

65608-2

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No. 656082

COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON

STONEWOOD DESIGN, INC.,

Plaintiff / Respondent,

v.

HERITAGE HOMES, INC. DBA OF WASHINGTON, D/B/A

INFINITY HOMES,

Defendant / Appellant.

BRIEF OF APPELLANT

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APPELLANT'S BRIEF
FILED
JAN 11 2011
COURT OF APPEALS
DIVISION 1
SEATTLE, WA

ORIGINAL

TABLE OF CONTENTS

I. Assignment of Error.....P. 4

 A. Error

 1.P. 4

 2.P. 4

 3.P. 4

 4.P. 4

 B. Error.....P. 4

 1.....P. 5

II. Statement of the Case.....P. 5

III. Argument.....P. 6

IV. Conclusion.....P. 9

V. Defendant’s Request for Costs /
 Attorney Fees on Appeal.....P. 10

TABLE OF AUTHORITIES

A. STATUTES

- 1. RCW 60.04.181(3).....P. 5-6; 9-10
- 2. RCW 60.04.181(2).....P. 8
- 3. RCW 60.04.141.....P. 8

B. CASES

- 1. *DBM Consulting Engineers, Inc. vs. US Fidelity
& Guarantee Co.*, 142 Wash. App. 35, 170 P.3rd
592 (2006)P. 6

I. ASSIGNMENTS OF ERROR [RAP 10.3(a)(4)]

1. The trial court erred in entering judgment against Contractor's Bonding and Insurance Company Lien Release Bond #SE10245.

Issues pertaining to Assignment of Error

- a. Did Stonewood Design Inc. ("Stonewood") record a lien against the subject property and seek foreclosure of that lien in its complaint.
 - b. Was the lien placed into evidence by Stonewood
 - c. Did the trial court adjudicate the validity and enforceability of Stonewood's lien
 - d. Did the trial court foreclose Stonewood's lien against either the subject property or the lien release bond
2. The trial court erred in not awarding attorney fees and costs to defendants Richard J. Gretsches and Michelle H. Gretsches ("Gretsch") and Heritage Homes, Inc. dba of Washington d/b/a Infinity Homes ("Infinity Homes") pursuant to RCW 60.04.181(3).

Issue pertaining to Assignment of Error

- a. Are defendants Gretsich and Infinity Homes prevailing parties on Stonewood's claim of lien and foreclosure asserted by Stonewood in this case.

II. STATEMENT OF THE CASE [RAP 10.3(a)(5)]

Stonewood filed this lawsuit against the defendants, claiming an unpaid balance owed to Stonewood by Infinity Homes (CP 3-18). Infinity Homes claimed an offset due to costs incurred by Infinity Homes to replace tile which Infinity Homes claimed that Stonewood incorrectly installed. Stonewood recorded a mechanic's lien on May 30, 2008 to secure payment of the balance owed (CP 17-18). Stonewood's lawsuit sought foreclosure of said lien (CP 3-18). Following trial to a jury and entry of the jury's verdict, the trial court entered judgment (without offset) in favor of Stonewood and against defendants Infinity Homes and Contractor's Bonding and Insurance Company #S10245. Stonewood's judgment against Contractor's Bonding and Insurance Company Lien Release Bond #S10245 (CP 278-282) was exclusively based upon Stonewood's breach of contract claim against Infinity Homes (CP 278-

282). The trial court entered Findings of Fact and Conclusions of Law with regard to the validity and enforceability of Stonewood's lien (CP 287-290). However, the trial court entered no order, judgment or decree of foreclosure on Stonewood's lien, nor did the trial court award Stonewood attorney fees pursuant to the lien statute, RCW 60.04.181(3).

III. ARGUMENT [RAP 10.3(a)(6)]

DBM Consulting Engineers, Inc. vs. US Fidelity & Guarantee Co., 142 Wash. App. 35, 170 P.3rd 592 (2006) is dispositive.

The opening paragraph of the DBM Consulting Engineers case states as follows:

“When an owner of property subject to a lien records a lien bond, the bond becomes security for the lien and guarantees payment of a judgment upon the lien. In this case, DBM Consulting Engineers recorded a lien against a client to secure a debt DBM asserted it was owed under a contract. The client obtained a lien bond to allow it to sell the property. DBM sued the client for breach of contract and prevailed at trial. DBM then sued the bond surety to compel it to pay DBM the amount of the bond, and the trial court granted DBM's motion for summary judgment. But because DBM failed to obtain a judgment upon the lien, only obtaining a judgment on the breach of contract claim, the surety was not obligated to pay on the lien bond. Accordingly, we reverse and dismiss.”

