

NO. 65616-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BLUE DIAMOND GROUP, CORP., a New York Corporation,

Appellant,

v.

WEA SOUTHCENTER, LLC, a Delaware Corporation,

Respondent.

Brief of Respondent

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2010 JUN 17 10:14:05


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I. STATEMENT OF THE ISSUES

The issue presented in this appeal is whether the trial court correctly granted WEA Southcenter's Motion for Summary Judgment against Blue Diamond because Blue Diamond failed to register as a "contractor" under the Contractor Registration Act, or alternatively, because Blue Diamond had no lien rights under Chapter 60.04 RCW.

II. STATEMENT OF THE CASE

A. The Parties

1. The Contractor: Blue Diamond

Plaintiff/Appellant Blue Diamond is a New York corporation that did construction work in King County, Washington.¹ Prior to doing this work, Blue Diamond did not register with Washington's Department of Labor and Industries, Washington's Secretary of State, Washington's Department of Revenue, or as a contractor with Washington's Department of Licensing.²

¹ CP 177.

² *Id.* at 84-85. *See also id.* at 177 (Blue Diamond's complaint failing to allege registration with any of these Washington agencies).

2. The Franchisors

Co-Defendants Kudo Beans Franchising, Inc. and Kudo Beans, Inc. are the franchisors of the Kudo Beans coffee chain (collectively “KB Franchisors”).³

3. The Franchisee/Tenant

Co-Defendant KB Seattle 1, Inc. (“KB Tenant”) is a former tenant of WEA Southcenter that operated a coffee kiosk in its mall. KB Tenant is also the franchisee of KB Franchisors.⁴

4. The Landlord: WEA Southcenter

WEA Southcenter owns and manages the Westfield Southcenter Mall (the “Mall”).⁵ WEA Southcenter has not entered into any contracts with Blue Diamond or KB Franchisors.⁶

B. The Lease with WEA Southcenter Required KB Tenant to Keep the Mall Free of Contractor Liens

In a lease dated May 1, 2008, WEA Southcenter leased a space in the Mall to KB Tenant (the “Lease”).⁷ Seven months later, KB Tenant

³ *Id.* at 4, 85, 178.

⁴ *Id.* at 10, 178.

⁵ *Id.* at 9, 178.

⁶ *Id.* at 10.

⁷ *Id.*

owed more than \$55,000 in rent and fees and was evicted through an unlawful detainer action for failure to pay rent.⁸

The Lease permitted, but did not require, KB Tenant to build improvements.⁹ The Lease gave KB Tenant the privilege of making certain improvements, (1) if KB Tenant paid for them,¹⁰ (2) if the improvements met certain quality standards,¹¹ and (3) if no liens were placed on the premises or Mall.¹² Within these limitations, KB Tenant could determine the scope of the project and create its own design and specifications.¹³

Blue Diamond misrepresents the record when it states that WEA Southcenter “does not provide any information, evidence, statements, declaration or affidavits to the trial court to demonstrate that the lease at controversy did not require the improvements, and only permitted them.”¹⁴

⁸ *Id.*

⁹ *Id.* at 62-76.

¹⁰ *Id.* at 62-63.

¹¹ *Id.*

¹² *Id.* at 27, 35.

¹³ *Id.* at 62-76.

¹⁴ Brief of Appellant, p. 23.

To the contrary, WEA Southcenter submitted the lease and a declaration to support its assertions.¹⁵

The Lease also required KB Tenant to “keep the Premises ... free from any and all liens arising out of any work performed, materials furnished or obligations incurred by or on behalf of [KB Tenant.]”¹⁶ Contrary to the terms of the Lease, KB Tenant failed to pay Blue Diamond, which resulted in Blue Diamond filing a lien against the Mall.¹⁷

C. In the Kiosk Contract, KB Franchisors, Not KB Tenant, Hired Blue Diamond as a Contractor and General Contractor

On or around July 3, 2008, KB Franchisors hired Blue Diamond to act as a general contractor and manage the construction of the coffee kiosk in the Mall (“Kiosk Contract”).¹⁸ Neither WEA Southcenter nor KB Tenant hired Blue Diamond.¹⁹

¹⁵ CP at 10, 62-76.

¹⁶ *Id.* at 35 (underline added). Further, within “ten (10) days after [KB] Tenant opens the Premises for business, [KB] Tenant shall deliver to [WEA Southcenter] ... original execution copies of all mechanics’ lien releases or other lien releases on account of [KB] Tenant’s Work....” *Id.* at 27.

¹⁷ *Id.* at 181.

¹⁸ *Id.* at 109.

¹⁹ *Id.* at 10, 109.

