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RULE

CR 8115
RAP 18.118

MISCELLANEOUS

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred in granting Defendants Travelers Casualty & Surety Company of America (“Travelers”) and Ferguson Construction, Inc.’s (“Ferguson”) motion for summary judgment dismissing Plaintiff CalPortland Company’s (“CalPortland”) materialmen’s lien claim because CalPortland complied with RCW 60.04 *et. seq.*, by bringing its claim against the bond after the real property was released.
- B. The trial court erred in awarding attorney’s fees based on Washington’s lien foreclosure statute after finding the lien foreclosure statute did not apply.

II. ISSUES PRESENTED

- A. **Whether a lien claimant, under RCW 60.04 *et seq.*, is required to serve the property owner with a summons and complaint where an RCW 60.04.161 bond in lieu of claim has been recorded releasing the property from the lien before the lawsuit has been filed and the surety on the bond was properly served.**
- B. **Whether attorney fees and costs are available under RCW 60.04 *et seq.*, when the trial court determined the statute did not apply.**

III. STATEMENT OF FACTS

A. Factual and Procedural Background.

CalPortland is a California corporation licensed to do business in Washington. It is a major supplier of ready mixed concrete, aggregate,

asphalt, and other construction materials. CalPortland filed the underlying action to collect unpaid invoices for materials supplied between August and November, 2010, to LevelOne Concrete, LLC (“LevelOne”), a subcontractor, for the construction of a Costco Wholesale Corporation (“Costco”) building in Clark County, Washington.

Costco purchased real property in Clark County on June 8, 2010. Shortly thereafter, Costco contracted with Ferguson, as the general contractor, to construct a building on the Property. Ferguson contracted with LevelOne to provide the concrete work. CP 26. On or about July 21, 2010, LevelOne contracted with CalPortland to supply ready mix concrete and related materials for the Costco project. CP 6-7.

Costco paid Ferguson, and Ferguson paid LevelOne for the concrete work. However, after CalPortland supplied materials to LevelOne, it became insolvent and did not pay for the materials LevelOne received from CalPortland. CP 26. On February 2, 2011, 89 days after CalPortland supplied materials to LevelOne, CalPortland filed and recorded a Claim of Lien against the Property for the unpaid sum of \$327,926.31. CP 40.

On April 1, 2011, pursuant to RCW 60.04.161, Ferguson filed a lien release bond in the amount of \$491,889.47 releasing the Costco

Property as security for the lien and substituting the bond in its place. The bond named Ferguson as the principal and Travelers as the surety. CP 44.

On August 15, 2011, after the lien release bond had been recorded, but within eight months after the lien had been filed, CalPortland brought the underlying action against LevelOne, Ferguson, and Travelers as the surety, to adjudicate its claims and recover from the bond. CP 5-13.

On May 18, 2012, Travelers and Ferguson moved for summary judgment seeking dismissal of CalPortland's claim on procedural grounds, arguing that CalPortland was required to sue Costco as the owner of the Property despite the fact that by recording the \$491,889.47 bond, the Property had been released from liability for the amount claimed. CP 97-106.

On June 18, 2012, the trial court issued a written decision on the motion for summary judgment, granting defendants' motion for two reasons. First, "plaintiff failed to serve the owner of the subject property" and, second, "CalPortland must adjudicate the merits of the underlying lien." CP 146.

On July 2, 2012, an order was entered granting Defendants' motion for summary judgment and awarding fees on the basis of RCW 60.04.181. CP 200.

On July 30, 2012, CalPortland filed its Notice of Appeal. CP 214.

IV. ARGUMENT

A. Standard of Review.

On review of an order for summary judgment, the court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 722, 853 P.2d 1373 (1993)). An appellate court evaluates the matter de novo, performing the same inquiry as the trial court. *Kruse* at 722.

On an appeal, the appellate court must construe “the facts and reasonable inferences therefrom in the manner most favorable to the nonmoving party to ascertain whether there is a genuine issue of material fact.” *Dumont v. City of Seattle*, 148 Wn. App. 850, 860-861, 200 P.3d 764 (2009) (citing *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 857, 851 P.2d 716 (1993)). Summary judgment is proper “if reasonable persons could reach but one conclusion from the evidence presented.” *Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005).