Substituting the parties in this case for the DBM case, the opening paragraph of the DBM would correctly read as follows:

“When an owner of property subject to a lien records a lien bond, the bond becomes security for the lien and guarantees payment of a judgment upon the lien. In this case, Stonewood Design, Inc. recorded a lien against a client to secure a debt Stonewood Design, Inc asserted it was owed under a contract. The client obtained a lien bond to allow it to sell the property. Stonewood Design, Inc. sued the client for breach of contract and prevailed at trial. Stonewood Design, Inc then sued the bond surety to compel it to pay Stonewood Design, Inc. the amount of the bond, and the trial court granted Stonewood Design, Inc.’s motion for summary judgment. But because Stonewood Design, Inc. failed to obtain a judgment upon the lien, only obtaining a judgment on the breach of contract claim, the surety was not obligated to pay on the lien bond. Accordingly, we reverse and dismiss.”

The lien laws have not changed since the date of the DBM case. Neither should the result.

The trial court entered Findings and Fact to the effect that Stonewood’s lien was valid and enforceable. Specifically, the trial court found:

“Plaintiff introduced the materialmen’s lien and the release of lien bond and proved facts necessary to support execution upon the release of lien bond.” (CP 288, Line 6)

However, the trial court did *not* foreclose Stonewood’s lien. The trial court ordered as follows:

“Stonewood Design, Inc. may execute upon the release of lien bond obtained by Heritage Homes, Inc. dba of Washington d/b/a Infinity Homes up to the amount specified in the bond for judgment entered in this matter.”(CP 289, Line 20)

The trial court’s First Amended Judgment stated as follows:

“**ORDERED** that plaintiff shall be entitled to execute on release of lien bond #S10245 and Contractor’s Bond #SE8528 issued by Contractor’s Bonding and Insurance Company *because* plaintiff prevailed in its breach of contract action against Heritage Homes, Inc. dba of Washington, a Nevada corporation, d/b/a Infinity Homes” (emphasis applied). (CP 281, Lines 15-18)

This was error. Stonewood may only execute on Contractor’s Bonding and Insurance Company Lien Release bond #S10245 if and after the trial court has entered an order, judgment, or decree of foreclosure, foreclosing Stonewood’s lien against Contractor’s Bonding and Insurance Company Lien Release Bond #S10245 which was substituted as security for the subject real property pursuant to RCW 60.04.141.

RCW 60.04.181(2) states as follows:

“The proceeds of the sale of property must be applied to each lien or class of liens in order of its rank and, in an action brought to foreclose a lien, pro rata among each claimant in each separate priority class. A personal judgment may be rendered against any party personally liable for any debt for which the lien is claimed. If the lien is established, *the judgment shall provide for the*

enforcement thereof upon the property liable as in the case of foreclosure of judgment liens.” (emphasis applied)

Stonewood did not prevail on its lien because the trial court did not enter a decree of foreclosure on Stonewood’s lien. RCW 60.04.181(3) states as follows:

“The court may allow the prevailing party in ht action, *whether plaintiff or defendant*, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of the title report, bond costs, and attorney’s fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court or arbitration, as the court arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.” (emphasis applied)

Defendants are a prevailing party in this case because Stonewood failed to secure judgment and foreclosure on its lien in the trial court. Accordingly, defendants respectfully request the Court of Appeals to remand this case to the trial court for a determination of an award of attorney fees to the defendants pursuant to RCW 60.04.181(3).

IV. CONCLUSION [RAP A7]

Stonewood’s claims against Contractor’s Bonding and Insurance Company Lien Release Bond #S10245 should be dismissed and this case

should be remanded to the trial court for a determination of an award of costs and attorney fees to the defendants pursuant RCW 60.04.181(3).

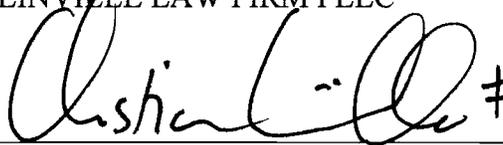
V. DEFENDANT'S REQUEST FOR COSTS / ATTORNEY FEES ON APPEAL [RAP 18.1]

Defendants request an award of costs and attorney fees on appeal pursuant to RCW 60.04.181(3) which provides as follows:

“The court may allow the prevailing party in ht action, *whether plaintiff or defendant*, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of the title report, bond costs, and attorney’s fees and necessary expenses incurred by the attorney *in the superior court, court of appeals, supreme court or arbitration*, as the court arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.” (emphasis applied)

Respectfully submitted this 15th day of November, 2010.

LINVILLE LAW FIRM PLLC

 WSBA #33545

Lawrence B. Linville, WSBA # 6401
David E. Linville, WSBA #31017
Attorneys for Appellant

CERTIFICATE OF SERVICE

Kristin F. Kelly declares as follows:

1. I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-referenced action, and competent to be a witness therein.

2. On the 16th day of November, 2010, I caused to be served a copy of Motion for Entry of Final Judgment on counsel as follows:

Counsel for Respondent:

Livengood, Fitzgerald & Alskog, PLLC
Greg McBroom
121 3rd Avenue
Kirkland, WA 98083

- VIA U.S. MAIL
- VIA FACSIMILE
- VIA MESSENGER
- VIA EMAIL
- VIA ECF

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

Dated this 16th day of November, 2010, at Seattle, Washington.


Kristin F. Kelly

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