

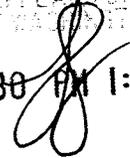
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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

No. 64432-7-1

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Court of Appeals,
Division I,
Of the State of Washington

CHRISTOPHER GRAY AND JULIE LASSONDE-GRAY,
Plaintiffs/Appellant

v.

BOURGETTE CONSTRUCTION, LLC,
Defendant/Respondent

BRIEF OF RESPONDENT

ORIGINAL

Bridget Bourgette Shaw
WSBA No. 28850

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I. Assignments of Error

No. 1 The court did not err in entering the order of October 13, 2009, denying the Appellants' motion to summarily release the materialmen's lien recorded by Bourgette Construction, LLC.

No. 2 The court did not err in concluding that the parties' dispute about the "middleman agent" precluded summarily releasing the lien pursuant to RCW 60.04.081.

No. 3 The court did not err in entering the order of October 13, 2009, awarding attorney fees to Bourgette Construction, LLC, as the prevailing party.

Issues Pertaining to Assignments of Error

No. 1 Whether a person's claim for furnishing improvements to an owner-occupied residence must be judicially enforceable prior to recording a lien to preserve the claim.

No. 2 Whether RCW 60.04.081 authorizes an owner-occupant to utilize the summary proceeding to release a legitimate party's meritorious claim of lien.

II. Statement of the Case

In the spring of 2008, the Appellants, Christopher J.D. Gray and Julie Lassonde-Gray (the "Grays") hired Geoffrey James, doing business as Westcott Development (hereinafter "Mr. James"), "to act on their

behalf to develop and manage the major remodel of their primary residence” located at 4805 84th Avenue SE, Mercer Island, Washington (hereinafter the “Residence”). CP 12, 14, 87, 88, 90, 91, 93. Neither Mr. James nor Westcott Development is a Washington licensed contractor. CP 87.

Pursuant to the authority conferred on him by the Grays, Mr. James entered into an agreement with Bourgette Construction, LLC (“Bourgette Construction”) to furnish the labor, services, materials, and equipment necessary to remodel and improve the Grays residence. CP 88, 89.

At the instance of Mr. James, Bourgette Construction began to perform labor at the Residence on April 1, 2008. CP 29-30. The record confirms that Bourgette Construction furnished the improvements at the instance of Mr. James based on the belief that Mr. James had actual authority to act as the Grays’ agent. CP 30-31.

On April 14 and 15, 2008, Bourgette Construction acted in reliance on Mr. James’ agency and applied for two permits from the City of Mercer Island to effectuate the improvements ordered by the Grays. CP 31-32; 70-74. The Grays were aware that Bourgette Construction was furnishing improvements to their residence and met with Bourgette to oversee Bourgette’s performance of the remodeling project. CP 31. At least seven

permits were issued by the City of Mercer Island for five companies to furnish improvements to the Grays' residence under contract with the Grays or their agent. CP 70-74. The last day on which Bourgette Construction furnished improvements to the Grays residence was March 15, 2009. CP 30.

Bourgette Construction provided invoices to Mr. James totaling in the amount of \$294,631.35 and Mr. James paid Bourgette Construction \$178,146.86 on behalf of the Grays. CP 30; 33-54. A balance due of at least \$116,484.49 remains owing to Bourgette Construction. CP 30.

Due to the failure of the Grays or their agent to pay Bourgette Construction, Bourgette owes \$36,705.61 to five persons or companies who performed services or provided materials ordered by Bourgette at the instance of Mr. James or the Grays. CP 31. Pursuant to the materialmen's lien statute at RCW 60.04.021, Bourgette Construction properly recorded a Claim of Lien on June 2, 2009, King County recording number 20090602001177. CP 80-81.

On September 23, 2009, the Grays filed an Order to Show Cause in King County Superior Court seeking to summarily release Bourgette Construction's Claim of Lien as frivolous and made without reasonable cause.

The show cause hearing was held on October 13, 2009. The Appellants argued that Mr. James had no authority to act as their agent and disclaimed authorizing Mr. James to contract with Bourgette Construction in their behalf. CP 12, 14. Interestingly, despite having on-going dealings with Bourgette, the Grays deny having received “any notice of any kind” from Bourgette Construction, LLC of the improvements it furnished to their residence. CP 12, 14.

