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NO. 62969-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SEA CON, LLC, a Washington limited liability company
and NATIONAL UNION FIRE INSURANCE COMPANY,
Appellants.

v.

NORTH COAST ELECTRIC COMPANY,
a Washington Corporation,
Respondents.

SUPPLEMENTAL BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

Assignment of Error No. 19: The Trial Court erred when it found that North Coast complied with the procedural requirements necessary to assert a lien under RCW Chapter 60.04. Findings of Fact and Conclusions of Law (“FF”) para. 21

Assignment of Error No. 20: The Trial Court erred when it found that Plaintiff had complied with the statutory requirements necessary to file and foreclose on its lien. FF para. 2

B. Issues Pertaining to Assignments of Error

Issue No. 12: Does a Superior Court have jurisdiction to hear a lien foreclosure case when the lien is invalid due to Plaintiff’s failure to comply with the requirements of the lien statute? Assignment 19 and 20

Issue No. 13: May a party maintain a lien foreclosure action when the claim of lien is invalid? Assignment 19 and 20

II. SUPPLEMENTAL STATEMENT OF THE CASE

Respondent/Plaintiff North Coast Electric Company (“North Coast”) recorded a claim of lien on the underlying real property on or about September 4, 2002. Ex. 53, CP 177 Ex 1. The claim of lien was signed by Bill Oster, as the manager of North Coast, with the personal, rather than corporate, attestation language contained in RCW

60.04.091(2). On or about October 22, 2002, North Coast recorded an amended claim of lien containing an identical attestation. Ex. 54, CP 177 Ex 2.

On or about March 24, 2010, Division II of the Washington State Court of Appeals issued a new opinion in Terry L. And Janis E. Williams V. Athletic Field, Inc., in which it held that corporate attestation of a claim of lien must comply with RCW 64.08, as required by RCW 60.04.091(2), and that failure to comply renders the claim of lien invalid. Appellant/Defendants SEA CON, LLC (“SEA CON”) and National Union (“National Union”) now ask this Court to apply this decision to North Coast’s claim of lien and amended claim of lien and declare them invalid and reverse the judgment of the Trial Court.

III. SUMMARY OF THE SUPPLEMENTAL ARGUMENT

The trial court erred in finding in North Coast’s favor because its lien was invalid. North Coast failed to comply with the statutory requirement of RCW 60.04.091 to properly acknowledge the claim of lien pursuant to chapter 64.08 RCW. This failure to comply with the statutory requirements of RCW 60.04.091 renders the claim of lien invalid. Therefore, based on the arguments below, SEA CON and National Union request that this Court reverse the Trial Court’s judgments, dismiss this

case and award SEA CON and National Union their attorney's fees and costs.

IV. SUPPLEMENTAL ARGUMENT

A. The Judgments are Void and the Court Lacked Jurisdiction Because North Coast Failed to Comply with the Statutory Requirements of RCW 60.04.091 for Attestation of the Claim of Lien and Amended Claim of Lien.

The interpretation and construction of a statute is a question of law to be reviewed de novo. *LRS Elec. Controls, Inc. v. Hamre Constr. Inc.*, 153 Wn.2d 731, 738, 107 P.3d 721 (2005); *Lumberman's, Inc. v. Barnhardt*, 89 Wn. App. 283, 286 (1997) citing *W.R.P. Lake Union Ltd. Partnership v. Exterior Servs., Inc.*, 85 Wn. App. 744, 749, 934 P.2d 722 (1997); *State v. Parada*, 75 Wn. App. 224, 229, 877 P.2d 231 (1994). In conducting such a review, an appellate court must construe a statute according to its plain language, and statutory construction is unnecessary and improper when the wording of a statute is unambiguous. *Id.*

The statute at issues in this case, RCW 60.04.091, is clear and any ambiguity is resolved simply by a close reading of the statute itself. It states that a claim of lien "Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien

to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08 RCW.” RCW 60.04.091(2).