1. Blue Diamond Acted as a General Contractor

In its own words, Blue Diamond alleges that it performed “oversight work,” “project management services,” and that it was responsible for “management of the worksite.”²⁰

Likewise, the title of the Kiosk Contract states, “Agreement Between [KB Franchisors] and Construction Manager where the Construction Manager is also the Constructor...”²¹ The agreement makes Blue Diamond the “Construction Manager” and “Constructor.”²²

The Kiosk Contract states that “[Blue Diamond] will take over the management of construction of the Project.”²³ Blue Diamond had a right to reimbursement from KB Franchisors for a variety of expenses, including payments to subcontractors, costs of materials and equipment, and more.²⁴

²⁰ *Id.* at 179-180.

²¹ *Id.* at 109 (underline added).

²² *Id.* Realizing that it must register as a contractor under the CRA and that it has no lien rights under Chapter 60.04 RCW, Blue Diamond cites to irrelevant facts that are not contained in the record. *E.g.*, Brief of Appellant pp. 17-18 (citing to course descriptions for construction management programs at Central Washington University and University of Washington). This evidence is hearsay and not part of the record on review. Further, the “label” that Blue Diamond puts on itself is irrelevant. What is relevant is that Blue Diamond’s “actions” require it to register as a contractor and do not entitle it to lien rights.

²³ CP at 127.

²⁴ *Id.* at 117.

The Kiosk Contract required Blue Diamond to consult with KB Franchisors (but not KB Tenant) on a number of issues. It had to “consult” with KB Franchisors regarding “site use and improvements and the selection of materials, building systems and equipment,” construction feasibility, scheduling, timelines, costs, and budgets.²⁵ Blue Diamond also had to provide a list of possible subcontractors, solicit bids, and then advise KB Franchisors as to which subcontractors to use.²⁶ During construction, Blue Diamond had to schedule periodic meetings with the KB Franchisors and various contractors to discuss the status of the work.²⁷

2. WEA Southcenter and KB Tenant Were Not Parties to the Kiosk Contract

Neither WEA Southcenter nor KB Tenant was a party to the Kiosk Contract.²⁸ Instead, the Kiosk Contract was “made ... between the Owners: Kudo Beans Inc. and Kudo Beans Franchising Inc. [i.e., KB

²⁵ *Id.* at 111.

²⁶ *Id.* at 112, 114.

²⁷ *Id.* at 114.

²⁸ *Id.* at 109.

Franchisors] ... and the Construction Manager: Blue Diamond....”²⁹ Blue Diamond reported to and submitted invoices to KB Franchisors.³⁰

Blue Diamond misrepresents the relationship between the parties when it states in its brief that “KB Franchising, Inc. Kudo Beans, Inc. and KB Seattle 1 acted as one in the same” and that Blue Diamond “contracted with all three entities,” and then proceeds to refer to all three entities collectively as Kudo Beans throughout its brief.³¹ These are three separate entities with different ownership. Blue Diamond’s own Kiosk Contract shows that Blue Diamond only contracted with KB Franchisors.³²

²⁹ *Id.* (underline added).

³⁰ *E.g., id.* at 179. *See also id.* at 111 (§ 2.1.2, Blue Diamond must provide a preliminary evaluation and meet regularly with KB Franchisors); *id.* at 111-112 (§ 2.1.3, Blue Diamond must provide a schedule to KB Franchisors); *id.* at 112 (§ 2.1.4, Blue Diamond must provide recommendations to KB Franchisors regarding phased construction; § 2.1.5, Blue Diamond must provide preliminary cost estimates to KB Franchisors); *id.* at 113 (§ 2.2, Blue Diamond must provide regular cost reports to KB Franchisors); *id.* at 114 (§ 2.3.2.5, Blue Diamond must provide a daily log of activity on the work site and a monthly written reports to KB Franchisors); *id.* at 127-128 (§§ 5.1.1, 7.1.2, 7.1.3).

³¹ Brief of Appellant, p. 22 n.15.

³² Further, Blue Diamond’s own complaint states “Thereafter, Plaintiff and KB [a defined term only including KB Franchisors] openly negotiated and executed a written Contract expressing the terms of their agreement.” CP at 179. Blue Diamond acknowledges in its complaint that it only contracted with KB Franchisors.

D. Procedural History

KB Franchisors did not pay Blue Diamond and Blue Diamond filed this lawsuit against seven defendants.³³ On May 8, 2009, the trial court granted summary judgment and dismissed all of Blue Diamond's claims against WEA Southcenter.³⁴ Blue Diamond appealed and WEA Southcenter filed a motion to dismiss the appeal because Blue Diamond had not sought discretionary review. Blue Diamond filed a motion for discretionary review, which the court of appeals denied. Now that a final judgment has been entered, Blue Diamond has again appealed the order granting WEA Southcenter's motion for summary judgment.³⁵

III. SUMMARY OF ARGUMENT

Because Blue Diamond was required to register as a contractor and unregistered contractors cannot maintain a mechanics' lien, the trial court correctly granted a summary judgment motion dismissing Blue Diamond's claims against WEA Southcenter. An entity is a "general contractor" and must register with the state if it "superintends, or consults on, in whole or

³³ The seven defendants are (1) Kudo Beans Franchising, Inc., (2) Kudo Beans, Inc., (3) Cherie Ryu, (4) KB Seattle 1, Inc., (5) Kim See Young, (6) Kihyon-Kim, and (7) WEA Southcenter. CP at 3-4.