In the present case, the trial court improperly concluded that a condition precedent existed as to Appellant’s right to payment for services, thereby granting summary judgment in Defendants’ favor.

B. CalPortland Complied with the Clear Language of Washington's Mechanics' and Materialmen's Lien Statute.

Washington's lien foreclosure statute, RCW 60.04 *et seq.*, provides requirements to foreclose a lien, including the identification of what party or property is subject to the lien. Ferguson argued that RCW 60.04.141 requires that the complaint to foreclose the lien be brought against the owner of the subject real property within eight months of the filing of the Notice of Claim of Lien.

While the above is a correct statement of law when the property serves as security for the lien, the parties necessary to the lawsuit differ once a release of lien bond is recorded because the property no longer secures the obligation. RCW 60.04.161 "Bond in Lieu of Claim" provides, in part:

The condition of the bond shall be to guarantee payment of any judgment upon the lien in favor of the lien claimant entered in any action to recover the amount claimed in a claim of lien, or on the claim asserted in the claim of lien. ***The effect of recording a bond shall be to release the real property described in the notice of claim of lien from the lien and any action brought to recover the amount claimed.***

RCW 60.04.161 (emphasis added).

On February 2, 2011, CalPortland properly recorded a Notice of Claim of Lien, which properly described the Costco Property. On April 1, 2011, Ferguson properly recorded a Release of Lien Bond. The effect of

the Release of Lien Bond, as provided in RCW 60.04.161, was “to release the real property described in the notice of claim of lien from the lien and any action brought to recover the amount claimed.” RCW 60.04.161. Therefore, after April 1, 2011, the real property that formerly served as security for the lien was released from the action to recover the amounts claimed. Because the lawsuit was not filed until after April 1, 2011, it would not have been proper for CalPortland to name Costco as a Defendant because its Property had already been released. Rather than naming a party that was already released, CalPortland properly served Travelers as surety, because Travelers essentially stepped into Costco’s shoes.

Case law is consistent with the clear language of the statute. This Court’s October 2012 decision in *Olson Eng'g, Inc. v. KeyBank Nat. Ass'n*, 171 Wn. App. 57, 66, 286 P.3d 390 (2012), considered the effect of the “bond in lieu of claim” statute finding “filing a bond under this statute releases the property from the lien encumbrance.” “The lien claimant is entitled to the release of the lien bond proceeds if it establishes the validity and correctness of the bond.” *Id.* at 66.

Under the statute and case law, once the lien bond is filed, it is the bond, and not the real property, that serves as security and the source for payment if the validity and correctness of the lien is established.

Therefore, the owner of the real property no longer has an interest in lawsuit. No matter the result of the lawsuit, no judgment can be entered against the owner of the real property. In other words, the effect of recording the bond is to “transfer the lien from the property to the bond to permit alienation of the property.” *DBM Consulting Eng’rs v. United States Fid. & Guar. Co.*, 142 Wn. App. 35, 41, 170 P.3d 592 (2007). Once the lien claimant reduces the claimed amount to judgment, the lien claimant is entitled to payment from the proceeds of the bond, not from the real property. *Stonewood Design Inc. v. Heritage Homes Inc.*, 165 Wn. App. 720, 725, 269 P.3d 297 (2011).

Respondents will likely argue that in *Olson*, *DBM* and *Stonewood*, the property owner was served with the lawsuit. However, in those cases, the RCW 60.04.161 bond releasing the real property was filed after the lawsuit foreclosing on the lien was filed, thus the property owner needed to be served with the suit. In the present case, Defendants filed the RCW 60.04.161 bond before the lawsuit was filed. In other words, the real property was released before the lawsuit began. The security for the lien at the time the lawsuit was filed was the bond, not the real property. Under Defendants’ logic, if Costco had sold the real property after the lien bond was filed, the new owner would also need to be served with the summons and complaint. A third party purchaser of real property that has

been released from the obligation under the bond has no interest in the litigation and no exposure to judgment. *Olson, DBM* and *Stonewood* all make clear that once the lien bond is filed, the property is released. The new third party purchaser need not be named as a defendant.

The determination of which party, and what asset secures the obligation, is made at the time the complaint is filed. Here, at the time the complaint was filed, the lien bond had already been posted. Accordingly, CalPortland brought suit against Travelers and its bond, not Costco and its Property, because Costco's Property had been released from the action to recover the amount claimed in the lien.

