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I. INTRODUCTION

Sterling Savings Bank (“Sterling”) appeals the trial court’s orders that deprived Sterling of its affirmative defense of equitable subrogation and denied the administration of justice. Sterling does not appeal entry of the initial stipulation and order between it and Mountain West Construction, LLC (“Mountain West”) regarding lien priority, but appeals the subsequent orders expanding the stipulation, exceeding the court’s authority, and eliminating Sterling’s defense of equitable subrogation which it did not intend to waive. Sterling’s equitable subrogation defense was not part of the stipulation; the stipulation’s express terms do not even address that defense. The trial court, however, found Sterling was not entitled to assert equitable subrogation and awarded Mountain West a windfall of over \$800,000. The trial court erred in entering these orders, and the orders should be reversed and the issues remanded.

II. ARGUMENT

Mountain West spends much of its response claiming that there is no evidence to support reversing the parties’ stipulation regarding priority, but that is not the issue on appeal. Sterling is not asking this Court to reverse the stipulation but to apply its express terms and only its express terms. In contrast, Mountain West does not spend much time addressing the very heart of the appeal, which is that the trial court exceeded its

powers when entering wrongful and overbroad orders after the stipulation. For the reasons discussed in Sterling's Opening Brief and for the reasons below, this Court should reverse the trial court's decisions that exceed its authority and improperly extend the scope of the parties' stipulation.

A. Including a finding on summary judgment that Sterling's lien is junior to Mountain West's lien is error.

1. The trial court exceeded its authority by granting relief beyond that requested in Mountain West's motion against JA.

A trial court cannot grant relief beyond that which is requested in a motion. *See Leland v. Frogge*, 71 Wn.2d 197, 201, 427 P.2d 724 (1967). This is because granting relief beyond that which is requested deprives the nonmoving party of notice and opportunity to be heard. *See* 14A Washington Practice: Civil Procedure § 25.13 (2d ed. 2003) at 113; *see also* 16D C.J.S. Constitutional Law § 1793 (2009).

It is undisputed that Mountain West's "relief requested" section of its summary judgment motion against James Alan, LLC ("JA") does not seek a finding that Mountain West's lien is superior to Sterling's lien or that Mountain West is entitled to immediate foreclosure. Mountain West did not even mention Sterling in the relief requested, issues, or argument sections of its motion for summary judgment against JA. CP 75-93. The trial court, however, made a finding that Sterling's lien is junior to Mountain West's lien, and thereafter entered a decree of immediate

foreclosure against Sterling. As a matter of law, Sterling was deprived of notice and opportunity to defend Mountain West's claims against it in that motion, thus the trial court's finding against Sterling is reversible error.

Moreover, Mountain West presented no evidence in its motion regarding its claim for priority or to defeat Sterling's affirmative defense of equitable subrogation. Mountain West now claims it did not have to prove lien priority because of the stipulation, but the stipulation did not address Sterling's claim of equitable subrogation. Sterling raised its affirmative defense of equitable subrogation in response to Mountain West's motion for summary judgment against JA, not just lien priority. Mountain West did not disprove Sterling's claims regarding lien priority and equitable subrogation as a matter of law, especially considering it did not address those issues in its initial motion.

The previously entered stipulation has no bearing on whether Mountain West gave Sterling the required notice in its summary judgment motion against JA and also no bearing on whether the trial court exceeded its authority by granting relief beyond that requested in the summary judgment motion. In its motion, Mountain West requested "an order of summary judgment against James Alan, LLC ('JA') for the principal amount of its materialmen's lien (\$801,354.58), and its attorneys' fees, costs, and interest" (CP 75); it did not request any order related to Sterling.

The trial court, however, made findings against Sterling and then on reconsideration, even found Mountain West was entitled to foreclose its lien against Sterling immediately. Such orders exceed the relief requested and should not have been entered as a matter of law.

2. Sterling had a viable affirmative defense of equitable subrogation, which precluded entry of any finding of priority on summary judgment.

A stipulation must be interpreted to determine the parties' intentions in entering into the stipulation. *See Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990); *Balmer v. Norton*, 82 Wn. App. 116, 121, 915 P.2d 544 (1996). Mountain West argues that the stipulation is unambiguous. Response at 20. Sterling agrees: there is no question that the stipulation did not address or encompass Sterling's claim of equitable subrogation. Nowhere in the stipulation is Sterling's waiver or release of its claim of equitable subrogation. The precise language of the stipulation states that Sterling stipulates Mountain West's materialman's lien is "superior" to Sterling's deed of trust. CP 429-30. The stipulation resolved the issue of record priority; it did not go beyond that to make any determination regarding equitable subrogation.