³⁴ *Id.* at 317-19.

³⁵ *Id.* at 367-377.

in part, work falling within the definition of a contractor.”
RCW 18.27.010(5).

As a matter of law, Blue Diamond superintended and consulted on building the coffee kiosk. Blue Diamond’s Kiosk Contract labels it as a “Constructor” and states that it must “consult with [KB Franchisors] regarding site use and improvements and the selection of materials, building systems and equipment.” Blue Diamond also admits that it provided “oversight” and “management of the worksite.” In other words, Blue Diamond had a consulting and superintendant role.

Blue Diamond qualifies as a general contractor because it “consulted on” and “superintended” work that meets the definition of a contractor. Blue Diamond did not register as a contractor, and thus, cannot maintain a lien against WEA Southcenter’s property.

Further, Blue Diamond has no lien rights under RCW 60.04.021 because Blue Diamond did not furnish “labor, professional services, materials, or equipment” within the meaning of the statute. Blue Diamond has not alleged that it provided “labor,” “material,” or “equipment” (such activities would have clearly required registration as a contractor). Blue Diamond did not provide “professional services,” which the statute defined as “architectural or engineering services.” RCW 60.04.011(13).
See also Pacific Industries, Inc. v. Singh, 120 Wn. App. 1, 7-8, 86 P.3d

778 (2003) (holding that a plaintiff that provided “construction management” services did not have lien rights because the legislature did not “expressly provide that those services are lienable”).

Additionally, Blue Diamond failed to provide the pre-claim notice that is a condition precedent to enforcing a lien. RCW 60.04.031(1), (6).

Finally, the trial court properly awarded WEA Southcenter its attorney fees. The trial court has discretion to award the prevailing party in a lien foreclosure action its attorney fees. RCW 60.04.181(3). Blue Diamond filed a lien foreclosure action against WEA Southcenter. WEA Southcenter prevailed when filed a summary judgment motion that resulted in Blue Diamond’s lien foreclosure claims being dismissed. Thus, the trial court did not abuse its discretion in awarding WEA Southcenter its attorney fees.

IV. ARGUMENT

A. Standard for Review of an Order Granting Summary Judgment

An appellant court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court. A trial court must grant a motion for summary judgment if “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” CR 56(c). On issues of statutory interpretation, the standard of

review is de novo. *Lake v. Woodcreek Homeowners Ass'n*, 168 Wn.2d 694, 525-26, 229 P.3d 791(2010).

An order granting a summary judgment motion must be sustained if supported by any basis in the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-201, 770 P.2d 1027 (1989). *See also* RAP 2.5(a) (“A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.”)

B. Blue Diamond Failed to Register as a Contractor, and Thus, Cannot Maintain an Action to Foreclose Upon a Lien

Here, the trial court correctly dismissed Blue Diamond’s claims because Blue Diamond failed to register as a contractor under the Contractor’s Registration Act (“CRA”). An unregistered contractor cannot maintain a mechanics’ or materialmen’s lien.

1. Public Policy Supports Strict Enforcement of the CRA

The registration requirement of the CRA is supported by strong public policy reasons. RCW 18.27.005 (the CRA “shall be strictly enforced[,], the doctrine of substantial compliance shall not be used[, and] anyone engaged in the activities of a contractor is presumed to know the requirements of [the CRA].”); RCW 18.27.020(2) (failing to register is a criminal offense).

Claims of unjust enrichment, lack of knowledge, or other equitable theories will not overcome the CRA's registration requirement. *Stewart v. Hammond*, 78 Wn.2d 216, 220, 471 P.2d 90 (1970) (“The law will be nullified if noncomplying contractors are permitted to evade the statute by a claim of ‘unwitting violation’ or ‘undue loss’ or by a claim that the other contracting party will be ‘unduly enriched.’”)

2. The CRA Prohibits Unregistered Contractors from Filing a Lien Claim

The CRA prohibits an unregistered contractor from bringing or maintaining a court action, or filing a mechanic's lien:

No ... contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work or for breach of any contract for which registration is required under this chapter without alleging and proving that he was a duly registered contractor and held a current and valid certificate of registration at the time he contracted for the performance of such work or entered into such contract. ...