C. RCW 60.04, et seq. Must Be Construed Liberally to Protect Lien Claimants.

The Mechanics' and Materialmen's lien statute is "to be liberally construed to provide security for all parties intended to be protected by their provisions." RCW 60.04.900.

In 2011, the Washington Supreme Court made clear that this statutory mandate has not changed. The court overruled other cases calling for a strict construction, writing to the extent "other cases suggest that the statute's mandate of liberal construction has been supplanted by a common law rule of strict construction, we disapprove them." *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 697, 261 P.3d 109 (2011).

In our case, a liberal construction to provide security for the intended parties must afford CalPortland, as the lien claimant, the opportunity to adjudicate its claim. As a practical matter, if the right to payment under the lien is proven, it is the bond, principal, and surety that will be required to satisfy the judgment, not the owner of the real property that has been released. Under these circumstances, CalPortland named as defendants, all parties with an interest in the claim for payment and bond. The interpretation of the statute adopted by the trial court denies CalPortland, as the lien claimant, the opportunity to adjudicate its claim. That interpretation is inconsistent with RCW 60.04.900, and the recent directive of the Supreme Court.

D. The Specific Provisions of RCW 60.04.161 Control over the General Provisions of RCW 60.04.141.

RCW 60.04.141 must be read in conjunction with RCW 60.04.161. To the extent any contradiction in the requirements to bring a claim exist, the more specific bond in lieu of claim section should govern cases where a lien bond has been posted releasing the real property.

An established canon of statutory interpretation, long recognized by the Washington Supreme Court, is that “the provision coming later in the chapter must prevail so long as it is more specific than the provision

occurring earlier in the sequence.” *State v. J.P.*, 149 Wn.2d 444, 453-54, 69 P.3d 318 (2003).

In our case, both parts of the two part test identified in *State v. J.P.* are met. RCW 60.04.161 is the provision coming after RCW 60.04.141, and provides direction in the specific subset of lien foreclosure actions where a bond has been posted releasing the real property from the lawsuit. For this reason, CalPortland’s compliance with the specific provisions of the bond in lieu of lien section of the statute preserves its opportunity to adjudicate the merits of its claim.

E. The Legislature Intended the Bond in Lieu of Claim Statute to Release the Real Property from Any Obligation under the Lien.

When interpreting a statute, “the court's objective is to determine the legislature's intent.” *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The “Bond in Lieu of Claim” statute was enacted by the legislature in 1986, and was amended in 1991 and 1992. (*See* 1991 c 281 § 16 - Bill Number: 1991 Substitute Senate Bill 5497, *see also*, 1992 c 126 § 10 - Bill Number: 1992 Engrossed Senate Bill 6441.) CP 120-136.

An instructive change occurred with the 1992 amendment. In 1992, the Legislature replaced the word “dismissing” with the term “releasing.” CP127. The Legislature’s Final Bill Report explained that

the term “release” was substituted for “dismiss” “because [release] is the traditional word used to describe the elimination of a lien.” CP135.

The fact that the legislature chose to use a word reflecting the elimination of a lien, shows that the effect of RCW 60.04.161 can be to release the owner of real property formerly subject to a lien, without ever being named as a party in a lawsuit. This distinction is important because RCW 60.04.161 is unambiguous in that the bond releasing the property may be posted “either before or after the commencement of an action to enforce the lien.” RCW 60.04.161.

The word “dismissed” with respect to a lawsuit contains an implication that the one who was dismissed was formerly a party to the lawsuit. To dismiss is to “send (something) away; specif., to terminate (an action or claim) without further hearing, esp. before the trial of the issues involved.” BLACK'S LAW DICTIONARY 502 (8th ed. 2004).

Release, on the other hand, has a more broad definition. Release means “[L]iberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced BLACK'S LAW DICTIONARY 1315 (8th ed. 2004).

The Legislature’s substitution of the term “release” for “dismiss” explains that upon recording a release of lien bond, the real property ceases to be subject to a claim of lien. Because the language of the statute

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makes clear the release of lien bond can be posted before the lawsuit is filed, the term “dismiss” is less appropriate. Use of the word “release” clarifies that the property can be released from the obligation before the lawsuit is filed. In cases where a bond has been posted prior to the filing of the lawsuit, it is not necessary to serve the property owner who has been released. Instead, the lien claimant must sue the bond as surety on the lien claim. To require service of a lawsuit on the property owner under these circumstances would defeat the purpose of the bond and the legislature’s change in statute terminology to “release.”