A look back to Mountain West's motion against Sterling, which prompted the parties' stipulation, also shows the motion is devoid of any mention of equitable subrogation. CP 316-24. In fact, the motion does

not address equitable claims at all. *Id.* Sterling's former counsel confirmed that Sterling agreed to the stipulation and "agreed to this priority as to filing". The stipulation addresses the parties' record title interests but does not address equitable subrogation. By its express terms, equitable subrogation is outside the scope of the stipulation.

Not only is equitable subrogation outside the scope of the stipulation, it also applies to the facts here or, at the very least, a genuine issue of material fact exists regarding whether the doctrine applies. In *Bank of America, N.A. v. Prestance Corp.*, 160 Wn.2d 560, 565, 160 P.3d 17 (2007), which was decided after the case Mountain West relies on, *Kim. v. Lee*, 145 Wn.2d 79, 31 P.3d 66 (2001), the Washington Supreme Court adopted the Restatement (Third) of Property: Mortgages § 7.6 (1997). That Restatement provision states:

One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment . . . and the mortgage retains its priority in the hands of the subrogee.

Restatement (Third) of Property: Mortgages § 7.6(a) (1997); *see Bank of America*, 160 Wn.2d at 582. Mountain West does not and cannot dispute that the purpose of equitable subrogation is to ensure justice between the parties without regard to form and to prevent injustice. *See Bank of America*, 160 Wn.2d at 565.

The requisite facts for equitable subrogation under Restatement (Third) of Property: Mortgages § 7.6(a) (1997) exist here: Sterling performed JA's loan obligations, which had been secured by a mortgage. In other words, Sterling refinanced JA's loans and by doing so, Sterling became equitably subrogated to first priority interest in the property. Sterling intended to gain first priority interest by paying off these prior loans. CP 647. Mountain West is not materially prejudiced by application of equitable subrogation; had Sterling not satisfied these loans, Mountain West's lien would be junior to those prior liens. In fact, Mountain West benefitted from Sterling's loan by receiving payment for its work on the property. It is necessary for Sterling to be equitably subrogated into first position to prevent unjust enrichment to Mountain West by Mountain West having priority over Sterling's deed of trust.

Mountain West also attempts to argue that equitable subrogation should not apply because such application could benefit Sterling's title company. Response at 24. This mischaracterizes the benefits of equitable subrogation. Sterling is the party that would benefit from being in first position. Any incidental benefit to Stewart Title does not justify refusal to apply equitable subrogation. Further, Sterling is the appellant here, not Stewart Title.

Mountain West attempts to shift blame away from itself by arguing the contract which required Mountain West to wait for written confirmation of funding before commencing work on the property was not the operative contract. Response at 21-22. Mountain West cannot dispute, however, that on May 14, 2007 it signed the contract containing the provision to wait for written confirmation of funding. CP 23. That same day, Mountain West began performing work on the property despite the fact that it had received no written confirmation of funding. CP 4-5. Mountain West did not sign the contract it now claims is the operative contract until June 7, 2007 – a month after the May 14, 2007 date Mountain West began performing work on the property. CP 4-5; CP 29. This is further evidence of the intent for Mountain West's lien to be junior to Sterling's lien.

Mountain West also misses the point about it having an undeserved windfall if Sterling is not equitably subrogated into first lien position. The undeserved windfall is Mountain West's lien having priority when Mountain West was only entitled to do the work because of Sterling's loan, when Mountain West would not have received any payment on its \$2.4 million contract without Sterling's loan, and when Sterling made the loan conditioned on the loan proceeds being used to satisfy the underlying loans on the property and on its loan being in first position against all

others. CP 647-48. Sterling had no knowledge that any lienable work had been done on the property when it issued the loan and believed it would be in first position when making the loan. *Id.*

Finally, Mountain West argues that the trial court denying Sterling the opportunity to file a motion to amend its answer while the summary judgment against JA was pending is not reversible error. Once again, Mountain West misses the point. The trial court's error is not the delay but is denying Sterling the opportunity to base its equitable subrogation argument on a properly filed amended answer. To the extent the trial court did not consider Sterling's claim for equitable subrogation because it had not filed a motion to amend, the trial court erred in refusing to allow Sterling to file such motion to amend before entering the partial summary judgment order.

The facts prove equitable subrogation or, at the very least, create a genuine issue of material fact as to whether equitable subrogation applies. Therefore, the trial court erred in making a finding of priority regarding Sterling in the order on Mountain West's motion for summary judgment against JA.