RCW 18.27.080 (underline added). *Andries v. Covey*, 128 Wn. App. 546, 552, 113 P.3d 483 (2005) (stating that the CRA “prohibits any persons who is required to be registered as a contractor but has failed to do so, from ... fil[ing] or foreclose[ing] a lien.”)

3. Blue Diamond Acted as a General Contractor, Which Requires Registration Prior to Maintaining Any Suit

The CRA defines a “contractor” as follows:

(1) “Contractor” includes any ... entity who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any ... structure, project, development, or improvement attached to real estate or to do any part thereof including the installation of carpeting or other floor covering, [or] the installation or repair of ... cabinet or similar installation.... “Contractor” also includes a consultant acting as a general contractor. ...

...

(5) “General contractor” means a contractor whose business operations require the use of more than one building trade or craft upon a single job or project or under a single building permit. A general contractor also includes one who superintends, or consults on, in whole or in part, work falling within the definition of a contractor.

RCW 18.27.010 (underline added).³⁶

Here, Blue Diamond “superintended” and “consulted on” “work falling within the definition of a contractor.”

Blue Diamond’s own Kiosk Contract labels it as a “Constructor” and states that it provided “consulting” services.³⁷ Blue Diamond had to

³⁶ Blue Diamond mistakenly relies upon *Shingledecker v. Roofmaster Prods. Co.*, 93 Wn. App. 867, 971 P.2d 523 (1999) in an attempt to expand the definition found in RCW 18.27.010. *Shingledecker* used a definition of general contractor applied in case law to determine when a party owes a duty to independent contractors under the Washington Industrial Safety and Health Act of 1973. The case never mentions the CRA or the CRA’s statutory definition of a “general contractor” and is wholly inapplicable.

³⁷ CP at 113 (§ 2.1.2, titled “Consultation” and requiring Blue Diamond to “consult with [KB Franchisors] regarding site use and improvements and the selection of materials, building systems and equipment.”)

consult with the KB Franchisors regarding site use and improvements and the selection of subcontractors, materials, building systems and equipment.³⁸

Blue Diamond also had responsibility for supervising the worksite. Blue Diamond states in its Complaint that it provided “management of the worksite” and performed “oversight work” and “project management services.”³⁹ Blue Diamond states in its Complaint that it “incurred costs for labor and expenses” and “costs ... for the purchase of fixtures and materials to be used on the jobsite.”⁴⁰ Blue Diamond managed the contracts with Arai Jackson Ellison Murakami, LLP (the architects), Woodburn Construction Co, Bargreen Ellingson, and The Sign Factory, Inc.⁴¹ Blue Diamond had to schedule meetings between KB Franchisors and the contractors to discuss the status of the project.⁴²

Blue Diamond mistakenly argues that its subjective beliefs can contradict the plain meaning of the Kiosk Contract (i.e., it wants to remove the term “Constructor” and numerous references to Blue

³⁸ *Id.* at 111-12, 114 (§§ 2.1.1, 2.1.6, 2.3.2.1).

³⁹ *Id.* at 179-80 (Complaint ¶¶ 13, 15, 16, 20).

⁴⁰ *Id.* at 182 (Complaint ¶¶ 38, 41).

⁴¹ *Id.* at 109, 127.

⁴² CP at 114.

Diamond's consulting and supervising obligations). However, a party's "unilateral or subjective intent as to the meaning of a contract word" is not admissible to "contradict or modify the written word." *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999).

Blue Diamond repeatedly describes itself as a "construction manager" that provided "consulting" and "oversight" services.⁴³ To provide oversight means to "superintend." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2294 (2002) (defining "superintend" as to "have charge or oversight").

According to its own words, Blue Diamond "superintended" and "consulted" on the Coffee kiosk, and thus, as a matter of law, cannot maintain its lien claim because it did not register as a "contractor."⁴⁴ The trial court correctly granted WEA Southcenter's summary judgment motion and dismissed Blue Diamond's claims.

⁴³ *E.g.*, CP at 297, 299 (Decl. Shulz ¶ 2 ("responsible for oversight"); ¶ 4 ("act[ed] as a construction manager"); ¶ 16 ("provided consulting services ... and acted as an 'advisor'")). An advisor is simply a consultant. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 32 (2002) (defining "advise" as to "consult" with).

⁴⁴ Blue Diamond has objected to WEA Southcenter defining the scope of its services by quoting sections of Blue Diamond's complaint, Blue Diamond's declarations, and Kiosk Contract. However, the complaint, declarations, and contracts are all competent evidence of Blue Diamond's actions. Blue Diamond cannot seek to contradict its own documents and certainly cannot object to WEA Southcenter quoting language from these documents.