F. CalPortland Cannot Maintain an Action against Costco.

The flawed logic of Travelers and Ferguson’s argument that CalPortland must sue Costco is shown by the undisputed reality that under no circumstances can CalPortland recover from Costco, or its Property, once the bond is in place.

A judgment obtained by CalPortland on its claim of lien will be satisfied by Ferguson as principal, or Travelers as surety, and Costco’s real property would not be at risk of being foreclosed upon. When Ferguson recorded the Release of Lien Bond, naming itself as principal, and Travelers as surety, Ferguson and Travelers stepped into the shoes of the Property owner, and Ferguson and Travelers obligated themselves to

pay CalPortland any sum which it may recover on the lien together with costs of suit.

In fact, if CalPortland named Costco as a defendant, knowing it could not recover from Costco, and Costco was not a necessary party, CalPortland could be subject to sanctions or attorney's fees for a frivolous case.

Public policy is served by avoiding unnecessary litigation that only increases expense and contributes to overcrowded court dockets. *Skinner v. Civil Service Com'n of City of Medina*, 168 Wn.2d 845, 852; 232 P.3d 558 (2010). Naming Costco, which has no financial risk in this case, is exactly the type of unnecessary litigation the Supreme Court has directed to be avoided.

Pursuant to the plain language of RCW 60.04.161, Costco was released from the obligation before the lawsuit was filed. CalPortland therefore had no duty to serve Costco with a copy of the summons and complaint.

G. Granting Summary Judgment on Procedural Grounds Denied CalPortland the Opportunity to Adjudicate Its Claims.

The second reason the Court gave in its written decision granting defendants' motion for summary judgment is "to prevail, CalPortland must adjudicate the merits of the underlying lien and must seek to

foreclose on it. Suing on the bond itself is insufficient. They must first prove the validity of the underlying lien.”

CalPortland agrees it must establish its right to payment for the materials it provided, which was the basis for its lien. This would necessarily include proving that CalPortland’s materials were delivered to the Costco Project, used for the project, and for CalPortland not to have received payment for its materials. In other words, CalPortland must adjudicate its rights to be paid under the statute. However, the motion in front of the trial court was *defendants’* procedural motion and granting it denied CalPortland the opportunity to adjudicate its lien claim.

The fact that a release of lien bond has been issued, does not prevent the parties from litigating the validity of the right to payment under the lien. *Olson Eng'g, Inc. v. KeyBank Nat. Ass'n*, 171 Wn. App. 57, 66, 286 P.3d 390, 394 (2012). In *Olson*, this Court held that parties may litigate lien priority after the filing of a release-of-lien bond. By obtaining a release-of-lien bond, the lien-disputing party may convey the property unencumbered, but the lien claimant is still able to establish the validity and correctness of the lien, and if so, is entitled to the release of the lien bond proceeds. *Id.* Defendants’ argument at summary judgment that the bond proceeds cannot be released until the validity of the lien is established is correct. However, the continuation of Defendants’

argument, the inference that CalPortland cannot establish a valid lien, fails because the underlying right to payment was never addressed or decided. The parties should be free to litigate the validity of the underlying claim for payment and lien at the time of trial.

H. Defendants' Reliance on *Stonewood Design, Inc. v. Heritage Homes, Inc* and *DBM Consulting Engineers, Inc. v. United States Fid. & Guar. Co.*, Is Misplaced.

Defendants argued that because CalPortland did not sue to foreclose on real property, it is somehow not entitled to the bond proceeds even if it establishes it had a valid lien and was unpaid for materials provided. There is no authority for this argument. As stated above, the RCW 60.04.161 bond releases the real property, which would have been foreclosed on if the claim was reduced to judgment. Once a bond has been posted, the security for payment of the judgment is no longer the real property. If judgment is entered in favor of CalPortland, it is entitled to the bond proceeds up to the amount of the judgment. It would not “foreclose” on the bond. A foreclosure is a CR 81 “special proceeding” to obtain payment on a judgment from a non-liquid asset.

