that Inland failed to mitigate any damages. This affirmative defense is also supported by Fowler's Vice President's Declaration that Inland had a duty to "[...] inquire as to the particular source of funds received from [EWD&P] to ensure the funds were allocated and credited to the proper account." (CP 44-45).

Finally, Western states that it reserves the right to "[...] assert other affirmative defenses as may be warranted and discovered as this action and/or other related litigation proceeds." (CP 9). Presumably, Western is referring to Fowler's concurrent lawsuit against EWD&P (CP

86-94) and reserving its right to amend its Answer based the facts uncovered in that case and its outcome.

The trial court erred when it failed to conduct a necessary party analysis. Fowler is not a necessary party because it was not impaired or impeded from protecting its interests.

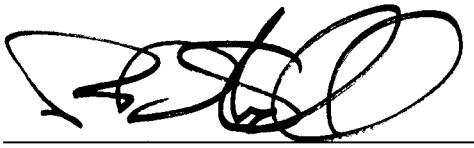
II. CONCLUSION

For the foregoing reasons and the reasons stated in Inland's Appellate Brief, the trial court erred when it denied Inland's motion for summary judgment and granted Western's motion for summary judgment and denied Inland's motion for reconsideration.

Inland respectfully requests this Court reverse the trial court's October 22, 2015 and December 16, 2015 orders, direct the trial court to enter a new order granting Inland's motion for summary judgment and award Inland its costs in filing its lien and the attorney's fees and costs it incurred at the trial court level and this appeal.

DATED this 3RD day of June, 2016.

CAMPBELL & BISSELL, PLLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of June, 2016, I caused to be served a true and correct copy of the foregoing document to the following:

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