While for the purposes of this appeal the Appellants “assume that Bourgette did supply some materials and some labor for James at the property,” they continue to insist that Bourgette furnished such improvements without their knowledge or consent. Appellant’s Brief, 3. The court concluded that the parties’ dispute about the “middleman agent” precluded summarily releasing the lien pursuant to RCW 60.04.081 and entered an order denying the Grays’ request to summarily release the lien recorded by Bourgette Construction. RP 25-26.

III. Argument

A. THE ORDER DENYING THE GRAYS’ MOTION TO SUMMARILY RELEASE BOURGETTE CONSTRUCTION’S LIEN WAS PROPER BECAUSE THE FRIVOLOUS LIEN PROCEEDING IS LIMITED IN SCOPE

A property owner may move for an order to show cause to summarily release a frivolous materialmen’s lien that has been recorded

against real property without reasonable cause. RCW 60.04.081. This statutory summary procedure is a limited one and is not to be used as a substitute for trial on the merits. *S.D. Deacon Corp. of Wash. v. Gaston Bros. Excavating, Inc.*, 150 Wn. App. 87, 90, 206 P.3d 689 (2009).

While the court may resolve factual disputes in the summary proceeding, the resolution of factual disputes must be confined to the limited group of cases where the lien claim is clearly meritless. *Id.* “Every frivolous lien is invalid, but not every invalid lien is frivolous.” *Id.* at 91. Factual disputes about the ultimate enforceability of a materialmen’s lien or claim are not adjudicated at the summary proceeding. *Id.* at 90. “Nowhere in the statute does the legislature give the trial court authority to expand this summary proceeding into a suit to foreclose the lien or to recover on a contractual theory.” *Id.* at 90-91, citing *Andries v. Covey*, 128 Wn. App. 546, 550, 113 P.3d 483 (2005). Thus, neither party may prove the merits of its case at the summary hearing. Instead, the party seeking the summary release of the lien must establish beyond legitimate dispute that the lien was improperly filed. *Id.* at 91. The scope of the summary hearing focuses on whether a claim of lien has been properly filed for recording, not whether it is enforceable.

The Grays argue that Bourgette’s lien must be summarily dismissed based on Bourgette’s alleged failure to provide notice of its

right to claim a lien. CP 19. Bourgette contends that no notice was required. CP 98. But it was and remains undisputed that Bourgette Construction furnished almost \$300,000 in improvements to the appellants' residence. CP 30. The Grays ask this court to hold that a legitimate claim of lien be dismissed at a summary proceeding merely because they dispute its enforceability. Appellant's Brief 11. The appellants ignore their burden and misconstrue the scope of the summary proceeding.

B. THE APPELLANTS FAIL TO MEET THEIR BURDEN TO SHOW THAT BOURGETTE'S CLAIM OF LIEN IS CLEARLY MERITLESS

The Grays bear the burden of establishing beyond legitimate dispute that Bourgette Construction's claim of lien is frivolous and was recorded without reasonable cause because it presents no debatable issues and is so devoid of merit that no possibility of sustaining the lien exists. *Id.* at 95-96 citing *W.R.P. Lake Union L.P. v. Exterior Svcs., Inc.*, 85 Wn. App. 744, 752, 934 P.2d 722 (1997). A lien is clearly meritless when it is not recorded by a proper party, not properly served, or not in compliance with the statutory content requirements. *Id.* at 95. The summary proceeding is limited to dismissing meritless claims because dismissal operates to deprive the claimant of the opportunity to present live testimony and cross-examine witnesses at trial. *Id.* at 96.

The summary hearing may resolve factual disputes about whether the parties are proper. Only a person who has furnished labor, professional services, materials, or equipment pursuant to RCW 60.04.021 may record a claim of lien. RCW 60.04.091. Similarly, the summary hearing may resolve factual disputes about whether the lien was signed by a proper party. *Id.* at 95. The Grays do not argue the lien was improperly signed or that Bourgette Construction never furnished improvements to their residence. *See* Appellant's Brief.