3. The trial court's summary judgment finding regarding priority is superfluous and not entitled to any future weight as a matter of law.

Sterling cites in its Opening Brief the law that factual findings on summary judgment are superfluous and entitled to no weight. *See Hamilton v. Huggins*, 70 Wn. App. 842, 848-49, 855 P.2d 1216 (1993). Mountain West does not dispute this law or argue otherwise. Instead, Mountain West claims that the finding is a restatement of the previously entered stipulation regarding priority, thus should be acceptable. This argument ignores the law that the trial court cannot rely on a superfluous finding in subsequent orders in the action, which this trial court did. The trial court's finding that Sterling's lien is junior to Mountain West's lien is a superfluous inclusion of a contested fact, and to the extent the trial court relied on this finding in subsequent orders, such reliance is error because the superfluous finding is entitled to no weight as a matter of law. *See id.*

B. The post-reconsideration orders exceed the relief requested and the scope of reconsideration.

The scope of Mountain West's motion for reconsideration is undisputed: it was limited to reconsideration of the amount of the award. CP 240-44. Despite the limited motion, the trial court granted reconsideration and then entered an order entitling Mountain West "to immediately foreclose its lien on the subject real property . . . and said lien is prior, superior, and paramount to all other lienholders and will be

foreclosed against those interests.” CP 254. The trial court’s entry of summary judgment after reconsideration is yet another instance of the court exceeding its authority by granting relief beyond that requested in the motion. Despite Mountain West’s attempts, it cannot justify the trial court’s order on summary judgment by stating that Mountain West’s subsequent motion for fees and a decree of foreclosure gave Sterling proper notice. The belated notice does not give the trial court authority to exceed the relief requested in a previous motion. Simply put, the trial court exceeded its authority when on a motion for reconsideration it entered an order regarding lien priority and immediate foreclosure when neither of those issues was raised in the motion for reconsideration.

C. The trial court abused its discretion when it denied Sterling the opportunity to amend its answer to add the claim of equitable subrogation.

Mountain West cites several cases in which a motion to amend was denied as untimely. None of those cases, however, address facts such as these. And none of those cases are instructive here. For example, unlike the cases of *Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn. App. 126, 639 P.2d 240 (1982) and *Trust Fund Services v. Glasscar, Inc.*, 19 Wn. App. 736, 577 P.2d 980 (1978), Sterling attempted to file its motion to amend before the court entered its summary judgment order but the trial court would not entertain such motion until after it resolved all the

summary judgment issues. And unlike the case of *Elliott v. Barnes*, 32 Wn. App. 88, 645 P.2d 1136 (1982), Sterling did not file its motion to amend a mere week before trial; trial had not even been scheduled in this case. The trial court should have applied CR 15(a) and freely given leave to amend because justice required it.

In its response, Mountain West fails to address the equitable considerations raised in Sterling's Opening Brief as well as the fact that justice required leave to amend. Moreover, Mountain West's only claimed prejudice is a possible delay in allowing the amendment, but mere delay does not justify denying a motion for leave to amend. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349-50, 670 P.2d 240 (1983). Also, there would be no undue delay considering no trial date had been set and Mountain West's lien would have continued to accrue interest during any delay. Justice required allowing Sterling leave to amend its answer to add the claim of equitable subrogation, and this Court should reverse the trial court's denial of Sterling's motion to amend.

D. Mountain West is not entitled to its fees and costs on appeal.

The trial court awarded Mountain West its attorneys' fees, costs, and interest against JA based on the contract with JA and/or the mechanics' lien statute. Attorneys' fees should not be awarded in Mountain West's favor against Sterling on those same grounds.

Moreover, Sterling should be considered the prevailing party in this appeal, thus Mountain West should have no entitlement to its fees and expenses. Therefore, Mountain West's request for fees should be denied.

III. CONCLUSION

For all of the reasons stated in this Reply Brief and also those in Sterling's Opening Brief, this Court should: 1) reverse and remand the finding regarding lien priority in the Order Granting in Part and Denying Part [sic] Mountain West's Motion for Summary Judgment; 2) reverse and remand the orders on priority and immediate foreclosure in the Order Granting Mountain West's Motion for Summary Judgment; 3) reverse the Order Denying Sterling's Motion to Amend Answer; 4) reverse and remand the decree of foreclosure in the Order Supplementing/Amending Summary Judgment and Certifying Judgment as Final and Decree of Foreclosure; and 5) deny Mountain West's request for attorneys' fees and costs on appeal.

DATED this 24th day of March, 2010.

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