C. Existing Washington Statutory and Case Law Holds that Blue Diamond, as a Construction Manager, Has No Lien Rights

Even if Blue Diamond had registered as a contractor, it has no lien rights because it does not qualify as a person entitled to a lien (i.e., it did not provide services or items meeting the statutory definitions of “equipment,” “materials,” “labor,” or “professional services” that would grant it a lien under Chapter 60.04 RCW). Mechanics’ and materialmen’s liens are only statutorily granted to the following persons:

[A]ny 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.

RCW 60.04.021. *Singh*, 120 Wn. App. at 7-8 (holding that a plaintiff that provided “construction management” services did not have lien rights because the legislature did not “expressly provide that those services are lienable”).⁴⁵

The lien statute is a derogation of common law and strictly construed; its benefits extend only to those that come “clearly” within its provisions. *Singh*, 120 Wn. App. at 6-7.

⁴⁵ Of course, Blue Diamond did not contract with WEA Southcenter or its tenant, KB Tenant, and thus is not entitled to a lien because it did not furnish its services “at the instance of the owner, or the agent or construction agent of the owner.” CP at 10, 109, 179.

Blue Diamond did not allege in opposition to the summary judgment motion that it provided “labor,” “materials,” or “equipment,”⁴⁶ because if it provided these items, it would likely have to register as a contractor.

Instead, Blue Diamond has only argued that it is entitled to a lien because it allegedly provided “professional services,”⁴⁷ a term defined as follows:

“Professional services” means surveying, establishing or marking the boundaries of, preparing maps, plans, or specifications for, or inspecting, testing, or otherwise performing any other architectural or engineering services for the improvement of real property.

RCW 60.04.011(13) (underline added).

The lien statute does not mention “consultants” or “construction managers” as persons that have lien rights. When a statute specifically lists the things upon which it operates, there is a presumption that the legislature intended all omissions (i.e., the rule of *expressio unius est*

⁴⁶ CP at 285 (in opposition to the summary judgment motion, Blue Diamond’s attorney arguing that it is entitled to a lien because it “render[ed] professional services to construction improvements,” but not alleging that Blue Diamond provided “labor,” “materials,” or “equipment” that would entitle it to a lien). *See also id.* at 296-99 (declaration in support of opposition to summary judgment in which Blue Diamond states it provided a “professional service,” but does not allege that it provided “labor,” “materials,” or “equipment” within the meaning of the lien statute).

⁴⁷ *Id.*

exclusio alterius). *Washington State Rep. Party v. Washington State Pub. Disclosure Com'n*, 141 Wn.2d 245, 281, 4 P.3d 808 (2000).

In *Singh*, the plaintiff provided “construction management” services. 120 Wn. App. at 7-8 (underline added). Specifically, the construction manager coordinated the project, managed the construction, obtained permits, met with engineers, purchased and provided materials for construction, and visited the site to check on progress. *Id.* Because the legislature did not “expressly provide that those services are lienable,” the court dismissed the construction manager’s lien claim. *Id.* at 8.

As Blue Diamond sought to distance itself from the activities that would require registration under the CRA (i.e., denying the statements that it made in its Complaint, the Kiosk Contract, and its supporting declarations), Blue Diamond simultaneously eliminated the activities that would have supported a mechanic’s lien and placed itself squarely within *Singh*, which held that a construction manager did not have any lien rights. As a matter of law, Blue Diamond did not provide services that entitle it to any lien rights.

D. Blue Diamond Failed to Provide Pre-Claim Notice, and Thus, as a Matter of Law, Cannot File a Lien

Even if Blue Diamond was a party that could assert a lien under the lien statute (it is no such party), it failed to provide pre-claim notice,

and thus, as a matter of law, cannot assert a lien. A “lien authorized by [Chapter 60.04 RCW] shall not be enforced unless” the person claiming the lien first “give[s] the owner or reputed owner notice in writing of the right to claim a lien.” RCW 60.04.031(1), (6). An exemption exists when the claimant contracts directly with the owner’s common law agent. RCW 60.04.031(2). Blue Diamond did not contract with the owner or an agent of the owner. Blue Diamond did not even contract with KB Tenant! The Kiosk Contract was between Blue Diamond and KB Franchisors. Moreover, a tenant is not automatically the landlord’s agent and finding an implied agency relationship requires “very clear proof of strong circumstances.” *Bunn v. Bates*, 31 Wn.2d 315, 319, 196 P.2d 741 (1948); *CKP, Inc. v. GRS Const. Co.*, 63 Wn. App. 601, 608, 821 P.2d 63 (1991) (generally stating the rule). Even if the Lease required KB Tenant to build the coffee kiosk and created a “statutory agency” for purposes of granting the KB Tenant the authority to order materials and services that can become a lien upon landlord’s interest, this does not make KB Tenant WEA Southcenter’s “common law agent.” *Globe Elec. Co. v. Union Leasehold Co.*, 166 Wash. 45, 6 P.2d 394 (1931) (holding that a contractor had to provide pre-claim notice to the owner and not just the tenant, even when the lease made the tenant a “statutory agent” by requiring the tenant to construct a building).

