

FILED
COURT OF APPEALS
PACIFIC

19 APR 23 AM 11:38

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY: 

No. 40029-4-II

WASHINGTON CONSTRUCTION, INC.,

Plaintiff-Appellant,

v.

DAVID ALAN DEVELOPMENT, ET AL., Defendants

and

STERLING SAVINGS BANK, Defendant-Respondent.

APPEALED FROM PIERCE COUNTY SUPERIOR COURT
THE HONORABLE VICKI L. HOGAN

BRIEF OF RESPONDENT CALIBER CONCRETE
CONSTRUCTION, INC.

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P.M. 4-22-2010

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I. INTRODUCTION

Respondent Caliber Concrete Construction, Inc. ("Caliber") entered into a written subcontract with Appellant Washington Construction, Inc. ("WCI") on or about October 8, 2008, under which it was to perform certain construction services on the Rita Estates Project in Gig Harbor, Washington (the "Project").

Caliber performed services for WCI in accordance with the requirements of the subcontract, but were not paid for those services. On November 18, 2008, Caliber recorded a mechanic's lien in the Pierce County property records, under recording number 200811180139. On May 21, 2009, Caliber filed an Answer, Affirmative Defenses, Counterclaim, Cross-Claims and Third Party Complaint to WCI's Third Amended Complaint in the action below. In that pleading, Caliber asserted *inter alia* causes of action against WCI for breach of contract, its own foreclosure action on its recorded mechanic's lien, and an action against WCI's contractor registration bond under RCW 18.27 et seq. Caliber sought principal damages of no less than \$20,079.96.

On November 23, 2009 Caliber filed a Response in Support of WCI's motion for partial summary judgment, which sought to

establish the validity of both WCI's and Caliber's liens on the Project property. That motion was ultimately granted.

On January 8, 2010, the project Property was sold at a trustee's sale, with Defendant-Respondent Sterling Savings Bank ("Sterling") reported to have purchased the property. That purchase expunged the liens of junior lienholders, including Caliber.

On March 10, 2010, the trial court entered an order disbursing the previously tendered WCI Contractor Registration Bond funds to those parties (including Caliber) who had claimed against the bond, based on a stipulation and order entered into by those parties.

II. AUTHORITY

A. The Issues on Appeal Impact WCI and Defendant-Respondent Sterling Savings Bank Only, and Effect Caliber Only Tangentially.

Caliber's subcontract is with WCI. It has no agreement with any other Defendant or party in the action. By virtue of asserting its right to foreclose its mechanic's lien, it necessarily brought claims against all those with recorded interests in the property.

"A lien foreclosure is absolutely void absent service of process upon a necessary party..." *Galvanizer's Inc. v. State*

Highway Comm'n, 8 Wn. App. 804, 807-08, 509 P.2d 73 (1973).

RCW 60.04.171 provides, in pertinent part:

In any action brought to foreclose a lien, the owner shall be joined as a party. The interest in the real property of any person who, prior to the commencement of the action, has a recorded interest in the property, or any part thereof, shall not be foreclosed or affected unless they are joined as a party.

Therefore, Caliber's presence in the action below is based on and limited to its claims against WCI and its registration surety under its contract and on those other parties with recorded liens, in order to comply with RCW 60.04.171, and perfect its foreclosure action.

The gravamen of this appeal—dealing with issues and causes of action between WCI and Sterling—but tangentially impacts Caliber, because it has no privity with or non-foreclosure-related causes of action against either Sterling or Defendant/Respondent David Alan Development. Certainly Caliber remains interested, as do other parties, in whether Caliber recovers on its claims below, given Caliber's claims for payment against WGI.

However, while the issue of Caliber's breach of its contract with Caliber remains pending below, it has but an attenuated connection with the issues to be decided on this appeal

DATED this 22ND day of April, 2010.

OLES MORRISON RINKER & BAKER LLP

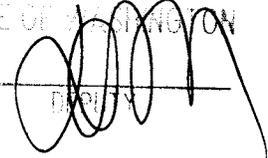
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DECLARATION OF SERVICE

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I, Catherine A. Melland, declare under penalty of perjury as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause;
2. I am employed by the law firm of Oles Morrison Rinker & Baker LLP. My business and mailing address is 701 Pike Street, Suite 1700, Seattle, WA, 98101-3930.
3. On April 22, 2010 I served by U.S. Mail a copy of the following documents on the following parties:

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Entitled exactly:

- 1) BRIEF OF RESPONDENT CALIBER CONCRETE CONSTRUCTION, INC.;
- 2) AND THIS DECLARATION OF SERVICE.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true.

Dated this 22ND day of April, 2010.


Catherine A. Melland