

66561-8

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NO. 66561-8

COURT OF APPEALS, DIVISION I

STATE OF WASHINGTON

MIKELLE ENTERPRISES, INC., a Washington corporation,

Plaintiff/Appellant,

vs.

RICHARD T. MIEHE, a single man; JAMES R. HENSON, JR, a single man; and ADMINISTRATOR, UNITED STATES SMALL BUSINESS ADMINISTRATION, an agency of the government of the United States of America,

Defendants/Respondents.

2011 JUN 13 PM 1:05
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

BRIEF OF APPELLANT

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I. INTRODUCTION

The outcome in this case will be controlled by the outcome of the pending *Williams v. Athletic Field* case now under review by the Washington Supreme Court. This case has elements that make the contractor's claim of lien enforceable even if *Williams* is upheld. But if the William's decision is reversed, the trial court's decision will also need to be reversed.

II. ASSIGNMENT OF ERROR

1. The trial court erred in dismissing plaintiff's claim of lien by order entered on December 21, 2010.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. A contractor's claim of lien uses the exact language described in the lien claim statute as a model claim of lien. The lien claimant's corporate president signs the lien indicating his office and authority and his signature is certified by a notary public from the county auditor's office. However, the language of the notary's certification, while matching the prescribed form of the lien claim statute, does not match the requirements for corporate acknowledgements under a different statute. Does the lien sufficiently comply with the statutory lien claim requirements? (Assignment of Error 1.)

III. STATEMENT OF CASE

Mikelle Enterprises is a general contractor hired by Richard Mieke and James Henson to remodel and improve their home. CP 118-123. The parties had a dispute over the work and payment, and Mikelle Enterprises filed a lien for unpaid earnings. CP 124-125.

Mikelle Enterprises' lien was on a preprinted form. The words and format of the lien are exactly those described in RCW 60.04.091. The company president's signature was certified at the Snohomish County Auditor's office by a notary public working for the county. CP 124-125.

When Mikelle Enterprises' contract earnings were still not paid seven months after the claim of lien was filed, Mikelle Enterprises filed a lawsuit in the Snohomish County Superior Court for foreclosure of the lien. CP 116.

In December 2010, Mieke and Henson brought a motion for judgment on the pleadings to dismiss Mikelle's claim of lien. The Honorable Larry McKeeman of the Snohomish County Superior Court granted Mieke and Henson's motion to dismiss Mikelle Enterprises' lien claim, citing Division II's decision *Williams v. Athletic Field*. 155 Wash. App. 434, 228 P.3d 1297 (Div. II April 7, 2010). CP 8-10.

IV. ARGUMENT

A. If *Williams* is Modified by the Washington Supreme Court, the Trial Court's Decision Must Also be Modified.

The recent case of *Williams v. Athletic Field*, 155 Wash. App. 434, 228 P.3d 1297 (Div. II April 7, 2010) relied on by Defendants Mieke and Henson, is controlling on the outcome of this case. The Washington Supreme Court has accepted review of the *Williams* case (Docket No. 84555-7). The case is scheduled for oral argument on June 14, 2011. (<http://templeofjustice.org/2011/williams-v-athletic-field-inc/>).

Appellant's counsel believes that a number of cases are now pending in the Washington appellate courts that involve lien claims declared invalid under the *Williams* decision. Appellant requests that this case be considered when the rest of the similarly situated cases are resolved.

B. The *Williams* Decision Is Distinguishable.

The *Williams* case did invalidate a lien very similar to the Mikelle Enterprises lien. However, Mikelle Enterprises' lien claim is factually distinguishable from the *Williams* lien.

In *Williams*, Division II held that a lien was not enforceable because it was not properly acknowledged. The court cited RCW 60.04.091, which requires that a 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.” *Id.* at 441.

In *Williams*, the lien was signed by an individual from a third party lien service company (acting as agent) on behalf of the corporation lien claimant. Although the agent’s signature was notarized, the *Williams* court held that the lien claim was defective because it was signed by the agent in her individual capacity, it did not indicate that she was signing in a representative capacity, and it lacked a proper corporate acknowledgement. *Id.* at 441.

However, the *Williams* court confuses the lien statute’s acknowledgement requirement with a notary’s certification. An acknowledgement is what the party signing the instrument communicates to the notary public. A certification is what the notary public writes on the document to confirm the acknowledgment given. This distinction is reflected in RCW 64.08.050:

The officer, or person, taking an acknowledgment as in this chapter provided, shall certify the same by a certificate written upon or annexed to the instrument acknowledged and signed by him or her and sealed with his or her official seal, if any, and reciting in substance that the person, or

persons, known to him or her as, or determined by satisfactory evidence to be, the person, or persons, whose name, or names, are signed to the instrument as executing the same, acknowledged before him or her on the date stated in the certificate that he, she, or they, executed the same freely and voluntarily. Such certificate shall be prima facie evidence of the facts therein recited. The officer or person taking the acknowledgment has satisfactory evidence that a person is the person whose name is signed on the instrument if that person: (1) Is personally known to the officer or person taking the acknowledgment; (2) is identified upon the oath or affirmation of a credible witness personally known to the officer or person taking the acknowledgment; or (3) is identified on the basis of identification documents.

RCW 64.08.050.

Acceptable short forms for certifications are listed in the statutory chapter applicable to Notary Publics, Chapter 42.44 RCW. The certification in the *Williams* lien was merely the certification of witnessing a signature, not for a corporate acknowledgment.

“Acknowledgements” are also defined in the Notary Public chapter: “Acknowledgment’ means a statement by a person that the person has executed an instrument as the person's free and voluntary act for the uses and purposes stated therein and, if the instrument is executed in a representative capacity, a statement that the person signed the

document with proper authority and executed it as the act of the person or entity represented and identified therein.” RCW 42.44.010(4).