Here, Blue Diamond mistakenly argues that the Lease included “plans and specifications” and that WEA Southcenter prepared the “plans and design drawing.”⁴⁸ This is false, is not supported by the Lease or any part of the record, and is pure argument. The Lease merely attached a two page site plan (i.e., not construction plans) showing the space that KB Tenant rented.⁴⁹ According to Blue Diamond’s own contract, KB Franchisors’ architect, Arai Jackson Ellison Murakami, LLP, produced the plans and design drawings.⁵⁰ The Lease did not require KB Tenant to build the Coffee kiosk.⁵¹ Blue Diamond has failed to rebut WEA Southcenter’s showing that KB Tenant was not its common law agent. Blue Diamond’s claims fail as a matter of law because it did not provide WEA Southcenter with a pre-claim notice.

E. Out of State Authority Cited by Blue Diamond Conflicts with Binding Washington Case Law and Washington’s Statute

Blue Diamond does not cite any legal authority that upholds a lien claim asserted by an unregistered construction manager. Rather than applying the language in Washington’s statute and case law to its actions,

⁴⁸ *Id.* at 298.

⁴⁹ *Id.* at 60-61.

⁵⁰ *Id.* at 116-17.

Blue Diamond discusses out of state, intermediary appellate court decisions that involve dissimilar facts, issues and statutes, and are not binding authority on Washington courts.⁵²

In *Fifth Day, LLC v. Bolotin*, 91 Cal. Rptr. 3d 633 (Cal. Ct. App. 2009), a California statute defined a “general building contractor” as:

a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of at least two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

Id. at 640 *citing* (CAL. BUS. & PROF. CODE § 7057 (underline added)).

Unlike Washington, California’s definition of a “general building contractor” requires that the person or entity also meet the definition of a “contractor.” *Fifth Day, LLC*, 91 Cal. Rptr. 3d 633, 640 (“If Plaintiff is not a contractor (because it does not perform activities listed in [the definition of] a contractor), it is, by definition, not a general contractor.”) Further, unlike Washington, California’s statute does not include within its definition of a “contractor” anyone who “consults on” work falling within the definition of a contractor. *See* RCW 18.27.010(5) (“A general

⁵¹ The standards listed in Exhibit B of the Lease simply ensure safety, prevent construction from interfering with the ongoing Mall operations, and mandate compliance with statutes, codes and regulations. CP at 62-76.

contractor also includes one who superintends, or consults on, in whole or in part, work falling within the definition of a contractor.”) (underline added). Washington’s statutory definition of a “general contractor” is broader than California’s.

Finally, the *Fifth Day, LLC* case did not involve a mechanic’s lien. Instead, it involved a defendant that contracted with the unregistered contractor, paid part of the contract, and then attempted to avoid the rest of the contract. 91 Cal. Rptr. 3d 633, 634-38. In contrast, Blue Diamond seeks to lien WEA Southcenter’s property even though WEA Southcenter never contracted with Blue Diamond and even though Blue Diamond never provided any lienable materials or services under Chapter 60.04 RCW.

Blue Diamond also incorrectly relies upon *Signature Development, LLC v. Sandler Commercial at Union, LLC*, No. COA09-646, 2010 N.C. App. LEXIS 2010, 2010 WL 4286383 (N.C. Ct. App. Nov. 2, 2010). The facts of that case and the wording of the North Carolina statute are easily distinguishable. The North Carolina case involved an appeal of a CR 12(b)(6) dismissal, which has very stringent standard of review. Further, North Carolina’s statute defined a “general contractor” as “any person or

⁵² Blue Diamond attached copies of the out of state authority as exhibits to its brief.

firm or corporation who for [compensation] undertakes to superintend or manage ... the construction of any building, highway, public utilities, grading or any improvement or structure....” *Id.* at *11 (*quoting* N.C. GEN. STAT. § 87-1) (edits and underline added). North Carolina’s administrative code defined the meaning of “undertakes to superintend or manage” and specifically excluded one retained by the owner as a “consultant” to assist with design, interface with contractors, provide cost and budgeting services, and monitor the progress of development. *Id.* at *28 (*citing* 21 N.C. ADMIN. CODE § 12.0208(a)). In contrast, Washington’s statute uses the broader term “consults” to define a general contractor. *See* RCW 18.27.010(5) (“A general contractor also includes one who superintends, or consults on, in whole or in part, work falling within the definition of a contractor.”) (underline added).

Finally, in *Signature Development*, the court dismissed the plaintiff’s lien claim because the lien was not authorized by statute. Similarly, Blue Diamond has no lien rights under Washington’s statute because it has not provided lienable “professional services.” RCW 60.04.021; *Singh*, 120 Wn. App. at 7-8.