The summary hearing may resolve factual disputes about service. *Id.* at 95. The party recording a claim of lien must properly serve the lien upon the property owner. RCW 60.04.091(2). The Appellants do not argue that Bourgette Construction failed to properly serve the claim of lien. *See* Appellant's Brief.

The summary hearing may resolve factual disputes about whether the lien form complies with the statutory requirements of RCW 60.04.091(2). *Id.* at 95. The Appellants do not argue that Bourgette Construction's claim of lien failed to comply with the statutory recording requirements at RCW 60.04.091. *See* Appellant's Brief.

The Grays fail to meet their burden to show that Bourgette's lien must be summarily dismissed as meritless. The Grays do not argue that Bourgette failed to furnish improvements, properly serve them, or comply

with the statutory content requirements. *See* Appellant's Brief. The court's denial of the Grays' motion to summarily release Bourgette's lien is correct given the Grays' utter failure to show that Bourgette's lien was clearly meritless.

C. BOURGETTE CONSTRUCTION'S CLAIM OF LIEN IS MERITORIOUS

A materialman's claim of lien is enforceable pursuant to statute if the claimant has furnished improvements to an owner-occupied property at the instance of the owner, or the agent or construction agent of the owner. RCW 60.04.021. As a creature of statute in derogation of the common law, the court strictly construes the materialmen's lien statute when adjudicating whether to *enforce* a claim of lien. *Henifin Const., L.L.C. v. Keystone Const.*, 136 Wn. App. 268, 274, 145 P.3d 402 (2006) (emphasis added).

A person who claims a lien for improvements furnished to an owner-occupied residence must comply with the requirements of RCW 60.04.031 in order to enforce the claim of lien. RCW 60.04.031(6). The question of whether the person claiming a lien is required to provide notice pursuant to RCW 60.04.031(4) turns on whether the lienor contracted directly with the owner, the owner's common law agent, or the owner's construction agent.

With respect to the improvement of an owner-occupied residence,

Persons who furnish professional services, materials, or equipment in connection with the repair, alteration, or remodel of an existing owner-occupied single-family residence or appurtenant garage [w]ho contract directly with the owner-occupier or their common law agent shall not be required to send a written notice of the right to claim a lien and shall have a lien for the full amount due under their contract, as provided in RCW 60.04.021. (Emphasis added) RCW 60.04.031(3)(a).

Thus, persons who contract with the owner or the owner's common law agent need not provide notice of the right to claim a lien while persons who contract with the owner's construction agent must give the owner notice of their right to claim a lien in accordance with RCW 60.04.031(4).

While a construction agent is statutorily defined at RCW 60.04.041, the common law controls the adjudication of contract and common law agency questions. *S.D. Deacon Corp.*, 150 Wn. App. at 93. It is for this reason that a long line of Washington cases have held that legitimate disputes about the merits of a claim, including the scope of contract, preclude the summary release of a lien as per se frivolous and recorded without reasonable cause. *Williams v. Athletic Field, Inc.*, 142 Wn. App. 753, 767, 139 P.3d 426 (2006). In *Williams*, it was undisputed that Athletic provided labor, services, materials, and/or equipment for the

improvement of the Williams's properties. *Id.* at 766. The Williams' sought to summarily dismiss Athletic's claim of lien based on the lack of notice (*Id.* at 764) and the lack of a written contract (*Id.* at 767). The court held that the lienor had established a prima facie case that it performed work at the property and that the contract disputes precluded summarily dismissing the lien. *Id.* See *S.D. Deacon Corp.*, 150 Wn. App. at 93 (2009) (legitimate disputes about whether a contract was integrated preclude summarily releasing a materialman's lien); *Henifin Const., L.L.C.*, 136 Wn. App. at 276 (legitimate disputes about the property owner's agent's scope of authority preclude summary release of a third party claimant's lien).

Similarly, legitimate disputes about the applicability of notice requirements, like whether a lienor is required to provide notice under RCW 60.04.031, are issues of merit that preclude the summary release of a lien as per se frivolous or filed without just cause. *W.R.P. Lake Union L.P.*, 85 Wn. App. at 752. See *Andries*, 128 Wn. App. at 554 (legitimate disputes about whether a lienor is required to register as a contractor preclude release of lien at summary proceeding); and *Intermountain Elec., Inc. v. G-A-T Bros. Const., Inc.*, 115 Wn. App. 384, 394 (2003) ("good faith" dispute about compliance with the filing requirements of RCW 60.04.091 preclude release of lien at summary proceeding). Washington

law is clear: Under the frivolous lien statute, debatable issues of fact about a meritorious claim must be resolved at trial rather than in a summary proceeding. *S.D. Deacon*, 150 Wn. App. at 90.