Thus, the acknowledgment is what the lien claimant represents to the notary, and the certification is what the notary writes on the face of the lien to confirm receiving the acknowledgment. Unfortunately, the *Williams* court, misconstruing the lien claim statute, held that the lien lacked a proper acknowledgement. What the court should have decided was that the certification was in error. However, RCW 60.04.091(2) requires an acknowledgement, and the certification should fall under the “substantial compliance” requirement described below. A certification error should not be fatal to a lien which otherwise substantially complies with the lien statute.

The factual difference between the *Williams* case and the present case is that in *Williams*, the signing party made no representation of her authority to act on behalf of the corporation, and there was nothing on the face of the lien to show the corporation’s authority to make the representations in the lien. *Id.* at 443-44.

In contrast, in the present case, Mike Hendrickson, as his signature in two parts of the lien claim identifies, signed in his representative capacity as the President of Mikelle Enterprises, Inc. CP 124-125. Unlike the third party agent in the *Williams* case, Mr. Hendrickson, as the

President of the lien claimant, is entitled to make representations on the corporation's behalf. Thus, all of the acknowledgement's requirements (identity as corporate officer, free and voluntary act of corporation, authority of signor) existed at the time of signature. Mr. Hendrickson was the corporation's president, he signed in his officer's capacity, his execution of the lien was a free and voluntary act of the corporation, and he was authorized to act on behalf of the corporation. CP 22. Mr. Hendrickson did identify himself as the company president to the notary public who certified his signature on the lien claim. *Id.* Mr. Hendrickson used the notary public available at the Snohomish County Auditor's office. As shown on the first page of the lien, the notary stamped "Notary Fee" on the first page of the lien so the extra charge of the notary would be added to the recording charges. CP 124.

In short, the substantive deficiency that existed in *Williams* (the lack of evidence of representative authority and attestation) does not exist in the present case and the lien should be held enforceable.

C. The Lien Was Exactly As Stated In RCW 60.04.091.

RCW 60.04.091 defines what must be included in a lien. (Copy of statute appended). It provides the format for a model lien and states: "A claim of lien substantially in the following form shall be sufficient." The claim of lien filed by Mikelle Enterprises follows this statutory format

exactly. The statute even copies the exact notary certificate used by the Mikelle Enterprises lien: “Subscribed and sworn to me this day of”

Thus, Mikelle Enterprises followed, to the letter, the form of lien described in the statute. It cannot be argued that Mikelle Enterprises’ lien is not “substantially” in the form required by the statute.

To find a lien invalid that followed this format would ignore legislative policy that the lien claim statutes be liberally construed to provide security for all parties intended to be protected by their provisions. RCW 60.04.900.

V. CONCLUSION

For the reasons stated above, Appellant Mikelle Enterprises, Inc. respectfully requests that the trial court decision dismissing Mikelle Enterprise’s claim of lien be reversed.

RESPECTFULLY SUBMITTED this 9th day of June, 2011.

MARSH MUNDORF PRATT SULLIVAN
+ McKENZIE, P.S.C.



Karl F. Hausmann, WSBA #21006
Attorneys for Plaintiff/Appellant Mikelle
Enterprises, Inc.

CERTIFICATE OF SERVICE

I, Helga Watson, hereby certify that on the 9th day of June, 2011, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

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

EXECUTED this 9th day of June, 2011, at Mill Creek, Washington.



Helga Watson, Legal Assistant

APPENDIX

RCW 60.04.091
Recording — Time — Contents of lien.

Every person claiming a lien under RCW 60.04.021 shall file for recording, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due. The notice of claim of lien:

(1) Shall state in substance and effect:

(a) The name, phone number, and address of the claimant;

(b) The first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due;

(c) The name of the person indebted to the claimant;

(d) The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien;

(e) The name of the owner or reputed owner of the property, if known, and, if not known, that fact shall be stated; and

(f) The principal amount for which the lien is claimed.

(2) 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. If the lien has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment. A claim of lien substantially in the following form shall be sufficient:

CLAIM OF LIEN

....., claimant, vs , name of person indebted to claimant:

Notice is hereby given that the person named below claims a lien pursuant to *chapter 64.04 RCW. In support of this lien the following information is submitted:

1. NAME OF LIEN CLAIMANT:

TELEPHONE NUMBER:

ADDRESS:

2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECAME DUE:

3. NAME OF PERSON INDEBTED TO THE CLAIMANT:

.....

4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED (Street address, legal description or other information that will reasonably describe the property):

.....

.....

.....

5. NAME OF THE OWNER OR REPUTED OWNER (If not known state "unknown"):

6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE; OR MATERIAL, OR EQUIPMENT WAS FURNISHED:

.....

7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS:

8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM SO STATE HERE:

.....

....., Claimant
.....
.....
(Phone number, address, city,
and
state of claimant)

STATE OF WASHINGTON, COUNTY OF

....., ss.

....., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

.....

Subscribed and sworn to before me this day of

.....

The period provided for recording the claim of lien is a period of limitation and no action to foreclose a lien shall be maintained unless the claim of lien is filed for recording within the ninety-day period stated. The lien claimant shall give a copy of the claim of lien to the owner or reputed owner by mailing it by certified or registered mail or by personal service within fourteen days of the time the claim of lien is filed for recording. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under RCW 60.04.181.

[1992 c 126 § 7; 1991 c 281 § 9.]

Notes:

***Reviser's note:** The reference to chapter 64.04 RCW appears to be erroneous. Reference to chapter 60.04 RCW was apparently intended.