The defendants in *Stonewood* made the same argument, which the court rejected. A judgment was entered in favor of the plaintiff on a lien claim in which an RCW 60.04.161 bond had been posted. The judgment entitled the plaintiff to “execute” on the bond. The defendants argued “the

order cannot obligate the surety because it does not specifically ‘foreclose’ the lien.” *Stonewood Design, Inc. v. Heritage Homes, Inc.*, 165 Wn. App. 720, 725, 269 P.3d 297 (2011). The court wrote “[t]his argument elevates form over substance and misreads *DBM*, which requires that the validity of the mechanics’ lien be litigated before execution on the release of lien bond is appropriate.” *Id.*

In the present case, the timing of the posting of the bond and filing of the complaint is critical. Here, the bond releasing the real property was posted before the complaint was filed. Just as it is not required to name a party with no interest in the litigation, it is not necessary to plead a cause of action for which there is no basis for recovery. If the lawsuit had been filed before the bond was posted, CalPortland would have had to name Costco and plead foreclosure as the only remedy to obtain payment from real property. Because the security for payment at the time the lawsuit was filed was in the form of a bond, a foreclosure is inapplicable. As required by *Stonewood*, the plaintiff need only prove the validity of the lien and underlying claim to be entitled to execute on the bond.

Defendants similarly misinterpret *DBM Consulting Engineers, Inc. v. U.S. Fid. & Guar. Co.*, 142 Wn. App. 35, 170 P.3d 592 (2007). In *DBM*, the surety was not required to pay on the lien bond because judgment was entered on an unjust enrichment theory and plaintiff did not

prosecute its lien claim. *Id.* at 42. In other words, the Plaintiff abandoned its lien claim to pursue an alternate theory of recovery.

In the present case, CalPortland's complaint properly alleges the existence of its lien. It has not abandoned the lien claim and should be entitled to the opportunity to litigate the merits of the lien, which it was denied when the summary judgment motion was granted on procedural grounds. As discussed above, if CalPortland prevails at trial on the validity of its lien and underlying claim, it should be entitled to the proceeds of the bond.

I. The Trial Court Erred in Awarding Attorney's Fees.

There is no contract between CalPortland and either Ferguson or Travelers. The authority the court relied on in awarding attorney's fees to Defendants was Washington's Mechanics and Materialmen's lien statute, RCW 60.04.181(3).

However, the Court's June 18, 2012, order found that CalPortland did not bring a lien action because it did not sue the owner of the real property that formerly secured the obligation on the lien. Accordingly, the statute did not apply and there was no authority to award fees.

If this Court remands the matter to the trial court on the grounds summary judgment should not have been granted because CalPortland properly served the bond, and did not have an obligation to serve the

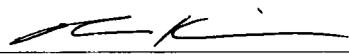
owner of the property after it had been released as security from the lawsuit, the attorney's fee award in favor of Defendants should be vacated, and CalPortland respectfully requests an award of attorney's fees and costs on appeal pursuant to RCW 60.04.181 and RAP 18.1.

V. **CONCLUSION**

Based on the foregoing, Appellant respectfully requests that this Court reverse the trial court's summary judgment order and award attorney fees and costs incurred herein.

RESPECTFULLY SUBMITTED this 14 day of January, 2013.

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

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

CALPORTLAND COMPANY, a
California corporation,

Appellant,

v.

LEVELONE CONCRETE, LLC, a
Washington limited liability company;
DALTON BROOKS and YULIA
BROOKS, and their marital commu-
nity; TRAVELERS CASUALTY &
SURETY COMPANY OF AMERICA,
a Connecticut corporation;
FERGUSON CONSTRUCTION, INC.,
a Washington corporation,

Respondents.

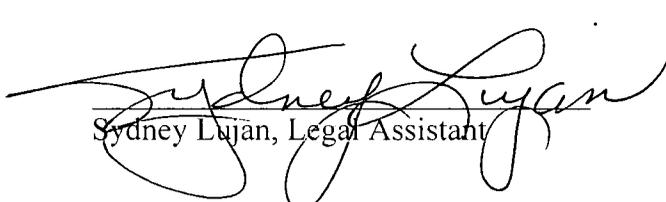
NO. 43760-1-II

CERTIFICATE OF
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I hereby certify that on the 14th day of January, 2013, I served a true and correct copy of the Brief of Appellant upon counsel of record, via the methods noted below, properly addressed as follows:

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