Chapter 64.08 of the RCWs governs acknowledgement of signatures. RCW 64.08.070 specifically governs the acknowledgement of corporate signatures. It provides two options for acknowledgement of a corporate signatures, either substantial compliance with the form of acknowledgement contained within that statute, or substantial compliance with “the form set forth in RCW 42.44.100(2).” RCW 64.08.070.

RCW 60.08.070: On this day of, 19. . . , before me personally appeared, to me known to be the (president, vice president, secretary, treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation. In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written. (Signature and title of officer with place of residence of notary public.)

RCW 42.44.100(2): I certify that I know or have satisfactory evidence that (name of person) is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument, on oath stated that (he/she) was authorized to execute the instrument and acknowledged it as the (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed) to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

While substantial, rather than strict compliance with these form is required, both RCW 64.08.070 and RCW 42.44.100(2) basically provide that the acknowledgement must confirm the signers position with the company, that he/she is authorized to execute the instrument on behalf of the company and that the company is doing so freely and voluntarily. The attestation contained on the claims of lien does not come close to substantial compliance with these statutes.

The attestation on the original claim of lien is, in total: "SUBSCRIBED AND SWORN to before me on the 4 day of September, 2002, by Bill Oster." The attestation on the amended claim of lien is identical, but for the date: "SUBSCRIBED AND SWORN to before me on the 17th day of October, 2002, by Bill Oster."

These attestations are facially deficient as they fail to indicate that Bill Oster was signing in a representative capacity for North Coast. Further, they fail to confirm Mr. Oster's authority to sign for North Coast and that North Coast's execution was a free and voluntary act of the corporation. These elements, along with the corporate seal, were the four essential elements for a valid corporate acknowledgment found by this Court in *Ben Holt Industries, Inc. v. Milne* 36 Wn.App. 468, 472-73, 675 P.2d 1256 (1984). That Court invalidated a lease agreement by holding

that the failure to include these elements in the acknowledgement rendered the acknowledgement and the underlying instrument invalid, even if a personal form of acknowledgement was used. *Id.*

As just found by Division Two of this Court, in *Williams v. Athletic Field, Inc.*, 2010 WL 1076118, 6 (Wn.App) (2010), this same reasoning and law applies to acknowledgement of claims of lien. That Court found an acknowledgement identical to those at issue in this case was insufficient to support a claim of lien when the signature was made on behalf of a corporation. *Id.* Said another way, on the same facts, with the same language, that Court held the lien invalid. The two cases are simply indistinguishable on any legally relevant ground.

The only differences between the facts of that case and this case are that it was on appeal from an RCW 60.04.081 frivolity dismissal, rather than after judgment and that the signature was on behalf of a corporation acting as agent for the claimant, rather than the claimant corporation itself. These facts are of no legal significance.

As the claim of lien and amended claim of lien are invalid, the lien does not exist. Therefore, the Court never had jurisdiction to hear the case and the Court was in error in finding compliance with the statutory requirements for sustaining lien foreclosure. On both of these grounds, the judgments on appeal should be reversed and judgment entered in favor

of SEA CON and National Union, with an award of attorney's fees and costs.

B. Remand is not Necessary Because the Invalidity of the Claims of Lien may not be Remedied.

The invalidity of the liens may not be remedied because, as the Courts in *Ben Holt* and *Athletic Field* found, parole evidence may not be used "to cure a defective acknowledgment." *Williams v. Athletic Field, Inc.*, 2010 WL 1076118, 5 (Wn.App) (2010) *citing Ben Holt*, 36 Wn.App. at 472, 675 P.2d 1256. As there is no way to cure the defect and thus remedy the invalidity, the proper remedy is reversal of the judgments in favor of North Coast and entry of judgment in favor of SEA CON and National Union.

V. CONCLUSION

As shown above, the Trial Court lacked jurisdiction to reach the merits of this case due to North Coast's failure to comply with the requirements of RCW 60.04.091. Further, the lien was invalid and unable to sustain a judgment for lien foreclosure. Therefore, SEA CON and

National Union request that the Court reverse the judgment of the Trial Court, and award them judgment with their attorney's fees and costs.

DATED this 9 day of April, 2010.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am employed by: Clausen Law Firm, PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served in the manner noted

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Lisa Vulin