Blue Diamond also erroneously relies upon *Puckett v. Gordon*, 16 So.3d 764, 769 (Miss. Ct. App. 2009), a case that Blue Diamond did not cite before the trial court. The *Puckett* case does not even involve a

mechanic's lien. Instead, it involved a defendant that contracted with an unregistered contractor and then threatened the plaintiff/unregistered contractor with a gun and refused to pay the amount owed. 16 So.3d at 766-68. Moreover, Mississippi does not have a statutory definition of a "general contractor," and thus, Mississippi's court relied upon a narrow definition found in case law. In contrast, Washington has a broad statutory definition of a "general contractor," i.e., one that "superintends" or "consults." *Puckett* is wholly inapplicable.

In short, Blue Diamond has not cited a single case that granted an unregistered construction manager lien rights. The out of state authority cited by Blue Diamond involves statutes that differ significantly from Washington's and cited cases must be understood in light of these differences. Blue Diamond seeks to lien WEA Southcenter's property even though Blue Diamond never contracted with WEA Southcenter, Blue Diamond did not register as a contractor, and even though Blue Diamond never provided any "equipment," "materials," "labor," or "professional services" that would entitle it to a lien. RCW 60.04.021; *Singh*, 120 Wn. App. at 7-8. The cases cited by Blue Diamond have no persuasive value to the facts and statutory provisions before this court.

F. The Trial Court Correctly Awarded WEA Southcenter Its Attorney Fees

Both case law and Washington statutes support the WEA Southcenter's award of attorney fees.

The court has the discretion to award the prevailing party in a lien foreclosure action its attorney fees:

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. ...

RCW 60.04.181(3) (underline added).

“Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

Here, the trial court was within its discretion in awarding WEA Southcenter its attorney fees. The only claim that Blue Diamond asserted against WEA Southcenter was for lien foreclosure.⁵³ WEA Southcenter filed a summary judgment motion and got Blue Diamond's lien

⁵³ CP at 183-84.

foreclosure claim dismissed because Blue Diamond had not registered as a contractor, had no lien rights under RCW 60.04.021, and failed to give the required pre-claim notice. The trial court properly awarded WEA Southcenter its attorney fees.

Blue Diamond cites *William v. Athletic Field Inc.*, 155 Wn. App. 434 (2010) for the proposition that “a [lien] claimant is entitled to its attorneys’ fees even if the lien is found invalid.”⁵⁴ Blue Diamond is misstating the law. In *William*, the court held the lien invalid, held that it was not frivolously filed, and held that “neither party substantially prevailed,” and thus, did “not award fees to either party.” 155 Wn. App. at 448. This flatly contradicts Blue Diamond’s statement.

Blue Diamond also misconstrues *Frank v. Fischer*, 108 Wn.2d 468, 739 P.2d 1145 (1987), and contends that a trial court cannot award attorney fees under RCW 60.04.181(3) if it based the dismissal in part on the lien claimant’s failure to register as a contractor.

In *Frank*, the owner (a professional contractor himself) knowingly hired an unregistered contractor. 108 Wn. 2d at 470. The only issue in the case was the failure to register under the CRA. After receiving the benefit of the unregistered contractor’s work, the owner refused to pay the

⁵⁴ Brief of Appellants, pp. 26-27.

contractor. *Id.* For public policy reasons, the court held that the owner did not have to pay the unregistered contractor under CRA, despite receiving the benefit of the unregistered contractor's work. *Id.* at 476. In these circumstances (where the unregistered status was known), the court exercised its discretion and decided not to also award attorney fees to the prevailing owner under the lien foreclosure statute, stating in part:

We award no attorney fees; the basis for the resolution of this case is the contractors registration statute, not the lien foreclosure statute. Moreover, the award of fees under RCW 60.04.130 is discretionary.

108 Wn.2d at 477. The court's holding turned on an exercise of its discretion under the facts of that case. Contrary to Blue Diamond's assertions, this case does not establish a bright line rule prohibiting an award of reasonable attorney fees in lien foreclosure cases.

Also noteworthy, *Frank v. Fischer* interpreted former RCW 60.04.130 (since repealed) and not the current RCW 60.04.181(3), which has added a phrase empowering the trial court with discretion whether to award reasonable attorney fees:

The court may allow the prevailing party in the action, whether plaintiff or defendant, [it's attorney fees and costs], as the court or arbitrator deems reasonable. ...

RCW 60.04.181(3) (underline added to highlight new language).

The clear, current text of RCW 60.04.181(3) gives the trial court discretion to award attorney fees to the prevailing party in a lien

foreclosure action, whether plaintiff or defendant, without any restriction on the basis for the prevailing party's win.