The prevailing party at the summary hearing may be awarded attorney fees and costs pursuant to RCW 64.04.081(4). Similarly, the prevailing party on appeal may be awarded attorney fees and costs. *S.D. Deacon Corp. of Wash.*, 150 Wn. App. at 96.

Bourgette's claim of lien is meritorious. It was and remains undisputed that Bourgette is a proper party who properly served and recorded the claim of lien. *See* Appellant's Brief. Bourgette Construction furnished nearly \$300,000 in improvements to the Grays' personal residence. CP 30. Like the lienor in *Williams*, Bourgette has established a prima facie claim that it performed the work. Just as disputes about contract, agency, and notice precluded the summary release of the liens at issue in *S.D. Deacon*, *Henifin*, *W.R.P. Lake Union L.P.*, Bourgette's meritorious but disputed claims require adjudication at trial. Regardless of the ultimate outcome, Bourgette Construction's lien must be tried on the merits rather than summarily dismissed at a show cause hearing.

IV. Conclusion

The show cause under the materialman's lien statute is a screening mechanism to deter false claims. The lower court did not err in

concluding that the parties' dispute about the "middleman agent" precluded summarily releasing the lien because Bourgette's prima facie claim is triable under the materialman's lien statute.

While Bourgette does not ask this court to hold that it may summarily enforce its claim, the Appellants ask this court to hold that they may simply disclaim knowledge, contract, or agency to summarily release a legitimate claim of lien related to payment for nearly \$300,000 in improvements furnished to their residence. CP 30; 33-54. The Respondent merely asks this court to hold that the summary proceeding under the frivolous lien statute is not intended to deprive Bourgette Construction of the opportunity to present live testimony and cross-examine witnesses because it has established a meritorious claim and raised triable issues of fact. The Respondent asks that this court affirm the order upon show cause denying the Grays the right to summarily discharge Bourgette's legitimate claims for valuable improvements to their personal residence.

Bourgette asks this court to hold that Bourgette's prima facie claim of lien justified the recording of the claim of lien against the Appellants' residence.

Given that the court did not err in entering the order of October 13, 2009 denying the Grays the right to summarily discharge Bourgette's legitimate claims, the Respondent asks that this court affirm the order of

October 13, 2009 awarding attorney fees to the Respondent as the prevailing party. Given the Grays' failure on appeal to meet its burden to show Bourgette's claim of lien is clearly meritless, Bourgette further asks the court hold that it is the prevailing party and award the Respondent its costs and reasonable attorneys' fees for this appeal.

March 30, 2010

Respectfully submitted,



Bridget Bourgette Shaw
Attorney for Respondent
WSBA No. 28850

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COURT OF APPEALS DIVISION 1 OF THE STATE OF WASHINGTON

Christopher J.D. Gray, et. al.,

Appellants

v.

Bourgette Construction, LLC,

Respondent

CASE # 66432-7-1

DECLARATION OF SERVICE

I declare, under penalty of perjury, that I have personal knowledge of the following statements and that they are true and accurate to the best of my knowledge. I am employed at the firm of Shaw Law Group, P.L.L.C., attorneys for Bourgette Construction, LLC, the above captioned Respondent. On the 30th day of March, 2010, I sent via ABC Legal Messengers, Incorporated, for service on this date the Respondent's Brief and copies, as follows:

One copy to:

Tarl R. Oliason
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Declaration of Service

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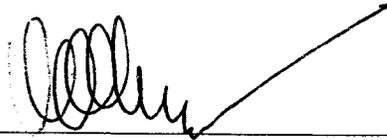
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An original, and one copy to:

Clerk of the Court of Appeals, Division 1
600 University
Seattle, WA 98101

Dated this 30th day of March, 2010

By:



Vicente Omar Barraza
Rule 9 Legal Intern, ID # 9116288
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