Granting the trial court the discretion to award attorney fees to the prevailing party in a lien foreclosure action is consistent with case law.⁵⁵ *Pilch v. Hendrix*, 22 Wn. App. 531, 533-34, 591 P.2d 824 (1979) (holding, without reference to Chapter 60.04 RCW, that “costs and reasonable attorney’s fees are allowable where the lien claimant does not prevail in the [lien foreclosure] action.”)

In *CKP, Inc. v. GRS Construction Co.*, 63 Wn. App. 601, 821 P.2d 63 (1991), the appellate court upheld an award of attorney fees to a lien claimant for the costs of defending against counterclaims that were “inextricably intertwined with [the lien claimant’s] establishment of its lien right.” *Id.* at 621. Here, because there is no contract, a lien claim is the only claim Blue Diamond can assert against WEA Southcenter.

In *Irwin Concrete, Inc. v. Sun Coast Properties, Inc.*, 33 Wn. App. 190, 653 P.2d 1331 (1982), the appellate court upheld an award of attorney fees when the defendant defeated a lien claim because its deed of

⁵⁵ No court has cited *Frank v. Fischer* in support of Blue Diamond’s contention that an award of attorney fees under RCW 60.04.181(3), a provision that postdates the *Frank* decision, requires that the matter be resolved based solely under Chapter 60.04 RCW.

trust was filed prior to the mechanic's lien, and thus, had priority. *Id.* at 196-97.

In *Moritzky v. Heberlein*, 40 Wn. App. 181, 697 P.2d 1023 (1985), the lien claimant prevailed on the foreclosure action but the defendant prevailed on counterclaims that exceeded the amount of the lien. *Id.* at 182. The trial court held that the counterclaims were “an ‘independent action’ from the lien foreclosure under RCW 60.04, thus no attorney fees and/or costs could be awarded...” *Id.* The court of appeals reversed, noting that the statute applied to the prevailing party, whether plaintiff or defendant, and remanded with instructions for the trial court to consider the defendant's request for attorney fees under Chapter 60.04 RCW. *Id.* at 183-84.

Finally, Blue Diamonds erroneously contends that awarding fees under RCW 60.04.181(3) conflicts with RCW 60.04.081, the frivolous lien statute.⁵⁶ In the case of a frivolous lien, the award of attorney fees is mandatory. RCW 60.04.081(4) (if the claim is found frivolous “... the court shall issue an order ... awarding costs and attorneys' fees ...”)

⁵⁶ In its complaint, Blue Diamond asked the court to award attorney fees and costs for the lien foreclosure action, apparently relying upon RCW 60.04.181(3). CP at 184 (Complaint ¶ 52). Under Blue Diamond's proposed rule, a successful lien claimant would always be entitled to its attorney fees and costs but a defendant would never be entitled to its attorney fees and costs. This is manifestly unreasonable and is contradicted by statute.

(underline added). In the case of a party prevailing against a lien claim that is not frivolous, the award of attorney fees under RCW 60.04.181(3) is discretionary. The two provisions compliment each other and are consistent.

Again, it is undisputed that Blue Diamond's only claim against WEA Southcenter was for lien foreclosure and it is undisputed that WEA Southcenter prevailed on this claim because Blue Diamond failed to register as a contractor, did not perform services that entitled it to a lien, and failed to provide the required pre-claim notice. WEA Southcenter did not contract with Blue Diamond.⁵⁷ The trial court correctly exercised its discretion in awarding WEA Southcenter its attorney fees.

G. WEA Southcenter Is Entitled to Its Attorney Fees and Costs Related to this Appeal

WEA Southcenter is entitled to its attorney fees and costs related to this appeal.

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. ...

⁵⁷ CP at 10, 109, 179.

RCW 60.04.181(3) (underline added). See also *Lumberman's of Washington, Inc. v. Barnhardt*, 89 Wn. App. 283, 292, 949 P.2d 38 (1997) (granting attorney fees to the prevailing party on appeal “pursuant to RCW 60.04.181(3) and RAP 18.1(a).”)

V. CONCLUSION

In short, Blue Diamond “superintended” and “consulted” on work meeting the definition of a contractor. Because Blue Diamond did not register as a contractor, it cannot maintain a lien against WEA Southcenter. Under *Singh* and Chapter 60.04 RCW, Blue Diamond has no lien rights for construction management services and did not provide the required pre-claim notice. WEA Southcenter is entitled to its attorney fees because it was the prevailing party. Blue Diamond’s appeal should be denied and the court should award WEA Southcenter its costs and fees for defending this appeal.

RESPECTFULLY SUBMITTED this 17th day of December,
2010.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 17, 2010, I emailed a true and correct copy of the Brief of Respondent to Scott G. Wolfe Jr. at Scott@wolfelaw.com pursuant to a written agreement of Scott G. Wolfe Jr. to accept service via email.

DATED this 17th day of December, 2010, at Seattle, Washington.



Bonnie Rakes